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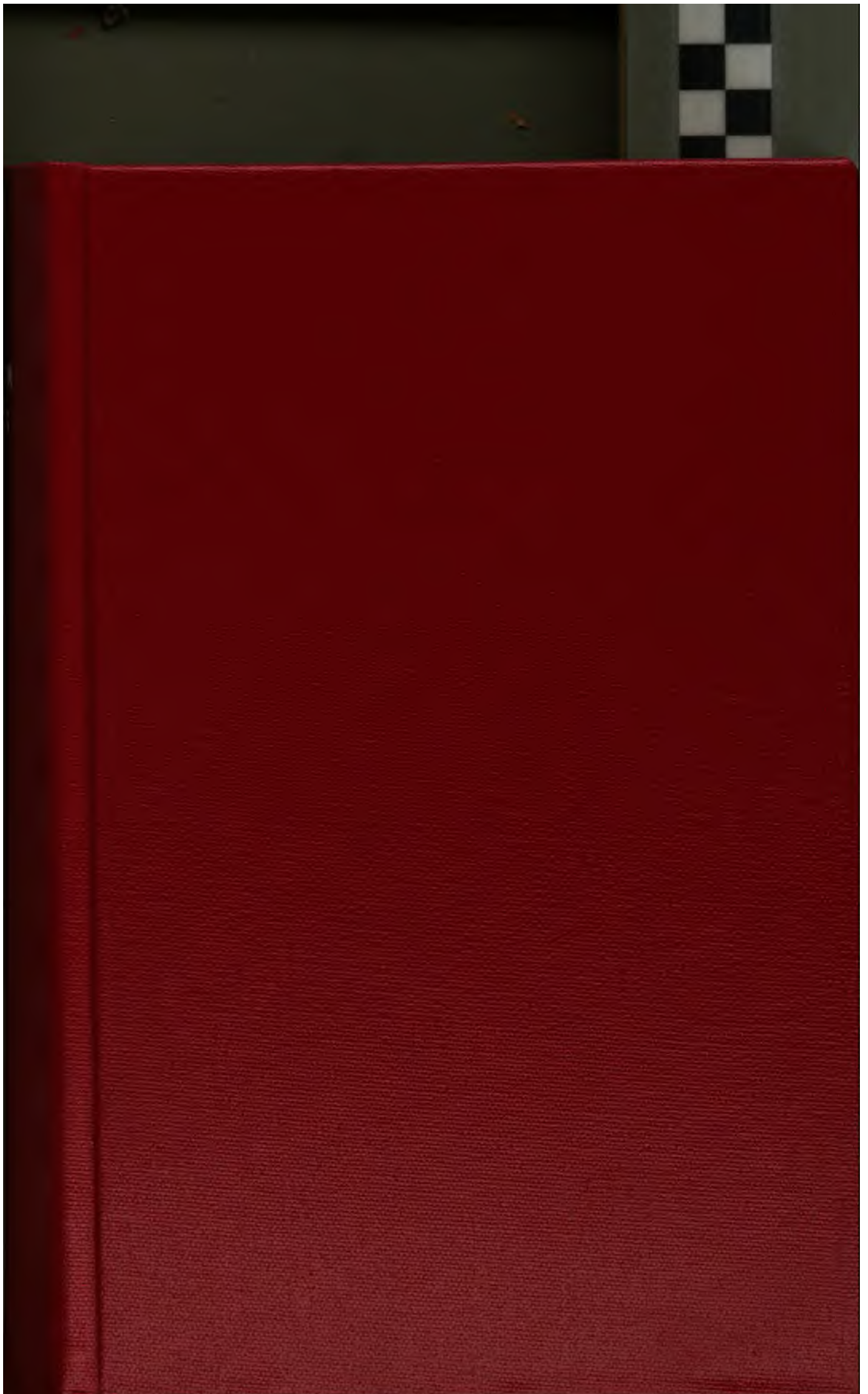
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THE
ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. McKINNEY.

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THE ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE.

MERITS.

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vol. 1, p. 338.

MESNE PROCESS.

See article *EXECUTIONS AGAINST THE BODY AND
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article *SUMMONS AND PROCESS*, and the references
there given.

MESNE PROFITS.

See articles *EJECTMENT*, vol. 7, p. 337; *TRESPASS*.

MILLS AND MILLDAMS.

BY ALFRED PIZEY.

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See in general articles *EMINENT DOMAIN*, vol. 7, p. 460; *NUISANCES*; *PARTITION*; *WATER AND WATER-COURSES*.

I. SCOPE OF THE ARTICLE.—The principal matters treated under this title arise in statutory proceedings to condemn lands for the use of milldams and compensate injuries caused by the improvement. The statutes were passed on the theory that water mills are a public benefit, and therefore the right of eminent domain might be exercised in their behalf and the milldam protected from abatement as a common-law nuisance.¹

Ad Quod Damnum.—One class of these laws provides both for

1. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Bottoms v. Brewer*, 54 Ala. 288; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Kepley v. Taylor*, 1 Blackf. (Ind.) 492; *Jones v. Skinner*, 61 Me. 25; *Darling v. Blackstone Mfg. Co.*, 16 Gray (Mass.) 187; *Howard v. Merrimac River Locks, etc.*, 12 Cush. (Mass.) 259; *Fiske v. Framingham Mfg. Co.*, 12 Pick. (Mass.) 68; *Hester v. Broach*, 84 N. Car. 251; *Newton v. Allis*, 12 Wis. 379.

² "The Purpose of These Statutes is to enable any riparian proprietor to erect

a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury." *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9.

the taking of land for the actual use of the milldam and also for assessing the damage caused by flooding.¹

Flowage Acts. — The other class, commonly called flowage acts, permits no direct condemnation, but relates only to the injury caused by flowing land. The mode of procedure in the two classes has a general similarity.²

II. EXCLUSIVENESS OF STATUTORY PROCEEDINGS — 1. Proceedings by Millowner. — Where the proceedings may be invoked only by the party wishing to erect the dam, the statutory remedy is not exclusive in the first instance against the landowner. Until the compensation has been actually assessed under the statute, and the amount paid, the latter is entitled to proceed as at common law.³

2. Proceedings by Landowner. — On the other hand, where the statutory mode of procedure can be invoked by the landowner, the remedy is exclusive for all injuries which come within the scope of the act,⁴ because, as has been said, the common-law

1. "This is a Common-law Writ, and has been a favorite mode of procedure in this country, especially in highway and mill cases." Lewis on Eminent Domain, § 402.

2. For the distinction drawn between these two classes of cases as an exercise of the right of eminent domain, and for a general discussion of that right as applied to mills, see Am. and Eng. Encyc. of Law (2d ed.), titles *Dams*, vol. 8, p. 699; *Mills*.

3. *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *Smith v. Olmstead*, 5 Blackf. (Ind.) 37; *Hunting v. Curtis*, 10 Iowa 152; *Kirkendall v. Hunt*, 4 Kan. 514; *Cave v. Calmes*, 3 A. K. Marsh. (Ky.) 36; *Anthony v. Law-horne*, 1 Leigh (Va.) 1; *Coleman v. Moody*, 4 Hen. & M. (Va.) 1.

Delaware Statute. — Act 1819 (Rev. Code Del. 1893, p. 520, § 3), giving double damages for injury resulting to a lower millowner by an unusual discharge of water over a dam above, does not take away his common-law remedies. *Ross v. Horsey*, 3 Harr. (Del.) 60.

Missouri Statute. — The remedy given by Rev. Stat. Mo. 1889, § 7019, to apply between the owners of different milldams, is only applicable where both dams have been erected under the provisions of the act. Otherwise actions for a common-law nuisance must be brought. *Arnold v. Klepper*, 24 Mo. 273; *Huffman v. Vaughan*, 72 Mo. 465. See also *Kyner v. Upstill*, 29 Neb. 768.

4. **Connecticut.** — *Williams v. Elting Woolen Co.*, 33 Conn. 353.

Maine. — *Dingley v. Gardiner*, 73 Me. 63; *Jones v. Skinner*, 61 Me. 25; *Monmouth v. Gardiner*, 35 Me. 247.

Massachusetts. — *Comins v. Turner's Falls Co.*, 138 Mass. 222; *McNally v. Smith*, 12 Allen (Mass.) 455; *Burnham v. Story*, 3 Allen (Mass.) 378; *Howard v. Merrimac River Locks, etc.*, 12 Cush. (Mass.) 259; *Bates v. Weymouth Iron Co.*, 8 Cush. (Mass.) 548; *Murdock v. Stickney*, 8 Cush. (Mass.) 113; *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429; *Hill v. Sayles*, 12 Met. (Mass.) 142; *Walker v. Oxford Woollen Mfg. Co.*, 10 Met. (Mass.) 203; *Fitch v. Stevens*, 4 Met. (Mass.) 426; *Charles v. Monson, etc.*, Mfg. Co., 17 Pick. (Mass.) 70; *Fiske v. Framingham Mfg. Co.*, 12 Pick. (Mass.) 68; *Stowell v. Flagg*, 11 Mass. 364.

Nebraska. — *Nosser v. Seeley*, 10 Neb. 460.

Rhode Island. — *Wilbor v. Matteson*, 8 R. I. 166; *Bull v. Valley Falls Co.*, 8 R. I. 42.

Wisconsin. — *Seymour v. Carpenter*, 51 Wis. 413; *Geise v. Greene*, 49 Wis. 334; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433; *Large v. Orvis*, 20 Wis. 697; *Babb v. Mackey*, 10 Wis. 371; *Newcomb v. Smith*, 2 Pin. (Wis.) 131, 1 Chand. (Wis.) 71.

Contra. — Under some statutes which give the initiative to either party, it is held that the remedy of the party injured is not exclusive, but he may at his option proceed as at common law. *Toney v. Johnson*, 26 Ind. 382; *Lane v. Miller*, 22 Ind. 104; *Summy v. Mulford*, 5 Blackf. (Ind.) 202; *Salisbury*

action is founded on a wrong done by the defendant, and the process itself presupposes a tort, and when the legislature has authorized the act itself complained of no right of action remains.¹

Injuries Not Permitted by Statute.—For all other injuries the common-law remedies by action for damages or in abatement of the dam as a nuisance are still open to the party injured.²

Mills v. Forsaith, 57 N. H. 124; *Ash v. Cummings*, 50 N. H. 591, *criticising* *Lebanon v. Olcott*, 1 N. H. 339. And see *Snowden v. Wilas*, 19 Ind. 10; *Nosser v. Seeley*, 10 Neb. 460.

1. *Stowell v. Flagg*, 11 Mass. 364.

Increasing Height of Dam.—Injuries caused by increasing the height of an established dam can be remedied only by proceedings under the Mill Acts. *Bottoms v. Brewer*, 54 Ala. 288; *Graham v. Virgin*, 78 Me. 338; *Brady v. Blackinton*, 113 Mass. 238; *Howard v. Merrimac River Locks, etc.*, 12 Cush. (Mass.) 259; *Leonard v. Schenck*, 3 Met. (Mass.) 357; *Johnson v. Kittredge*, 17 Mass. 76. But see *Burnham v. Story*, 3 Allen (Mass.) 378.

Remedy under Private Acts.—Where the right to erect dams across a water-course is given to a corporation or an individual, by private act of the legislature, a remedy provided by the statute for assessing damages to parties injured is exclusive. *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475; *Boston, etc., Mill Corp. v. Newman*, 12 Pick. (Mass.) 467; *Leitzsey v. Columbia Water Power Co.*, 47 S. Car. 464. And see *Cogswell v. Essex Mill Corp.*, 6 Pick. (Mass.) 94.

And where in such cases the remedy is given by reference to a general mill-dam law, the remedy is exclusive, though the general law has been repealed. *Crosby v. Smith*, 19 Wis. 449; *Wood v. Hustis*, 17 Wis. 417.

Other Instances.—Injury occasioned by a reservoir dam for the storage of water to supply a mill is within the scope of the act. *Shaw v. Wells*, 5 Cush. (Mass.) 537; *Wolcott Woollen Mfg. Co. v. Upham*, 5 Pick. (Mass.) 292; *Nelson v. Butterfield*, 21 Me. 220; *Currie v. Adams*, 14 Quebec L. Rep. 169. So also is injury caused by a dam at the threshold of an unnavigable outlet of a lake. *Clute v. Briggs*, 22 Wis. 608.

A proceeding is properly brought under the Mill Act for damages caused to the plaintiff's mill by water flooded back upon it from a dam higher up and more ancient. *Baird v. Wells*, 22 Pick. (Mass.) 312. See also *Hatch v. Dwight*,

17 Mass. 289; *Kyner v. Upstill*, 29 Neb. 768. *Contra*, under an early statute, *Bigelow v. Newell*, 10 Pick. (Mass.) 348.

But injuries caused to an existing mill or mill site by the erection of a dam must be remedied at common law and not under the statute. *Large v. Orvis*, 20 Wis. 697; *Shannon v. State*, 18 Wis. 605; *Moore v. Coburn*, 1 Pin. (Wis.) 538; *Mowry v. Sheldon*, 2 R. I. 369. *Contra*, *Burnett v. Nicholson*, 72 N. Car. 334; *Pugh v. Wheeler*, 2 Dev. & B. L. (N. Car.) 50.

North Carolina Statute.—Under the peculiar terms of the Mill Act of North Carolina the proceeding under the statute is exclusive in the first instance, and in all cases where the annual damage assessed does not amount to more than twenty dollars. But where the annual damage is determined to be more than that sum, the party injured may elect either to take the amount of damage assessed for a term of five years or to accept damages for one year only and then proceed as at common law. *Goodson v. Mullen*, 92 N. Car. 207; *Hester v. Broach*, 84 N. Car. 251; *Jones v. Clarke*, 7 Jones L. (N. Car.) 418; *Shaw v. Etheridge*, 7 Jones L. (N. Car.) 225; *Fellow v. Fulgham*, 3 Murph. (N. Car.) 254; *Gilliam v. Canaday*, 11 Ired. L. (N. Car.) 106; *Howcott v. Warren*, 7 Ired. L. (N. Car.) 22; *Gillet v. Jones*, 1 Dev. & B. L. (N. Car.) 339; *Mumford v. Terry*, 2 Law Repos. (N. Car.) 425.

The owner of land injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as twenty dollars, and who has taken judgment for, and received the damage for, the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition. *Gilliam v. Canaday*, 11 Ired. L. (N. Car.) 106.

2. *Stevens v. King*, 76 Me. 197; *Wilson v. Campbell*, 76 Me. 94; *Goodwin v. Gibbs*, 70 Me. 243; *Bradey v. Black-*

Exclusiveness of Common-law Remedies. — In some states the public character attributed to mills has caused the courts to favor the action of trespass on the case for damages, rather than the remedy by injunction, whereby the dam is abated and the improvement rendered of no value. Only upon allegations showing a much stronger case than is usually necessary will an action to abate the nuisance be entertained.¹

inton, 113 Mass. 238; Brigham v. Wheeler, 12 Allen (Mass.) 89; Chapman v. Newmarket Mfg. Co., (N. H. 1892) 38 Atl. Rep. 16.

"The remedy thereby provided is intended to be confined solely to cases where land is overflowed by raising a head of water, and to the incidental and consequential damages which necessarily and naturally arise therefrom. This is settled by a series of adjudicated cases. For all other injuries the remedy at common law still remains, and the party sustaining damage can maintain an appropriate action to recover it." Thompson v. Moore, 2 Allen (Mass.) 350.

Instances — Erection on Another's Land. — A party must proceed at common law, and not under the statute, where the mill and dam are not both located upon the land of the millowner. Crockett v. Millett, 65 Me. 194; Morton v. Franklin Co., 62 Me. 455; Jones v. Skinner, 61 Me. 25; Barnard v. Fitch, 7 Met. (Mass.) 605; Fitch v. Stevens, 4 Met. (Mass.) 426; Henley v. Wilson, 77 N. Car. 216. But see *contra*, Prescott v. Curtis, 42 Me. 64.

Erection on Navigable Stream. — Where the dam complained of is erected over a navigable stream. Cobb v. Smith, 16 Wis. 661, *overruling* Newell v. Smith, 15 Wis. 101; Fisher v. Horicon Iron, etc., Co., 10 Wis. 351.

Where the Dam Is Negligently Used or not constructed in strict accordance with law. Wilson v. Campbell, 76 Me. 94; Leonard v. Wading River Reservoir Co., 113 Mass. 235; Johnson v. Kittedredge, 17 Mass. 76; Winkley v. Salisbury Mfg. Co., 14 Gray (Mass.) 443; Hill v. Sayles, 12 Met. (Mass.) 142; Hackstack v. Keshena Imp. Co., 66 Wis. 439; Rich v. Keshena Imp. Co., 56 Wis. 287. And see Aldworth v. Lynn, 153 Mass. 53; Morris Canal, etc., Co. v. Seward, 23 N. J. L. 219; Kelly v. Lett, 13 Ired. L. (N. Car.) 50.

Repeal of Statute. — Where compensation has not been obtained under the

milldam act and it has been repealed. French v. Owen, 5 Wis. 112; Pratt v. Brown, 3 Wis. 603, *overruling* Stephens v. Marshall, 3 Pin. (Wis.) 203, 3 Chand. (Wis.) 222.

Diversion of Water. — Where the injury complained of is the obstruction of the watercourse and diversion of the water, and not the flowing of land. Thompson v. Moore, 2 Allen (Mass.) 350.

Where the Mill Has Been Removed and the mill site abandoned. Baird v. Hunter, 12 Pick. (Mass.) 556.

Where the Head of Water Is Raised by a dam of drift stuff, and not by the body of the dam. Clapp v. Manter, 78 Me. 358.

Where a Highway Is Flowed. — Where the land flowed is a part of a public highway in which the public has only an easement. New Salem v. Eagle Mill Co., 138 Mass. 8; Cheshire v. Adams, etc., Reservoir Co., 119 Mass. 356; Andover v. Sutton, 12 Met. (Mass.) 182; Com. v. Stevens, 10 Pick. (Mass.) 247; Monmouth v. Gardiner, 35 Me. 247; Calais v. Dyer, 7 Me. 155; Venard v. Cross, 8 Kan. 249.

Injury to Land in Another State. — Where the dam is situated in one state and the land flowed in another. Salisbury Mills v. Forsaith, 57 N. H. 124; Wooster v. Great Falls Mfg. Co., 39 Me. 246; U. S. v. Ames, 1 Woodb. & M. (U. S.) 76.

Dam for Storage of Water. — Where the dam is used for the purpose of storing water to flood logs to the mill, and not for the purpose of furnishing water power. Bryan v. Burnett, 2 Jones L. (N. Car.) 305.

1. Daughtry v. Warren, 85 N. Car. 136; Atty.-Gen. v. Lea, 3 Ired. Eq. (N. Car.) 301; Eason v. Perkins, 2 Dev. Eq. (N. Car.) 38; Hyatt v. Myers, 73 N. Car. 232. See also Ogletree v. McQuaggs, 67 Ala. 580; Atty.-Gen. v. Hunter, 1 Dev. Eq. (N. Car.) 12; Atty.-Gen. v. Blount, 4 Hawks (N. Car.) 384; McLaughlin v. Hope Mfg. Co., 103 N. Car. 100; Society, etc., v. Butler, 12 N.

III. VENUE. — Injuries to Land Are Local, and consequently proceedings under milldam acts must usually be brought in the county in which some part of the land lies.¹

IV. JURISDICTION. — The court authorized to conduct proceedings under these acts is generally pointed out by the acts themselves.²

V. PARTIES — 1. **In Ad Quod Damnum Proceedings.** — Under those acts in which land may be taken for the actual use of the dam, the proceeding must generally be brought by the party wishing to erect the dam,³ against all persons who will be injured by its erection.⁴ But the remedy is sometimes given to the landowner also.⁵

2. **Under Flowage Acts — Parties Complainant.** — Under acts which relate solely to the damage caused by flowing lands, the proceedings can be only at the suit of the party injured.⁶

J. Eq. 498; Cobb v. Smith, 16 Wis. 661; Sheldon v. Rockwell, 9 Wis. 167. *Contra*, Weiss v. Oregon Iron, etc., Co., 13 Oregon 496; Zweig v. Horicon Iron, etc., Co., 17 Wis. 362; Dickson v. Burnham, 14 Grant's Ch. (U. C.) 594; Rowe v. Titus, 6 New Bruns. 326.

1. Dotson v. Sibert, 4 Bibb (Ky.) 464; Bates v. Ray, 102 Mass. 458; Geise v. Greene, 49 Wis. 334.

This is so even though the dam is erected in another county. Worster v. Winnipiseogee Lake Co., 25 N. H. 525. See also Lohmiller v. Indian Ford Water-Power Co., 51 Wis. 683.

2. See Humphrey v. Berkshire Woollen Co., 10 Allen (Mass.) 420; Pace v. Freeman, 10 Ired. L. (N. Car.) 103; Hale v. Burwell, 2 Patt. & H. (Va.) 608.

Query, whether a petition under a flowage act can be removed to a Circuit Court of the United States from a state court. Occum Co. v. Sprague Mfg. Co., 35 Conn. 496.

3. Hendricks v. Johnson, 6 Port. (Ala.) 472; Olmstead v. Camp, 33 Conn. 532; Hunting v. Curtis, 10 Iowa 152; Kirkendall v. Hunt, 4 Kan. 514; *Re* Jenison, 28 Ont. Rep. 136.

Discontinuing Action. — Under such statutes the proceeding may be discontinued by the millowner without the consent of the landowner. Hunting v. Curtis, 10 Iowa 152.

4. Wilson v. Hanthorn, 72 Iowa 451; Wootten v. Campbell, 7 Dana (Ky.) 204; Groce v. Zumwalt, 4 Mo. 568. See also Pierce Mill Co. v. Koltermann, 26 Neb. 722.

Joinder of Parties Defendant. — All persons who have lands that will be

overflowed may be joined in a single petition as defendants, even where some of them reside and their lands lie in another county. Todd v. Austin, 33 Conn. 87.

5. **Nebraska Statute.** — Proceedings by the landowner should be according to Comp. Stat., §§ 14 *et seq.*, and not under those sections applicable to the millowner. Kyner v. Upstill, 29 Neb. 768; Pierce Mill Co. v. Koaltermann, 26 Neb. 722.

Joinder of Persons Injured. — The parties injured need not all be joined as plaintiffs, but the proceedings may be by one alone. Pierce Mill Co. v. Koltermann, 26 Neb. 722.

Indiana Statute. — It was held under Act 1831, that before a mill was erected the millowner only might bring the action. Afterwards only the party injured could commence it. Smith v. Olmstead, 5 Blackf. (Ind.) 37; Summy v. Mulford, 5 Blackf. (Ind.) 113.

6. **Particular Parties.** — The proceeding under these acts is held to be an action upon a claim for money only. It must therefore be brought by the grantor of land for damages which accrued during his occupancy. Walker v. Oxford Woollen Mfg. Co., 10 Met. (Mass.) 203; Turner v. Whitehouse, 68 Me. 221; Faville v. Greene, 12 Wis. 11; Sabine v. Johnson, 35 Wis. 185, *overruling* Mead v. Hein, 28 Wis. 533, and Pick v. Rubicon Hydraulic Co., 27 Wis. 433.

By a Mortgagor or Mortgagee for the damages which accrued during their respective possessions. Vaugh v. Wetherell, 116 Mass. 138; Paine v. Woods, 108 Mass. 160; Hatch v. Dwight, 17

Joinder of Parties Complainant. — All parties who have an estate in the lands flowed must join as complainants.¹

Parties Defendant. — The proper defendants are the owners or occupants of the mill.²

Mass. 289. See also *Ballard v. Ballard Vale Co.*, 5 Gray (Mass.) 468.

By the Grantee of the Land Injured for damage caused after he became the owner, *Charles v. Monson*, etc., Mfg. Co., 17 Pick. (Mass.) 70; *Newell v. Smith*, 15 Wis. 101; unless his grantor had elected to accept gross damages to cover future as well as past damage, *Isele v. Schwamb*, 131 Mass. 337.

By the Legal Representative of a deceased person. *Darling v. Blackstone Mfg. Co.*, 16 Gray (Mass.) 187; *Howcott v. Warren*, 7 Ired. L. (N. Car.) 20. See also *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Howe v. Ray*, 110 Mass. 298; *Sumner v. Tileston*, 7 Pick. (Mass.) 198; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Watson v. Perine*, 13 U. C. C. P. 229.

Owner of Land Flowed. — No persons can commence proceedings under such statutes except those whose land is overflowed as result of the erection of the milldam. *Waddy v. Johnson*, 5 Ired. L. (N. Car.) 333; *Howcott v. Warren*, 7 Ired. L. (N. Car.) 20. See also *Johnston v. Roane*, 3 Jones L. (N. Car.) 523.

Proceedings Not Applicable Between Privies. — A mortgagor of land does not, by flowing portions of it, obtain title to such portions as against the mortgagee subject only to the mortgagee's right to proceed under the flowage act. *Dyer v. Cranston Print Works Co.*, 17 R. I. 774, where the court said: "The mill act is intended to operate between strangers, and not between those who hold in privity of title; and under these circumstances the act of Chafee was not such an adverse proceeding as to amount to a condemnation of the flowed land as against the mortgagee."

Parties in Common-law Actions Under Flowage Acts. — The decisions under the flowage acts determining who is liable for damages accrued and accruing and who may sue are based on the rules applicable in actions at common law for injuries caused by a dam or other nuisance. See the following cases, wherein the proper parties to actions at law are considered:

Indiana. — *Anderson v. Hubble*, 93 Ind. 570.

Iowa. — *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa 145.

Massachusetts. — *Prentiss v. Wood*, 132 Mass. 486.

New Hampshire. — *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; *Curtice v. Thompson*, 19 N. H. 471; *Sargent v. Stark*, 12 N. H. 332; *Plumer v. Harper*, 3 N. H. 88.

New Jersey. — *Morris Canal, etc., Co. v. Ryerson*, 27 N. J. L. 457.

New York. — *Brown v. Bowen*, 30 N. Y. 519; *Blunt v. Aikin*, 15 Wend. (N. Y.) 522; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

Ohio. — *Warring v. Martin*, Wright (Ohio) 380.

South Carolina. — *Leitzsey v. Columbia Water-Power Co.*, 47 S. Car. 464.

Wisconsin. — *Cobb v. Smith*, 38 Wis. 21; *Lohmiller v. Indian Ford Water-Power Co.*, 51 Wis. 683.

New Brunswick. — *McNaughton v. Fraser*, 8 New Bruns. 247.

In *Fuller v. Chicopee Mfg. Co.*, 16 Gray (Mass.) 43, it was said: "They [the flowage acts] were not intended to confer any new right, or to create an additional claim for damages, which did not exist at common law. They only substituted in the place of the common-law remedies a more simple, expeditious, and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills."

1. *Turner v. Whitehouse*, 68 Me. 221; *Phillips v. Sherman*, 61 Me. 548; *Moor v. Shaw*, 47 Me. 88; *Tucker v. Campbell*, 36 Me. 346. See also *Schiffer v. Eau Claire*, 51 Wis. 385; *Seymour v. Carpenter*, 51 Wis. 413.

2. *Hathorn v. Kelley*, 86 Me. 487; *Davis v. Brigham*, 29 Me. 391; *Nelson v. Butterfield*, 21 Me. 220; *Lowell v. Shaw*, 15 Me. 242; *Sampson v. Bradford*, 6 Cush. (Mass.) 303. See also *Abbott v. Upham*, 13 Met. (Mass.) 172; *Wilson v. Myers*, 4 Hawks (N. Car.) 73.

Particular Parties — Grantor or Grantee. — Who are proper parties defendant in a proceeding under flowage acts will depend on who was in possession

Joinder of Parties Defendant. — All persons having an estate in the mill site and dam must be joined as parties defendant.¹

VI. THE APPLICATION — 1. In General. — It must appear from facts alleged in the application that the case is a proper one for the exercise of the right conferred by the statute.²

when the damages accrued for which the proceeding is brought. Thus for past damages which accrued while the grantor of a mill was in possession the action must be brought against such grantor, and not against the grantee. *Charles v. Monson, etc., Mfg. Co.*, 17 Pick. (Mass.) 70; *Holmes v. Drew*, 7 Pick. (Mass.) 141.

On the other hand, for damages arising during possession of the grantee or of a mortgagee, they are the only parties who are liable. *Hennessey v. Andrews*, 6 Cush. (Mass.) 170; *Sutliff v. Johnson*, 17 Neb. 575; *Abbott v. Upham*, 13 Met. (Mass.) 172.

Legal Representative. — The proceeding is properly brought against the legal representative of the person who committed the injury. *Fellow v. Fulgham*, 3 Murph. (N. Car.) 254; *Howcott v. Coffield*, 7 Ired. L. (N. Car.) 24. But see *Rackley v. Sprague*, 19 Me. 344.

Surviving Tortfeasors. — The action may be brought against surviving tortfeasors. *Tyler v. Mather*, 9 Gray (Mass.) 177; *Wilson v. Myers*, 4 Hawks (N. Car.) 73.

Corporation Defendants. — Where the dam causing the injury is owned by a corporation, the proceeding must be brought against it, and not against the stockholders, unless expressly authorized by statute. *Norton v. Hodges*, 100 Mass. 241. *Quare*, whether a corporation is a person within the meaning of the general milldam law and entitled to its benefits. *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 351.

Debt for Annual Damages. — A mortgagee of a mill, milldam, and privilege, who has taken and kept possession for conditions broken, is liable to an action, on Rev. Stat. Mass., c. 116, § 24, for the unpaid annual damages for flowing land, which have been awarded by verdict against the mortgagor. *Fuller v. French*, 10 Met. (Mass.) 359.

1. *Hathorn v. Kelley*, 86 Me. 487; *Moor v. Shaw*, 47 Me. 88; *Hill v. Baker*, 28 Me. 9. See also *Goodwin v. Gibbs*, 70 Me. 243; *Newell v. Smith*, 26 Wis. 582.

2. *Folmar v. Folmar*, 68 Ala. 120, 71 Ala. 136; *Bush v. Robinson*, 44 Ala. 328; *Walters v. Houck*, 7 Iowa 72; *Farrington v. Blish*, 14 Me. 425; *Fox v. Holcomb*, 34 Mich. 299; *Powers v. Irish*, 23 Mich. 430; *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204; *Fari-bault v. Hulett*, 10 Minn. 30; *Pierce Mill Co. v. Koltermann*, 26 Neb. 722; *Whitworth v. Puckett*, 2 Gratt. (Va.) 531; *Faville v. Greene*, 12 Wis. 11.

Debt for Annual Damages. — This rule is applicable to the statutory action in debt or assumpsit for arrears of annual damages, even though the tribunal authorized to entertain the suit is one of general jurisdiction. *Prentiss v. Parks*, 65 Me. 559.

Sufficient Allegations. — "The applicant is averred to be the owner of the land on each side of the stream; the land is described by sectional subdivisions, township, and range; the name of the watercourse, on which side the mill and gin were to be erected, the kind of mill and gin, and the height of the proposed dam are precisely stated; and this is all the statute requires the application to contain." *Folmar v. Folmar*, 71 Ala. 136.

A Statute Abolishing Special Pleading in civil actions and providing for a specification of defense, to be filed with the general issue, applies to complaints under flowage acts. *Howard v. Merri-mac River Locks, etc.*, 12 Cush. (Mass.) 259.

Wisconsin Statute. — Under Rev. Stat. Wis. 1858, c. 56, pleadings and all proceedings under the Milldam Act were placed on the same footing as those in other actions, and were to be construed by the liberal rules of the code, and not by the strict rules of the common law. *Zeidler v. Johnson*, 38 Wis. 335.

Amendments. — The usual liberality in the matter of amendments to the pleadings is permissible. For various amendments that have been allowed, see *Russell v. Turner*, 62 Me. 496; *Whitney v. Gilman*, 33 Me. 274; *Sanger v. Newton*, 134 Mass. 308; *Hill v. Sayles*, 12 Met. (Mass.) 142; *Siman v. Rhoades*, 24 Minn. 25; *Bassett v. Salis-*

Oath and Signature to Application. — In the absence of express statutory direction, the application need not be sworn to, and may be signed by counsel for the applicant.¹

2. Particular Allegations. — Under most statutes the application should allege facts which show the kind of mill,² the description of the land which will be used or injured,³ with the names of owners,⁴ and the character of the injury.⁵

3. Complaint for Increased Damages — Necessary Averments. — A complaint asking the increase of the annual damages previously assessed must set out the former proceedings,⁶ allege dissatisfaction with the damages at first awarded,⁷ and demand an increase.⁸

VII. PROCESS — 1. To Adverse Parties. — Adverse parties must usually be notified as in other actions by process issued when the application is made.⁹

bury Mfg. Co., 28 N. H. 438; Wilson v. Myers, 4 Hawks (N. Car.) 73; Sabine v. Johnson, 35 Wis. 185.

A Complaint Asking Damages and the abatement of the dam cannot be amended so as to state a cause of action under the milldam law. Newton v. Allis, 12 Wis. 379. See also Benbow v. Robbins, 71 N. Car. 338; Irwin v. Richardson, 88 Wis. 429.

1. Gammell v. Potter, 2 Iowa 562.

Petition Ore Tenua. — The application under some statutes may be made orally. Mairs v. Gallahue, 9 Gratt. (Va.) 94; Whitworth v. Puckett, 2 Gratt. (Va.) 528; Mead v. Haynes, 3 Rand. (Va.) 33.

2. McCulley v. Cunningham, 96 Ala. 583; Bottoms v. Brewer, 54 Ala. 288; Barnard v. Fitch, 7 Met. (Mass.) 605; Fitch v. Stevens, 4 Met. (Mass.) 426; Slack v. Lyon, 9 Pick. (Mass.) 61; Little v. Stanback, 63 N. Car. 285; Harding v. Goodlett, 3 Yerg. (Tenn.) 41; Mairs v. Gallahue, 9 Gratt. (Va.) 94. *Contra*, where there is no limitation contained in the statute, Burnham v. Thompson, 35 Iowa 425.

3. Prescott v. Curtis, 42 Me. 64; Com. v. Ellis, 11 Mass. 462; Lake v. Loysen, 66 Wis. 424.

4. **In Ad Quod Damnum Proceedings.** — Mairs v. Gallahue, 9 Gratt. (Va.) 94; Martin v. Beverley, 5 Call (Va.) 444; Wroe v. Harris, 2 Wash. (Va.) 126; Faribault v. Hulett, 10 Minn. 30.

Under Flowage Acts. — Crockett v. Millett, 65 Me. 191; Farrington v. Blish, 14 Me. 423; Paine v. Woods, 108 Mass. 162.

5. Prescott v. Curtis, 42 Me. 64; Bridgers v. Purcell, 1 Ired. L. (N. Car.) 232; Lake v. Loysen, 66 Wis. 424.

Other Allegations — Navigability of

Stream. — Under most statutes it is necessary to allege that the stream across which the dam is to be erected is not navigable. Waller v. McConnell, 19 Wis. 417. See also Siman v. Rhoades, 24 Minn. 192, 25.

Dimensions of Dam. — It is not generally necessary to state the dimensions of the dam or the times when it should be left open. Lake v. Loysen, 66 Wis. 424; Hovey v. Perkins, 63 N. H. 516.

Nonpayment of Compensation. — That the injury to the landowner has not been compensated for need not be alleged. Faville v. Greene, 12 Wis. 11. See also Thien Voegtlander, 3 Wis. 461.

6. Vandusen v. Comstock, 9 Mass. 203; Ray v. Fletcher, 12 Cush. (Mass.) 200; Stevens v. Fitch, 2 Met. (Mass.) 507. See also Cullifer v. Gilliam, 9 Ired. L. (N. Car.) 126; Gillet v. Jones, 1 Dev. & B. L. (N. Car.) 339.

7. Leonard v. Schenck, 3 Met. (Mass.) 357.

8. Ray v. Fletcher, 12 Cush. (Mass.) 200.

9. Hoag v. Denton, 20 Iowa 118; Gammell v. Potter, 2 Iowa 562; Coleman v. Andrews, 48 Me. 562; Prentiss v. Parks, 65 Me. 559; Cox v. Buie, 12 Ired. L. (N. Car.) 139.

Alias Writ of Ad Quod Damnum. — After the proceedings have been commenced and process served, if the writ of ad quod damnum is quashed a second writ may be issued without further notice to the defendant. Burnham v. Thompson, 35 Iowa 421.

Connecticut Statute. — Under the Connecticut act flowage petitions are to be served by citation in the same manner as petitions in equity. McArthur v. Morgan, 49 Conn. 347.

Ex-parte Proceedings. — But under some statutes, if the application does not ask for the condemnation of land the proceedings are *ex-parte* until the return of the inquisition.¹

Waiver. — The lack of process or any irregularities in its service are waived by a general appearance, as in other actions.²

2. To the Sheriff. — The Writ of *Ad Quod Damnum* or similar process runs to the sheriff, and directs him to call a jury to meet on the premises for the purpose of inquiring into and assessing the damage.³

Separate Warrants. — Where several cases for injuries caused by a single dam are pending at the same time, it is necessary to issue but one warrant, which shall recite the several cases and direct a trial by one jury.⁴

VIII. THE ISSUES — **Before the Sheriff's Jury.** — The principal issue before the sheriff's jury is whether any persons have been damaged by the erection of the dam, and if so, to what extent.⁵

Before the Court. — Every other issue, whether of law or of fact, including objections to the complaint and the like, is to be determined as in other actions, either prior to the impaneling of the sheriff's jury,⁶ or, under some statutes, after the return of

1. *Frost v. Barnes*, 47 Ala. 279; *Rushton v. Martin*, 43 Ala. 555; *Hendricks v. Johnson*, 6 Port. (Ala.) 472, 5 Port. (Ala.) 208; *Shackleford v. Coffey*, 4 J. J. Marsh. (Ky.) 40; *Hunter v. Matthews*, 12 Leigh (Va.) 228, 1 Rob. (Va.) 494.

2. *Wood v. Wilson*, 12 Ind. 657; *Bernard v. Brewer*, 2 Wash. (Va.) 76; *Sumner v. Miller*, 64 N. Car. 688.

3. **Date of Meeting.** — The writ should usually specify the day on which the jury is to meet. *Folmar v. Folmar*, 68 Ala. 120, 71 Ala. 136; *Shackleford v. Coffey*, 4 J. J. Marsh. (Ky.) 40; *Irvin v. Scobee*, 3 T. B. Mon. (Ky.) 50; *Dawson v. Moons*, 4 Munf. (Va.) 535. But see *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

Right of Deputy to Execute Writ. — *Under the Flowage Acts* it has been determined that the sheriff's duty is in a measure judicial and must be exercised in person and not by deputy. *White v. Bodwell*, 3 Dane's Abr. 19. See also *Wilmarth v. Knight*, 7 Gray (Mass.) 294.

In Ad Quod Damnum proceedings, however, the writ may be executed by the deputy. *Gay v. Caldwell*, Hard. (Ky.) 68; *Noel v. Sale*, 1 Call (Va.) 495; *Bernard v. Brewer*, 2 Wash. (Va.) 76; *Wroe v. Harris*, 2 Wash. (Va.) 126. See also *Stevens v. Duck River Nav. Co.*, 1 Sneed (Tenn.) 237.

Plea in Abatement. — A plea in abatement will not lie to a writ of *ad quod damnum*, but defects must be reached by a motion to quash. *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

4. *Richardson v. Curtis*, 2 Cush. (Mass.) 341; *Wilmarth v. Knight*, 14 Gray (Mass.) 112.

Jurors. — It is no objection to the proceedings that thirteen persons were summoned to attend as jurors, if only twelve were impaneled. *Hosmer v. Warner*, 15 Gray (Mass.) 46.

5. See the cases cited in the next succeeding note, and see also *Adams v. Pearson*, 7 Pick. (Mass.) 341; *Zeidler v. Johnson*, 38 Wis. 335.

6. *Maine.* — *Hubbard v. Great Falls Mfg. Co.*, 80 Me. 39; *Currier v. Swan*, 63 Me. 323; *Coleman v. Andrews*, 48 Me. 562; *Prescott v. Curtis*, 42 Me. 64; *Underwood v. North Wayne Scythe Co.*, 41 Me. 291; *Nelson v. Butterfield*, 21 Me. 220; *Cowell v. Great Falls Mfg. Co.*, 6 Me. 282; *Axtell v. Coombs*, 4 Me. 322.

Massachusetts. — *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301; *Tyler v. Mather*, 9 Gray (Mass.) 177; *Darling v. Blackstone Mfg. Co.*, 16 Gray (Mass.) 187; *Wilmarth v. Knight*, 7 Gray (Mass.) 294; *Hosmer v. Warner*, 7 Gray (Mass.) 186; *Nutting v. Page*, 4 Gray (Mass.) 581; *Howard v. Merrimac River Locks, etc.*, 12 Cush. (Mass.) 259;

the inquest.¹

Title to Land. — Under the flowage acts one of the issues which may be made is whether or not the applicant has title to the lands injured. In ad quod damnum proceedings, on the other hand, it seems that questions of title may not be raised and tried.²

Commissioners for Assessment of Damages. — Some statutes provide that the damages shall be assessed by commissioners instead of by a sheriff's jury.³

Charles v. Porter, 10 Met. (Mass.) 37; Adams v. Pearson, 7 Pick. (Mass.) 341. *North Carolina.* — Sumner v. Miller, 64 N. Car. 688; Jones v. Clarke, 7 Jones L. (N. Car.) 418.

Wisconsin. — Lockhart v. Geir, 54 Wis. 133; Babb v. Mackey, 10 Wis. 371, which cases, however, are not precisely in point.

1. In proceedings by writ of ad quod damnum issue may be taken on the application, and the inquest also may be traversed, and a trial had as in other actions. Frost v. Barnes, 47 Ala. 279; Rushton v. Martin, 43 Ala. 555, 42 Ala. 289; Peck v. Van Rensselaer, 8 Blackf. (Ind.) 312; Chapman v. Groves, 8 Blackf. (Ind.) 309; Honenstine v. Vaughan, 7 Blackf. (Ind.) 520; Gammell v. Potter, 6 Iowa 548; Newcomb v. Royce, 42 Neb. 323 [discussing Sutliff v. Johnson, 17 Neb. 575; Pierce Mill Co. v. Koltermann, 26 Neb. 722; Kyner v. Upstill, 29 Neb. 768]; Whitworth v. Puckett, 2 Gratt. (Va.) 531; Hunter v. Matthews, 12 Leigh (Va.) 228; Mayo v. Turner, 1 Munf. (Va.) 405; Eppes v. Cralle, 1 Munf. (Va.) 258. But see McArthur v. Morgan, 49 Conn. 347.

2. Anthony v. Lawhorne, 1 Leigh (Va.) 1; Wood v. Boughan, 1 Call (Va.) 330; Arnold v. Klepper, 24 Mo. 273; Hendricks v. Johnson, 6 Port. (Ala.) 472; Skipwith v. Young, 5 Munf. (Va.) 276. See also Hovey v. Perkins, 63 N. H. 516; Otis v. Hall, 3 Johns. (N. Y.) 451.

Title Not Triable by Sheriff's Jury. — In Howard v. Merrimac River Locks, etc., 12 Cush. (Mass.) 259, the court said: "It is manifestly the policy of the mill acts to provide that, in the mere assessment of damages for flowing land, the parties interested shall have the judgment of a jury of experienced persons, who shall go upon the land, examine it, and form their opinions from such view and examination. But it is obvious that such a body of persons, going out under the inspection

and care of the chief executive officer of the county, though well qualified to form a just opinion of the value of land, its capacities for productive purposes, and the damage done to it by flowing, is not a tribunal suitably constituted to act judicially upon the right and title of the complainant to the land, of the right and privilege of the millowner to enjoy the benefit, as of right, without payment of damages; depending, as such right must, upon the just application of legal principles to the facts of each case. These are matters in bar, and we think it is the policy of the law that their rights, and the questions of law and fact on which they depend, shall be determined in a regular course of judicial proceeding, in a court duly constituted to hear and decide such questions of right, so as to leave nothing for the sheriff's jury but to estimate the damages in favor of one whose title to the land flowed is determined, and against one who has no ground to insist on the right of flowing, without paying damages therefor."

3. Coleman v. Andrews, 48 Me. 562; Underwood v. North Wayne Scythe Co., 41 Me. 291; Prescott v. Curtis, 42 Me. 64; Nelson v. Butterfield, 21 Me. 224; Burrill v. Martin, 12 Me. 345; Sumner v. Miller, 64 N. Car. 688.

Massachusetts Statute. — Under an early statute in Massachusetts the issue as to whether or not damage has been caused by the overflow was triable at the bar of the court. Charles v. Porter, 10 Met. (Mass.) 37; Johnson v. Kittredge, 17 Mass. 76; Holmes v. Drew, 7 Pick. (Mass.) 141; Vandusen v. Comstock, 3 Mass. 185; Adams v. Pearson, 7 Pick. (Mass.) 341.

Annual Damages. — *North Carolina.* — An issue involving the amount of annual damage caused to the plaintiff's land by the overflow is a proper one to be submitted to the jury. Hester v. Broach, 84 N. Car. 251; Cagle v.

IX. VERDICT AND JUDGMENT — 1. Under Flowage Acts. — The Verdict should assess past damages in gross, and contain a separate finding of the amount of damages that will annually accrue.¹

Substantial Conformity to Statute. — If the verdict of the sheriff's jury, in a complaint for flowage, follows the statute substantially, it is sufficient.²

The Award of Arbitrators to whom the parties have voluntarily referred the question of damage is to be treated in all respects as a verdict of a jury on that question.³

The Judgment can include only the damages that have accrued at the time of its rendition.⁴ For the amount of annual damage as it falls due, a statutory remedy in debt or assumpsit is provided.⁵

2. In Ad Quid Damnum Proceedings. — For matters which pertain to the inquest or verdict and the final order of the court in

Parker, 97 N. Car. 271; McGee v. Fox, 107 N. Car. 766; Burnett v. Nicholson, 86 N. Car. 99.

1. *Maine.* — Bradstreet v. Erskine, 50 Me. 407; Clarke v. Rockland Water-Power Co., 52 Me. 68; Billings v. Berry, 50 Me. 31; Bryant v. Glidden, 36 Me. 36; Hathorn v. Kelley, 86 Me. 487.

Massachusetts. — Stowell v. Flagg, 11 Mass. 364.

North Carolina. — Goodson v. Mullen, 92 N. Car. 207; Burnett v. Nicholson, 86 N. Car. 99; Pugh v. Wheeler, 2 Dev. & B. L. (N. Car.) 50; Harper v. Miller, 4 Ired. L. (N. Car.) 34; Gillet v. Jones, 1 Dev. & B. L. (N. Car.) 339.

Wisconsin. — Murray v. Scribner, 70 Wis. 228; Sabine v. Johnson, 35 Wis. 185; Aken v. Parfrey, 35 Wis. 249; Newton v. Allis, 16 Wis. 198.

Gross Damages. — It is also generally necessary under these acts that the verdict assess a sum in gross to cover all damages past and future, which sum the party injured may elect to take. Newton v. Allis, 16 Wis. 198, and cases cited *supra*. See also Darge v. Horicon Iron Mfg. Co., 22 Wis. 691.

Height of Dam. — The verdict must usually regulate the height of the dam and the manner in which it shall be used at different seasons of the year. Bryant v. Glidden, 36 Me. 36; Cogswell v. Essex Mill Corp., 6 Pick. (Mass.) 94; Com. v. Ellis, 11 Mass. 462; Wilmarth v. Knight, 7 Gray (Mass.) 294; Winkley v. Salisbury Mfg. Co., 14 Gray (Mass.) 443; Brady v. Blackinton, 113 Mass. 238; Atkins v. Witherell, 142 Mass. 482; Aken v. Parfrey, 35 Wis.

249; Sabine v. Johnson, 35 Wis. 185. See also Darge v. Horicon Iron Mfg. Co., 22 Wis. 691; *In re* Burnham, 22 Ont. App. 40.

2. Shaw v. Mills, 9 Cush. (Mass.) 503.

3. Pollard v. Moore, 51 N. H. 188; Leonard v. Wading River Reservoir Co., 113 Mass. 235; Winkley v. Salisbury Mfg. Co., 14 Gray (Mass.) 443; Adams v. Pearson, 7 Pick. (Mass.) 341.

The question of damages, however, is not a controversy "which might be the subject of a personal action at law or of a suit in equity," and cannot be the subject of submission to an arbitration before a justice of the peace. Carpenter v. Spencer, 2 Gray (Mass.) 407; Henderson v. Adams, 5 Cush. (Mass.) 610.

4. Billings v. Berry, 50 Me. 31; Bradstreet v. Erskine, 50 Me. 407; Com. v. Ellis, 11 Mass. 462; Sabine v. Johnson, 35 Wis. 185. See also Wight v. Barnstable Sav. Bank, 123 Mass. 183.

5. **Exclusiveness of Statutory Remedy.** — This statutory remedy is exclusive of the common-law action in debt or assumpsit. Paine v. Woods, 108 Mass. 160; Leland v. Woodbury, 4 Cush. (Mass.) 245; Knapp v. Clark, 30 Me. 244. See also Hill v. Sayles, 12 Met. (Mass.) 142.

But it seems that it is not exclusive of the right of the party injured to proceed at common law against the dam as a nuisance. State v. Mills, 29 Wis. 322; Pick v. Rubicon Hydraulic Co., 27 Wis. 433; Ackerman v. Horicon Iron, etc., Co., 16 Wis. 151; Zweig v. Horicon Iron, etc., Co., 20 Wis. 40, 17 Wis. 362.

ad quod damnum proceedings, see *infra*, XI. *The Record*.

X. COSTS — Special Statutory Provisions. — The taxation of costs is a statutory matter, and is usually regulated by the mill acts and not left to be determined by general laws governing costs.¹

XI. THE RECORD — 1. In General — Necessity to Show Compliance with Statute. — The jurisdiction conferred by these statutes being special and limited, the record must affirmatively show that the law has been complied with in every particular.²

Ownership of Land. — In ad quod damnum proceedings the ownership of the land on both sides and in the bed of the stream should be shown by the record.³

Notice to Adverse Parties. — It must appear from the record that all parties whose property will be injured have been notified of the proceedings.⁴

Amending the Record. — It is proper to permit a return on a writ of ad quod damnum to be amended where there is sufficient in the record to amend by.⁵

2. The Inquisition. — The inquisition of the sheriff's jury in ad quod damnum proceedings should show that the jurors were sworn and charged as required by the statute under which the proceedings were instituted,⁶ and should contain findings upon

1. For cases in which questions concerning costs under the local acts have been decided, see *Folmar v. Folmar*, 71 Ala. 136, 68 Ala. 120; *Burrill v. Martin*, 12 Me. 345; *Fisher v. Johnson*, 2 Allen (Mass.) 436; *Wilmarth v. Knight*, 14 Gray (Mass.) 112; *Fitch v. Stevens*, 2 Met. (Mass.) 506; *Johnson v. Sutliff*, 17 Neb. 423; *Bridgers v. Purcell*, 1 Ired. L. (N. Car.) 232; *Eppes v. Cralle*, 1 Munf. (Va.) 258. See also *Newton v. Allis*, 16 Wis. 198; *Ogletree v. McQuaggs*, 67 Ala. 580; *R. Burnham*, 16 Ont. Pr. Rep. 390.

2. *McCulley v. Cunningham*, 96 Ala. 583; *McAllilley v. Horton*, 75 Ala. 491; *Folmar v. Folmar*, 68 Ala. 120, 71 Ala. 136; *Bottoms v. Brewer*, 54 Ala. 288; *Martin v. Rushton*, 42 Ala. 289, 43 Ala. 555; *Owen v. Jordan*, 27 Ala. 608; *Macon v. Owen*, 3 Ala. 116; *Wood v. Wilson*, 12 Ind. 657; *Martin v. Beverley*, 5 Call (Va.) 444; *Coleman v. Moody*, 4 Hen. & M. (Va.) 1.

Judgment. — For the sufficiency of orders giving leave to establish the dam, see *Malone v. State*, 51 Ala. 55; *Whitworth v. Puckett*, 2 Gratt. (Va.) 531; *Hunter v. Matthews*, 1 Rob. (Va.) 494; *Coalter v. Hunter*, 4 Rand. (Va.) 58.

3. *Hamilton v. Adams*, 7 J. J. Marsh. (Ky.) 248; *Wootten v. Campbell*, 7 Dana (Ky.) 204; *Bibb v. Montjoy*, 2

Bibb (Ky.) 1; *M'Affee v. Kennedy*, 1 Litt. (Ky.) 92; *Smith v. Connelly*, 1 T. B. Mon. (Ky.) 58; *O'Bannon v. Jackson*, Sneed (Ky.) 201. See also *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589.

4. *Honenstine v. Vaughan*, 7 Blackf. (Ind.) 520; *Lane v. Miller*, 17 Ind. 58; *Pierce Mill Co. v. Koltermann*, 26 Neb. 722.

5. *Gay v. Caldwell*, Hard. (Ky.) 68; *Dawson v. Moons*, 4 Munf. (Va.) 535; *Harper v. Miller*, 4 Ired. L. (N. Car.) 34. See also *Bernard v. Brewer*, 2 Wash. (Va.) 76.

6. *Owen v. Jordan*, 27 Ala. 608; *McAllilley v. Horton*, 75 Ala. 491; *Rushton v. Martin*, 43 Ala. 555, 42 Ala. 289; *Walters v. Houck*, 7 Iowa 72; *Akin v. Davis*, 11 Kan. 580; *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589; *Shackleford v. Coffey*, 4 J. J. Marsh. (Ky.) 40. See also *Spring v. Lowell*, 1 Mass. 423.

Majority Verdict. — It is not necessary that the verdict be rendered or signed by all the jurors. A majority verdict is sufficient. *Frost v. Barnes*, 47 Ala. 279; *Austin v. Helms*, 65 N. Car. 560.

Qualification of Jurors. — It is a valid objection in these proceedings, as in other actions, that it appears that a majority of the jurors were members of a former jury which returned an inquest favorable to the erection of the mill and dam. *Folmar v. Folmar*, 68

all questions which it requires them to investigate.¹

XII. APPEALS — 1. In General. — **Special Statutory Provisions** usually regulate the mode in which proceedings under milldam acts may be reviewed.²

Trial de Novo. — Some statutes provide for a trial *de novo* on appeal to an inferior tribunal before the case can be taken to the court of last resort.³

Ala. 120, 71 Ala. 136; *Hunter v. Matthews*, 12 Leigh (Va.) 228, two judges dissenting.

The record need not show that the jurors who held the inquest were qualified to serve. Such objection should be raised by special plea or by assignment of error in fact. *Gay v. Caldwell*, Hard. (Ky.) 68.

1. The Principal Matters Required to Be Investigated by these statutes, findings on which must be made by the inquest, are the health of the neighborhood; the obstruction of navigation, and of the passage of fish; and whether the dam will flood any mansion house, orchard, or the like.

Alabama. — *McAllilley v. Horton*, 75 Ala. 491; *Bush v. Robinson*, 44 Ala. 328; *Martin v. Rushton*, 42 Ala. 289, 43 Ala. 555; *Owen v. Jordan*, 27 Ala. 608.

Indiana. — *Gherkey v. Haines*, 4 Blackf. (Ind.) 160.

Kentucky. — *Trabue v. Macklin*, 4 B. Mon. (Ky.) 407; *Major v. Taylor*, 1 A. K. Marsh. (Ky.) 552; *Mountjoy v. Oldham*, 1 A. K. Marsh. (Ky.) 535; *Bibb v. Montjoy*, 2 Bibb (Ky.) 1; *Shackleford v. Coffey*, 4 J. J. Marsh. (Ky.) 40.

Virginia. — *Mairs v. Gallahue*, 9 Gratt. (Va.) 94; *Smith v. Waddill*, 11 Leigh (Va.) 556; *Kownslar v. Ward*, Gillmer (Va.) 127; *Eppes v. Cralle*, 1 Munf. (Va.) 258.

Matters Required by Statute to Be Investigated. — In *McAllilley v. Horton*, 75 Ala. 491, it was said: "We understand it to be settled by the past decisions of this court that it is sufficient, so far as concerns the inquest of the jury, if it is clearly responsive to all of these matters which the statute requires the jury to investigate. Any finding of the jury which falls short of this requirement is defective and would authorize the entire proceedings to be vacated or quashed on motion of any party to the record."

Damages. — The land overflowed should be described in the inquisition and the amount of damages assessed to the different owners. *Gammell v.*

Potter, 2 Iowa 563; *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589; *Smith v. Connelly*, 1 T. B. Mon. (Ky.) 58; *Smith v. Rogers*, Litt. Sel. Cas. (Ky.) 117; *O'Bannon v. Jackson*, Sneed (Ky.) 201; *Dawson v. Moons*, 4 Munf. (Va.) 538; *Coleman v. Moody*, 4 Hen. & M. (Va.) 1.

That damages are assessed which the jury has no right to consider will be no ground for reversal where they are assessed separately so that the amount of legal damages may be ascertained. *Eppes v. Cralle*, 1 Munf. (Va.) 258. See also *Goodson v. Mullen*, 92 N. Car. 207; *Burnett v. Nicholson*, 86 N. Car. 99.

2. See for questions which have been raised and decided under the local statutes: *McCulley v. Cunningham*, 96 Ala. 583; *McAllilley v. Horton*, 75 Ala. 491; *Rushton v. Martin*, 43 Ala. 555, 42 Ala. 289; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Cowell v. Great Falls Mfg. Co.*, 6 Me. 282; *Humphrey v. Berkshire Woollen Co.*, 10 Allen (Mass.) 420; *Lowell v. Spring*, 6 Mass. 398; *Turner v. Holleran*, 11 Minn. 253.

3. *Harper v. Miller*, 4 Ired. L. (N. Car.) 34; *Andrews v. Johnson*, 1 Law Repos. (N. Car.) 272; *Jones v. Clarke*, 7 Jones L. (N. Car.) 418; *Towson v. Debow*, 5 Sneed (Tenn.) 193; *Smith v. Waddill*, 11 Leigh (Va.) 556; *Hunter v. Matthews*, 12 Leigh (Va.) 228. See also *Kearns v. Thomas*, 37 Wis. 118.

Interlocutory Orders. — Interlocutory orders are not generally subject to review until after final judgment. A decision that the complaint may be maintained is such an order. *Comins v. Turner's Falls Co.*, 140 Mass. 146; *Hamilton v. Farrar*, 131 Mass. 573; *Turner v. Holleran*, 11 Minn. 253. And so is one quashing an inquisition. *Allison v. Taylor*, 3 T. B. Mon. (Ky.) 7.

An order overruling a motion to set aside the verdict of a jury on a writ of *ad quod damnum* and to quash the writ is a final order and appealable. *Burn-*

2. *Certiorari*. — Where no provision for reviewing proceedings under the mill acts exists *certiorari* will lie to bring up the record.¹

XIII. REPAIR OF MILLS — *Remedy of Cotenant*. — At common law one tenant in common or joint tenant might by writ of *de reparatione facienda* compel his cotenants to join in repairing the mill. But this writ has been superseded in several states by a statutory remedy, which has been held to be exclusive in the absence of a special contract between the parties.²

XIV. CRIMINAL PROSECUTIONS AGAINST MILLERS. — The duties of millers who grind for toll are in many states looked upon as matters of public interest and regulated by statute.³

ham v. Thompson, 35 Iowa 421. So also under some statutes is an order appointing commissioners to determine the necessity for taking land for the improvement and to ascertain damages. *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204; *Minor v. Harris*, Phil. L. (N. Car.) 322.

1. *Vandusen v. Comstock*, 3 Mass. 185; *Palmer Co. v. Ferrill*, 17 Pick. (Mass.) 58; *Faribault v. Hulett*, 10 Minn. 30; *Brooks v. Morgan*, 5 Ired. L. (N. Car.) 481. See also *Minor v. Harris*, Phil. L. (N. Car.) 322.

Supersedes. — In some states a supersedeas is proper. *Wingfield v. Crenshaw*, 3 Hen. & M. (Va.) 245; *Noel v. Sale*, 1 Call (Va.) 495. See also *White v. King*, 5 Leigh (Va.) 726.

2. *Alden v. Carleton*, 81 Me. 358; *Buck v. Spofford*, 31 Me. 34; *Converse*

v. Ferre, 11 Mass. 325; *Calvert v. Aldrich*, 99 Mass. 74; *Carver v. Miller*, 4 Mass. 559. See also *Clark v. Plimmer*, 31 Wis. 442; *Anderson v. Greble*, 1 Ashm. (Pa.) 136; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Gwinneth v. Thompson*, 9 Pick. (Mass.) 31; *Glover v. McGaffey*, 55 Vt. 172.

3. Such laws, in the present state of development of the country, do not seem to be of much importance, few cases having been tried under them. For indictments and penal actions for keeping a false toll dish, see *State v. Nixon*, 5 Jones L. (N. Car.) 257; *State v. Perry*, 5 Jones L. (N. Car.) 252; *Kirby v. Rice*, 8 Yerg. (Tenn.) 442; *State v. Bishop*, 7 Conn. 181. For a refusal to grind grain offered, see *Kirby v. Lee*, 8 Yerg. (Tenn.) 439; *Merrill v. Cahill*, 8 Mich. 55.

MINES AND MINING.

BY ALFRED PIZEY.

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I. JURISDICTION OF STATE AND FEDERAL COURTS—1. In Adverse Suits.—Although a state court may be a court of “competent jurisdiction” for the purpose of trying an adverse suit under the sections of the Revised Statutes of the United States relating to mining rights in the public domain, the mere fact that it is such an action is sufficient to authorize a removal of the cause to a federal court,¹ or a review by the Supreme Court of the United States of a final judgment rendered in a state court of last resort.²

1. *Rutter v. Shoshone Min. Co.*, 75 Fed. Rep. 37 [*distinguishing* *Bushnell v. Crooke Min., etc., Co.*, 148 U. S. 682], affirmed 59 Cir. Ct. App. 538; *Burke v. Bunker Hill, etc., Min., etc., Co.*, 46 Fed. Rep. 644; *Strasburger v. Beecher*, 44 Fed. Rep. 209; *Frank Gold, etc., Min. Co. v. Larimer M. & S. Co.*, 8 Fed. Rep. 724.

“A suit brought in support of an adverse claim, in pursuance of the requirements of section 2326, Rev. Stat. U. S., as amended in March, 1881 (1 Supp. Rev. Stat. 609), is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the question involved in the litigation.” *Burke v. Bunker Hill, etc., Min., etc., Co.*, 46 Fed. Rep. 644.

Meaning of Phrase “Court of Competent Jurisdiction.”—The phrase “court of competent jurisdiction” contained in

the Mining Acts as applied to an adverse suit has been held to mean a court of general jurisdiction. *Burke v. McDonald*, 2 Idaho 310; *Chambers v. Harrington*, 111 U. S. 350, *affirming* 3 Utah 94, wherein the court said: “It is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court, is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court.”

2. *Chambers v. Harrington*, 111 U. S. 350, *affirming* 3 Utah 94; *Quigley v. Gillett*, 101 Cal. 462.

“As the very essence of the trial is to determine rights by a regular procedure in such court [court of competent jurisdiction] after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of

3. In Other Actions.—In all other suits concerning mines and mining, in order to give jurisdiction to a federal court it must affirmatively appear from facts stated in the complaint that general grounds exist authorizing such a court to take cognizance of the case.¹

II. THE ADVERSE SUIT—**1. Character of the Action.**—The scheme presented by the United States Mining Acts to determine who is entitled to the patent for a particular location has been outlined in a general way by the Supreme Court of the United States.² Many questions, however, which have been

the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review as in other similar cases." *Chambers v. Harrington*, 111 U. S. 350, *affirming* 3 Utah 94.

1. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 202; *Wise v. Nixon*, 76 Fed. Rep. 3, 78 Fed. Rep. 203; *State v. Charlotte Harbor Phosphate Co.*, 74 Fed. Rep. 578; *Boggs v. Merced Min. Co.*, 3 Wall. (U. S.) 304 [dismissing writ of error from judgment in 14 Cal. 279]; *Trafton v. Nougues*, 4 Sawy. (U. S.) 178, 4 Cent. L. J. 228, 24 Fed. Cas. No. 14,134. And see *Evans v. Durango Land, etc., Co.*, 49 U. S. App. 320.

Federal Questions.—The identity of lodes or veins; what is a lode or vein; whether a party may cross-cut through the country rock of another claim in following a vein beyond the boundaries of his own location; disputes as to boundary lines, or the amount of land included within the limits of the claim; whether the land or the veins, lodes, or ledges are such as to be within the meaning of the United States Mining Acts, involve no construction of federal laws, and hence raise no federal question. *Blue Bird Min. Co. v. Latgey*, 49 Fed. Rep. 289; *Latgey v. Blue Bird Min. Co.*, 49 Fed. Rep. 292.

Compare *Cheesman v. Shreve*, 37 Fed. Rep. 36, where it was determined that whether a particular vein could be followed beyond the boundaries of one location into the claim of another, under section 2322, raised a federal question; and *Haggin v. Lewis*, 66 Fed. Rep. 199, holding that a suit may be removed to a federal court which necessitates a decision as to whether a vein was a "known vein" under section 2333, and hence not covered by the patent for a placer mining claim within which it lay.

In *Murray v. Blue Bird Min. Co.*, 45

Fed. Rep. 385, the court refused to follow the above case of *Cheesman v. Shreve*, 37 Fed. Rep. 36.

How Federal Question Raised.—Under the existing law governing the removal of causes from state to federal courts, in cases of this character as in other cases, the facts which will authorize the removal must appear in the plaintiff's statement of his own claim, unaided by anything contained in the subsequent pleadings. *Evans v. Durango Land, etc., Co.*, 49 U. S. App. 320; *State v. Charlotte Harbor Phosphate Co.*, 74 Fed. Rep. 578; *Wise v. Nixon*, 78 Fed. Rep. 203, 76 Fed. Rep. 3; *Haggin v. Lewis*, 66 Fed. Rep. 199.

3. In Richmond Min. Co. v. Rose, 114 U. S. 576, *affirming* 17 Nev. 25, the court, by Miller, J., said, in part: "Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal, before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the rights of the parties under instruction as to the law from the court."

Parties.—Only those who have filed adverse claims in the Land Office can be joined or intervene in an adverse

raised in adverse suits, have received attention only in lower courts, and their decisions are lacking in uniformity.

Action at Law. — In some jurisdictions it has been determined that an adverse suit must be at law in ejectment, and not an action in equity to quiet title or the like.¹

Action at Law or in Equity. — In other states the action may be brought either at law or in equity, according to the remedy proper under the facts existing in the particular case; as ejectment by one out of possession, or a bill in equity to quiet title by one in possession.²

Action in Equity. — In some of the later cases, on the other hand, it has been held that a trial by jury is not a matter of right in an

suit. *Mont Blanc Consol. Gravel Min. Co. v. Debour*, 61 Cal. 364. See also *Turner v. Sawyer*, 150 U. S. 578.

Commencement and Prosecution of Adverse Suit. — Whether an adverse suit was properly commenced, and prosecuted with reasonable diligence, must depend on action taken by the court, and cannot be judged by the Land Department. *Rose v. Richmond Min. Co.*, 17 Nev. 25, *affirmed* 114 U. S. 576; *Mars v. Oro Fino Min. Co.*, 7 S. Dak. 605.

1. *Manning v. Strehlow*, 11 Colo. 451; *Burke v. McDonald*, 2 Idaho 310; *Iba v. Central Assoc.*, 5 Wyoming 355. See also *Becker v. Pugh*, 9 Colo. 589, 17 Colo. 243; and the opinion of Temple, J., in the late case of *Adams v. Crawford*, 116 Cal. 495.

Reasons Given in Support of This View. — These decisions are based on the ground that the suit for all practical purposes is one to determine legal title to the location; judgment in favor of one or the other party being considered as *res judicata* not only against adverse litigants but also against the United States. *Burke v. McDonald*, 2 Idaho 310 [Buck, J., dissenting]; *Rosenthal v. Ives*, 2 Idaho 244; *Schultz v. Allyn*, (Arizona 1897) 48 Pac. Rep. 960; *Hoffman v. Beecher*, 12 Mont. 489; *Iba v. Central Assoc.*, 5 Wyoming 355; *Anthony v. Jillson*, 83 Cal. 296; *Seymour v. Fisher*, 16 Colo. 188. See also *Strasburger v. Beecher*, 44 Fed. Rep. 209; *Burke v. Bunker Hill, etc., Min., etc., Co.*, 46 Fed. Rep. 644; *Gwillim v. Donnellan*, 115 U. S. 45; *Wolverton v. Nichols*, 119 U. S. 485, *reversing* 5 Mont. 89.

It may also be said that, contrary to the usual rule, it seems to be settled that ejectment will lie for an equitable

interest in a mining claim. See article EJECTMENT, vol. 7, p. 260. See also *Rogers v. Brenton*, 10 Q. B. 26, 59 E. C. L. 26, and cases cited.

Right to a Trial by Jury. — In the following cases the right to a jury trial was raised but not decided, because waived: *Perego v. Dodge*, 9 Utah 3, *affirmed* 163 U. S. 160; *Adams v. Crawford*, 116 Cal. 495; *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 89.

Possessory Actions. — In *Oregon*, it has been held that before the interest has ripened into an equitable title by full compliance with the conditions given in the Mining Acts, any interference with the possession can only be remedied in a possessory action before a justice of the peace. *Duffy v. Mix*, 24 Oregon 265; *Bishop v. Baisley*, 28 Oregon 119; *Bilyeu v. Smith*, 18 Oregon 335. See also the following cases decided in *California* under an early statute: *Freeman v. Powers*, 7 Cal. 104; *Small v. Gwinn*, 6 Cal. 447; *Grass Valley Quartz Min. Co. v. Stackhouse*, 6 Cal. 413; *Van Etten v. Jilson*, 6 Cal. 19; *Hicks v. Bell*, 3 Cal. 219.

2. *Schultz v. Allyn*, (Arizona 1897) 48 Pac. Rep. 960; *The 420 Min. Co. v. Bullion Min. Co.*, 9 Nev. 240, 3 Sawy. (U. S.) 634; *Rose v. Richmond Min. Co.*, 17 Nev. 25, *affirmed* 114 U. S. 576. But see *Steel v. Gold, Lead, etc., Min. Co.*, 18 Nev. 80; *Becker v. Pugh*, 9 Colo. 589, 17 Colo. 243; *Wolverton v. Nichols*, 119 U. S. 485 [*reversing* 5 Mont. 89, and discountenancing the rule announced in *Milligan v. Savery*, 6 Mont. 129, upon the authority of that case]. The case of *Milligan v. Savery*, *supra*, also went to the United States Supreme Court, but was dismissed without a hearing upon the merits in 136 U. S. 643.

adverse suit; that the suit relates only to an equitable interest in land, and courts of law have no jurisdiction.¹

2. Allegations—*a. WHERE GOVERNED BY MINING ACTS — The Complaint.*—As a result of the different constructions put upon the Mining Acts the usual allegations applicable in the particular action brought are held insufficient in some cases, where the suit is adverse. But the complaint must allege facts which entitle the plaintiff to a patent from the United States for the location in dispute.² It must appear from the complaint that the adverse claim was filed, and the suit commenced, within the time lim-

1. *Rutter v. Shoshone Min. Co.*, 75 Fed. Rep. 37, affirmed 59 Cir. Ct. App. 538; *Doe v. Waterloo Min. Co.*, 43 Fed. Rep. 219, 55 Fed. Rep. 11, affirmed on other grounds in 44 U. S. App. 204. See also *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, affirmed 6 Mont. 53; *Perego v. Dodge*, 163 U. S. 160, affirming 9 Utah 3.

"This action, then, is to find who is entitled to the conveyance from the government—from the trustee—for the land in controversy. Actions for conveyance of realty are essentially equitable. Again, whatever claim either party may have to the ground in controversy is based upon an equitable title alone, while the legal title remains in the government. Common-law actions deal with legal and not equitable titles." *Rutter v. Shoshone Min. Co.*, 75 Fed. Rep. 37.

Relation Between the Land Office Proceedings and the Adverse Suit.—In this connection it has been finally decided that the adverse suit is not for all practical purposes a trial of the legal title to the location, but that the Land Office of the United States is still to determine whether the conditions laid down by the Mining Acts have been complied with. For the relation which these proceedings bear to one another, see the following cases: *Nesbitt v. De Lamar's Nevada Gold Min. Co.*, (Nev. 1898) 53 Pac. Rep. 178, 52 Pac. Rep. 609; *Hamilton v. Southern Nevada Gold, etc., Min. Co.*, 13 Sawy. (U. S.) 113; *Wight v. Dubois*, 21 Fed. Rep. 693; *Golden Reward Min. Co. v. Boxton Min. Co.*, 79 Fed. Rep. 869; *Dahl v. Raunheim*, 132 U. S. 260; *Dahl v. Montana Copper Co.*, 132 U. S. 264; *Hamilton v. Southern Nevada Gold, etc., Min. Co.*, 33 Fed. Rep. 562; *Kannaugh v. Quartette Min. Co.*, 16 Colo. 341; *Seymour v. Fisher*, 16 Colo. 188; *Hunt v. Eureka Gulch Min. Co.*,

14 Colo. 457. And see *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286; *Mont Blanc Consol. Gravel Min. Co. v. Debour*, 61 Cal. 364.

2. *Anthony v. Jillson*, 83 Cal. 296; *Schultz v. Allyn*, (Arizona 1897) 48 Pac. Rep. 960; *Ducie v. Ford*, 8 Mont. 233.

"The party filing the contest should allege and prove every step necessary to establish his right to his mining claim, that would be required in the Land Office for a patent, with the exception of advertisement and certificate of surveyor-general as to amount of work required before patent could be obtained." *Schultz v. Allyn*, (Arizona 1897) 48 Pac. Rep. 960.

Allegations Showing Action to Be an Adverse Suit.—An allegation in the complaint that the action is brought in support of an adverse claim will be sufficient to authorize the trial to be conducted as an adverse suit. *Marshall Silver Min. Co. v. Kirtley*, 12 Colo. 410.

It need not be averred that the action was brought in respect to the premises included in the adverse claim filed in the Land Office, where the facts pleaded show it. *Hoffman v. Beecher*, 12 Mont. 489.

Variance.—For immaterial variance between the description of the premises given in the adverse claim and that contained in the complaint in the adverse suit, see *Hoffman v. Beecher*, 12 Mont. 489.

Conflicting Location.—It must appear from the complaint how and to what extent the locations of the parties conflict. *Cronin v. Bear Creek Gold Min. Co.*, (Idaho 1893) 32 Pac. Rep. 204.

Precedent.—The report of the case of *Campbell v. Taylor*, 3 Utah 325, contains a complaint at length, which embodies the allegations considered necessary by this class of cases.

ited;¹ that the claimants are citizens of the United States, or have filed a declaration of their intention to become citizens;² and that the annual work required to hold the claim by section 2324 of the Revised Statutes has been done.³

Defendant's Pleading.—The pleading of the defendant should, like that of the plaintiff, contain allegations to show his title as claimed, and he must substantiate them with proof.⁴

5. UNDER GENERAL RULES OF PLEADING.—In other cases no distinction is made in the pleadings owing to the fact that the suit is adverse. The necessary allegations are the usual ones, and do not seem to be controlled by the provisions of the Mining Acts. Compliance with the Mining Acts is matter of evidence only.⁵

1. *Gronin v. Bear Creek Gold Min. Co.*, (Idaho 1893) 32 Pac. Rep. 204; *Mattingly v. Lewisohn*, 8 Mont. 259, 13 Mont. 408.

An Answer Sets Up a Good Defense to the complaint in an adverse suit, which avers that no claim has been duly filed in the Land Office by the plaintiff, covering the premises in controversy. *Marshall Silver Min. Co. v. Kirtley*, 12 Colo. 410.

2. *Anthony v. Jillson*, 83 Cal. 296; *Lee Doon v. Tesh*, 68 Cal. 43; *Keeler v. Trueman*, 15 Colo. 143; *Schultz v. Allyn*, (Arizona 1897) 48 Pac. Rep. 960; *Ducie v. Ford*, 8 Mont. 233.

Citizenship of Corporations.—An averment that a corporation is organized under the laws of the state, naming it, is a sufficient allegation, and it need not appear from the pleading that the stockholders are citizens. *Doe v. Waterloo Min. Co.*, 44 U. S. App. 204. See also *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291, *affirming* 6 Mont. 53; *McKinley v. Wheeler*, 130 U. S. 630. *Contra*, *Thomas v. Chisholm*, 13 Colo. 105.

"In considering the question of jurisdiction in the federal courts, it is an established rule that when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller v. Dows*, 94 U. S. 444. Congress was familiar with this rule, and, it seems, probably intended to establish a similar rule under the Mineral Land Act of 1872." *Doe v. Waterloo Min. Co.*, 44 U. S. App. 204.

Citizenship Allegations Necessary Only in Adverse Suits.—No allegations of citizenship are necessary in any action other than adverse suits brought under the United States statutes; even

though title to the premises involved has not yet been perfected by the issue of the patent. *Harris v. Kellogg*, 117 Cal. 484; *Moritz v. Lavelle*, 77 Cal. 10; *Thompson v. Spray*, 72 Cal. 528; *Lee Doon v. Tesh*, 68 Cal. 43; *McFeters v. Pierson*, 15 Colo. 201. *Contra*, *Bohanon v. Howe*, 2 Idaho 417.

Admissions in Pleading.—Citizenship must be proved even though admitted by the pleading. *Rosenthal v. Ives*, 2 Idaho 244; *Burke v. McDonald*, 2 Idaho 646; *Iba v. Central Assoc.*, 5 Wyoming 355. Otherwise of an admission that the adverse claim has been duly filed in the Land Office. *Burke v. McDonald*, 2 Idaho 646; *Michael v. Mills*, 22 Colo. 439; *Iba v. Central Assoc.*, 5 Wyoming 355.

3. *Ducie v. Ford*, 8 Mont. 233; *Anthony v. Jillson*, 83 Cal. 296 [*citing* *Morgan v. Tillotson*, 73 Cal. 520; *Jackson v. Roby*, 109 U. S. 440; *Chambers v. Harrington*, 111 U. S. 353]. See also *Campbell v. Taylor*, 3 Utah 325.

4. *Anthony v. Jillson*, 83 Cal. 296.

Under the section cited (21 Stat. at L. 505, c. 140) the ruling was that "each party is practically a plaintiff and must show his title; that there can be no nonsuit, but that if neither shows title the verdict must be special, and the title of course remains in the United States, so far at least as the litigating parties are concerned." *Iba v. Central Assoc.*, 5 Wyoming 355.

5. The latest adverse suit of importance is that of *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100, *criticizing and overruling* *Anthony v. Jillson*, 83 Cal. 296. The court said: "Under the state laws either party may bring an action to determine an adverse claim, but the jurisdiction and the procedure govern-

8. Verdict and Judgment. — The verdict returned in an adverse suit need not be special, unless special verdicts are required by

ing the action depends entirely upon our state constitution and laws. This action seems well adapted to the object sought to be accomplished by the Congressional law, for in it the rights of the parties are wholly determined by the Acts of Congress, and involve the same questions as to the relative rights of the parties which the officers of the Land Office would otherwise have been required to pass upon. But it does not matter to the state court whether its judgment can be made available in the Land Office or not. This view was taken by this court in *Quigley v. Gillett*, 101 Cal. 462, where it was said: "The action was brought to determine the question of the right of possession of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the Land Office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency." To the same effect is *The 420 Min. Co. v. Bullion Min. Co.*, 9 Nev. 240, 3 Sawy. (U. S.) 634. It was there held that the Act of Congress simply required the contestant to bring such action as was authorized by the laws of the state to determine the right of possession, and that such action, when brought, would be governed and determined by the practice and rules of pleading there prevailing, irrespective of the Act of Congress requiring the suit to be brought." See also *Quigley v. Gillett*, 101 Cal. 462; *Adams v. Crawford*, 116 Cal. 495; *Harris v. Kellogg*, 117 Cal. 484; *Perego v. Dodge*, 9 Utah 3, *affirmed* 163 U. S. 160; *Bushnell v. Crooke*, Min., etc., Co., 12 Colo. 247, 148 U. S. 682; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256; *Newman v. Newton*, 14 Fed. Rep. 634.

Wyoming. — The doctrine of the text was applied in a late Wyoming case to all the pleading subsequent to the petition; in that, additional allegations were held to be necessary. The court said: "When such a suit is commenced rightfully in a state court, the rules of pleading and practice governing the action which is selected by the complaining party, and the remedy thereby sought, apply to the same extent and with the same force as to such an action generally, unless a different statutory rule is provided,

except perhaps in the nature of the judgment to be rendered." *Iba v. Central Assoc.*, 5 Wyoming 355.

Nevada. — A complaint in an adverse suit brought under the local Act of Feb. 10, 1873, is sufficient if it substantially conforms to the language of the statute. It need not allege the pendency of a contest before the land department, or that the defendant's claim is invalid. *Rose v. Richmond Min. Co.*, 17 Nev. 25, *affirmed* 114 U. S. 576; *Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co.*, 12 Nev. 312; *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370, *overruling* *Blasdel v. Williams*, 9 Nev. 161.

Allegation of Citizenship. — A party will not be held to have failed in his suit because he did not allege or prove citizenship, where no objection was properly made on that ground. *O'Reilly v. Campbell*, 116 U. S. 418; *Garfield Min., etc., Co. v. Hammer*, 6 Mont. 53, *affirmed* 130 U. S. 291; *Jackson v. Dines*, 13 Colo. 90; *Adams v. Crawford*, 116 Cal. 495.

Failure to Do Annual Work. — In suits for the recovery of possession of mining claims which are not adverse, a forfeiture under section 2322 of the Revised Statutes is matter of defense, and must be specially pleaded. *Bishop v. Baisley*, 28 Oregon 119; *Renshaw v. Switzer*, 6 Mont. 464; *Morenhaut v. Wilson*, 52 Cal. 263, *overruling* *Bell v. Brown*, 22 Cal. 671.

And this rule is applicable to an adverse suit so far that the plaintiff need not prove performance of the annual work, but the burden is on the defendant to show a forfeiture. *O'Reilly v. Campbell*, 116 U. S. 418; *Quigley v. Gillett*, 101 Cal. 462; *Harris v. Kellogg*, 117 Cal. 484.

Forfeiture, however, need not be specially pleaded in an adverse suit. "In such actions, the question whether the plaintiff has forfeited any rights under the Acts of Congress is necessarily involved, and need not, when relied upon by defendant, be specially pleaded." *Steel v. Gold, Lead, etc., Min. Co.*, 18 Nev. 80.

The laws, customs, or rules, for non-compliance with which a forfeiture is claimed, need not be set out in the pleading. *Colman v. Clements*, 23 Cal. 245; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

local statutory provisions.¹ The judgment for possession must be limited to the claim or part thereof, the right to which is

And it is not necessary as at common law, after alleging the facts, to conclude "that thereby the claim was forfeited." *Bishop v. Baisley*, 28 Oregon 119.

Abandonment. — The defense of abandonment of a mining claim may always be introduced under the general issue. *Morenhaut v. Wilson*, 52 Cal. 263; *Bell v. Bed Rock Tunnel, etc.*, Co., 36 Cal. 214; *Bell v. Brown*, 22 Cal. 671.

Description of Premises. — For cases which have discussed the requisites of complaints in describing the premises in dispute, see *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471; *Grady v. Early*, 18 Cal. 108; *Hamburg Min. Co. v. Stephenson*, 17 Nev. 449.

A description of a claim as "situated about five miles from the Denver and Rio Grande railroad track, up what is known as 'Tie Canyon,' near the head of the right-hand fork, in Utah county, Utah Territory," is bad as being too indefinite. *Darger v. Le Sieur*, 9 Utah 192, 8 Utah 160.

Description of Injury. — For sufficient description in a complaint to quiet title of the injury sustained by the plaintiff, see *Pralus v. Pacific Gold, etc.*, Min. Co., 35 Cal. 30.

Ownership. — A general allegation of ownership is usually sufficient in an action to recover possession of a mining claim, *Souter v. Maguire*, 78 Cal. 543; *Thompson v. Spray*, 72 Cal. 534; *Hall v. Arnott*, 80 Cal. 348; *O'Keefe v. Cannon*, 52 Fed. Rep. 898; or in a bill to enjoin trespass thereon, *Thomas v. Nantahala Marble, etc.*, Co., 8 U. S. App. 429.

Possession. — In an action to quiet title to a mining claim, the complaint need not allege possession in the plaintiff. *Landregan v. Peppin*, 94 Cal. 465. *Contra*, under early law, *Pralus v. Jefferson Gold, etc.*, Min. Co., 34 Cal. 558.

Where possession must be alleged the facts must be pleaded which show its character. A general allegation is insufficient. *Smith v. Doe*, 15 Cal. 100.

Answer. — For cases which have discussed the sufficiency of an answer in actions to recover the possession of mining claims, see *Pike v. Sutton*, 21 Colo. 84; *Mills v. Fletcher*, 100 Cal. 142; *McTarnahan v. Pike*, 91 Cal. 540;

Bay State Silver Min. Co. v. Brown, 21 Fed. Rep. 167.

"In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under section 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode." *Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, reversing 16 Fed. Rep. 829.

In ejectment for land belonging to the public domain and used by the plaintiff for agricultural purposes, an answer which seeks to justify an entry thereon on the ground that the land is valuable for mining purposes must affirmatively allege facts which give a legal right to enter under such circumstances. *Lentz v. Victor*, 17 Cal. 272.

Claims on Town Sites. — For actions for the possession of claims within limits covered by a patented townsite, see *O'Keefe v. Cannon*, 52 Fed. Rep. 898; *Richards v. Dower*, 81 Cal. 44.

1. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100; *Bennett v. Harkrader*, 158 U. S. 441. And see *Pike v. Sutton*, 21 Colo. 84.

"The form of the verdict was sufficient. Whether it would answer the purpose of the parties in the Land Office does not concern us. It complies with all the requirements of our laws and practice." *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100.

Contra, that the verdict in an adverse suit must show that the successful party is entitled to possession by virtue of having complied with the Mining Acts: *McGinnis v. Egbert*, 8 Colo. 41; *Manning v. Strehlow*, 11 Colo. 451; *Thomas v. Chisholm*, 13 Colo. 105; *Burke v. McDonald*, 2 Idaho 646. See also *Bushnell v. Crooke Min., etc.*, Co., 12 Colo. 247, 148 U. S. 682.

Description of Premises. — The verdict need contain no description of the premises, but will be sufficient if it refers for such description to the complaint. *Colorado Cent. Consol. Min. Co. v. Turck*, 50 Fed. Rep. 888; *Haws v. Victoria Copper Min. Co.*, 160 U. S.

established by the evidence.¹ The judgment itself need not direct the issuance of the writ of possession. A supplementary order to that effect is sufficient.²

III. INSPECTION OF MINES. — It is well settled that a court of equity has the power to compel mine owners to permit an inspection of their works at the suit of a party who can show reasonable ground for suspicion that his lands are being trespassed upon through them.³

303, *affirming* 7 Utah 515. The premises in dispute need not be defined with mathematical or scientific accuracy. Colorado Cent. Consol. Min. Co. v. Turck, 50 Fed. Rep. 888; Argonaut Consol. Min., etc., Co. v. Turner, 23 Colo. 400.

Where the claim as described in the complaint is larger in extent than allowed by law the defect is cured by the verdict which confines the claim within legal limits. Frohner v. Rodgers, 2 Mont. 179.

Findings of Court. — For cases discussing the sufficiency of the findings of the court upon the questions which arise in cases of this character, see Larkin v. Upton, 144 U. S. 19, *affirming* 7 Mont. 449, 5 Mont. 600; McTarnahan v. Pike, 91 Cal. 540; Gelcich v. Moriarty, 53 Cal. 217; Pralus v. Pacific Gold, etc., Min. Co., 35 Cal. 30; Butte Hardware Co. v. Cobban, 13 Mont. 351. See also Kahn v. Central Smelting Co., 102 U. S. 641.

1. Keefe v. Doreland, 16 Mont. 16.

2. Landregan v. Peppin, 94 Cal. 465.

3. Thornburgh v. Savage Min. Co., 23 Fed. Cas. No. 13,986, 7 Morr. Min. Rep. 667, 1 Pac. L. Mag. 267; Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. Rep. 179; St. Louis Min., etc., Co. v. Montana Co., 9 Mont. 288, *affirmed* 152 U. S. 160; Blue Bird Min. Co. v. Murray, 9 Mont. 468; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Thomas Iron Co. v. Allentown Min. Co., 28 N. J. Eq. 77; Bennitt v. Whitehouse, 28 Beav. 119; Atty.-Gen. v. Chambers, 12 Beav. 159; Lonsdale v. Curwen, 3 Bligh 168 note; Walker v. Fletcher, 3 Bligh 172; Lewis v. Marsh, 8 Hare 97; Blakesley v. Whieldon, 1 Hare 176; Bennett v. Griffiths, 30 L. J. Q. B. 98; Whaley v. Branker, 10 L. T. N. S. 155.

"The motion appears to me to be analogous to the motion made for the production, by parties, of books or writings in their possession which contain evidence pertinent to the issue

(Rev. Stat. U. S., § 724), and to the motions under the code practice for admission or inspection of writings or examination of the parties, before trial. The petitioner, a party in interest in the main cause, one of those whom the receiver represents, wishes to examine the mines in charge of the receiver. He cannot do so in person. He wishes to do so by agent in whom he confides. He is entitled to this knowledge. It is for himself only, certainly in the first instance. It is ordered that the petitioner have access to the mines for the purpose indicated, at such time as will not interfere with the working thereof, either in person or by any one agent whom he may select. The receiver may require that he himself, or some other person selected by him, shall accompany the agent selected by the petitioner; this visit to be limited to one occasion, the petitioner to be at liberty to employ as his agent Evan H. Davis." Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. Rep. 179.

"The plaintiff must have an order to inspect at all reasonable times, upon giving one day's notice, so far as may be necessary to ascertain whether the defendant has worked into the plaintiff's land, and how far and to what extent, with liberty to measure, dial, and make all such plans or surveys as may be necessary for that purpose, and to use the defendant's machinery for descending and ascending, doing no injury to the defendant's works, and paying the defendant any expenses which he may incur." Bennitt v. Whitehouse, 28 Beav. 119.

Notice and Hearing. — It is better that such an order should not be made without service of a notice of the application and a hearing, although this is not always necessary. Thomas Iron Co. v. Allentown Min. Co., 28 N. J. Eq. 77.

Security for Damages. — The party inspecting is not required in an ordinary

IV. MISCELLANEOUS MATTERS.—There are many scattering cases under the different actions which may be brought at law or in equity, which have had to do with matters of pleading and procedure where the subject-matter concerned mines and mining, and which are not subject to any general classification. These cases relate to such matters as accounting,¹ affidavit of defense,² conversion,³ criminal proceedings,⁴ failure of consideration for a mining lease,⁵ forfeiture of mining leases,⁶

case to give security to cover damage. But security will be compelled if the inspection is likely to necessitate acts that will cause injury. *Bennett v. Griffiths*, 30 L. J. Q. B. 98; *St. Louis Min., etc., Co. v. Montana Co.*, 9 Mont. 288, *affirmed* 152 U. S. 160.

Costs.—Reasonable expenses of the inspection may be allowed by the court as part of the costs of the case, *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

Appeal and Certiorari.—Where no appeal from an order for the inspection of a mine is provided by the statute which gives the right of inspection, the proceedings may be reviewed by certiorari. *St. Louis Min., etc., Co. v. Montana Co.*, 9 Mont. 288, *affirmed* 152 U. S. 160.

Inspection by the Court.—That a lower court by consent of parties examined mines and work done, in an action to quiet title to a mining claim, will have no weight in a court of review in determining the correctness of its decision. "Such an inspection, except in very special cases, has not been provided for, and cannot be given any weight by this court." *Dibble v. Castle Chief Gold Min. Co.*, 9 S. Dak. 618.

1. Accounting.—Bill for an accounting of the amount due under a mining lease. *Heckscher v. Trotter*, 41 N. J. Eq. 502, 42 N. J. Eq. 251.

2. Affidavit of Defense.—An affidavit of defense must be filed in an action to recover money due for minerals raised under a lease. *Johnston v. Cowan*, 59 Pa. St. 275; *Muhlenberg v. Henning*, 116 Pa. St. 138. But none is required where the action is in damages for the nonperformance of the lease as a whole, *Eshelman v. Thompson*, 62 Pa. St. 495; nor in an action in assumpsit founded upon an implied contract between a mining company and a stockholder, that the latter should pay the assessments made by the former upon the stock, *Woodwell v. Bluff Min. Co.*, 25 Pa. St. 365.

3. Conversion.—Action to recover the value of coal mined upon lands which the plaintiff had duly declared his intention to pre-empt under section 2347 *et seq.* of the Revised Statutes of the United States, but to which he had not at the time obtained title. *Evans v. Durango Land, etc., Co.*, 49 U. S. App. 320.

4. Criminal Actions—Indictments.—For conspiracy in ousting complainants from a mining claim under section 5508 of the U. S. Revised Statutes. *U. S. v. Ringeling*, 8 Mont. 353.

For "shooting coal off the solid," under an act of the legislature of Missouri passed April 11, 1895. In this case the court reviews American legislation of the kind, and says of a similar law of Pennsylvania: "This act proceeded on the line of the Act of Parliament [18 & 19 Vict., c. 108], but greatly extended the measures looking to the safety of miners. Similar enactments are to be found in Illinois, New York, Ohio, and many other states." *State v. Murlin*, 137 Mo. 297.

For not filling up an abandoned gas or oil well as required by section 2, Act of Feb. 9, 1893, 9 Ohio Laws 24. *State v. Oak Harbor Gas Co.*, 53 Ohio St. 347.

5. Failure of Consideration.—In actions upon leases to search for and raise mineral in a certain parcel of ground, failure of consideration by reason of none being contained therein is usually matter of defense and must be specially pleaded. *Cook v. Andrews*, 36 Ohio St. 174; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; *McDowell v. Hendrix*, 67 Ind. 513; *Wilson v. Beech Creek Cannel Coal Co.*, 7 Pa. Super. Ct. Rep. 241; *Kokomo Natural Gas, etc., Co. v. Albright*, 18 Ind. App. 151.

6. Forfeiture of Mining Leases.—For the sufficiency of the service of notice in actions under the law of Nova Scotia to forfeit mining leases, see *In re Sword's Lease*, 9 Nova Scotia 389; *Reg.*

injunctions,¹ joinder of claims,² liens against mining corporations, or upon mining property,³ mining corporations,⁴ parties to proceedings of various kinds,⁵ actions for personal

v. Tobin, 14 Nova Scotia 305; *Reg. v. Elze*, 16 Nova Scotia 130; *Wallace v. Creelman*, 18 Nova Scotia 546.

In an action for relief against the forfeiture of a mining lease for non-payment of rent, the answer alleged that the lessees had failed to furnish monthly statements of the ore mined, as required by the lease; that they had committed waste; that they were insolvent; and that the property was in danger of being dismembered or destroyed by the creditors and unpaid workmen for the purpose of securing their debts. It was held, on demurrer, that all these matters were proper to be considered in determining whether relief should be granted. *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204.

1. **Injunctions.**—Bills of injunction to restrain the mining of valuable ores on mining locations the title to which is in dispute. *St. Louis Min., etc., Co. v. Montana Min. Co.*, 58 Fed. Rep. 129; *Thomas v. Nantahala Marble, etc., Co.*, 8 U. S. App. 429; *Waterloo Min. Co. v. Doe*, 82 Fed. Rep. 45; *Erhardt v. Boaro*, 113 U. S. 537; *Bishop v. Baisley*, 28 Oregon 119; *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 3. And see *Merced Min. Co. v. Fremont*, 7 Cal. 317; *Boston Franklinite Co. v. New Jersey Zinc Co.*, 13 N. J. Eq. 215; *Hurley v. Delaware, etc., Canal Co.*, 5 Pa. Dist. Rep. 257.

Action on a bond given to obtain an injunction against interference with the possession of a mine. *Donahue v. Johnson*, 9 Wash. 187.

2. **Joinder of Claims.**—After suit has been brought several mining claims cannot be united, each having a portion of the outcrop, for the purpose of asserting a right to follow a vein upon its dip, when said right does not exist within the said claims considered separately. *Cheesman v. Shreeve*, 40 Fed. Rep. 787.

3. **Liens.**—The statutory liens given against mining corporations in the upper peninsula of Michigan are to be enforced by action in the same manner provided for the enforcement of liens generally. And it makes no difference whether the corporation is domestic or foreign. *McLaren v. Byrnes*, 80 Mich. 275.

The term "mining ground," used in a finding of the court in a case to foreclose a statutory lien for labor and material, is sufficient to designate and include the property involved, and is equivalent to the statutory phrase "mining claim." *Bewick v. Muir*, 83 Cal. 368, 373.

Under section 1195 of the California Code any number of persons claiming liens against the same mining property may join as plaintiffs in an action to foreclose. *Malone v. Big Flat Gravel Min. Co.*, 76 Cal. 578.

4. **Mining Corporations.**—For cases which have discussed the requisite parties and matters of practice and pleading necessary to a bill in equity to charge a mining corporation, its directors and stockholders, with the debts of the concern, under Act of July 18, 1863, still in force in *Pennsylvania*, see *Young v. Allegheny Oil Co.*, 10 Phila. (Pa.) 525, 30 Leg. Int. (Pa.) 13; *Archer v. Rose*, 3 Brews. (Pa.) 264; *Hoard v. Wilcox*, 47 Pa. St. 51; *Sheriff v. Globe Oil Co.*, 1 Brews. (Pa.) 489. Under *Massachusetts* statute, see *McRae v. Locke*, 118 Mass. 269.

5. **Parties.**—Only persons in privity with the United States, by virtue of having duly located the premises in question as a mining claim, can attack a patent which has been previously issued therefor. *New Dunderberg Min. Co. v. Old*, 49 U. S. App. 201; *Hermocilla v. Hubbell*, 89 Cal. 5; *Meyendorf v. Frohner*, 3 Mont. 282 (Wade, C. J., dissenting).

In an action to restrain further trespass on the land of the plaintiff in the mining of coal, and for an accounting, both the principal and the agent who has been doing the work are properly joined as defendants. *United Coal Co. v. Canon City Coal Co.*, (Colo. 1897) 48 Pac. Rep. 1045. Compare *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80. Both lessor and lessee are also properly joined as plaintiffs in such an action. *United Coal Co. v. Canon City Coal Co.*, (Colo. 1897) 48 Pac. Rep. 1045.

Where one lessee brings an action against a lessee in possession of the land for the purpose of mining coal, claiming priority of right, the owner

injuries,¹ and recovery of bodies of entombed miners.²

must be joined as a defendant. *Porter v. Noyes*, 47 Mich. 55.

1. **Personal Injuries.**—Section 16, c. 93, Ill. Rev. Stat., requires "the owner, agent, or operator of coal mines to keep a sufficient supply of timber, when required, to be used as props, * * * and to send down such props when required." In an action for personal injuries under this section, a complaint which only charges a failure to furnish and set props states no cause of action. *Consolidated Coal Co. v. Rung*, 24 Ill. App. 255.

A suit under the *Illinois* acts for the safety of miners, for an injury which

results in death, cannot be brought by a personal representative. It lies only at the suit of the widow, lineal heirs or adopted children, or persons dependent for support upon the deceased, in the order named. *Beard v. Skeldon*, 113 Ill. 584, 13 Ill. App. 54; *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255.

2. **Recovery of Bodies of Entombed Miners.**—The Act of May 9, 1889 (*Brightly's Purdon* 1340), for the recovery of bodies of entombed miners, contemplates a full hearing with notice. The court will appoint a commissioner to take testimony. *Malitsky's Appeal*, 6 Kulp (Pa.) 6.

MINORS.

See articles *GUARDIANS*, vol. 9, p. 886; *INFANTS*, vol. 10, p. 581; *NEXT FRIEND*.

MINUTES.

BY ALFRED PIZEY.

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CROSS-REFERENCE.

As to *taking judge's minutes to jury room*, see article *JURY*, vol. 12, p. 597.

I. DEFINITION AND NATURE. — What are commonly known as minutes of the court are memoranda of the proceedings, made by the clerk in his minute book, or by the judge when no clerk is provided, and the basis of the record afterwards made therefrom.¹ Where the minutes are thus considered, they are only temporary authority for the proceedings which they detail, and are superseded by the final or complete record.² But such a

1. Kinney's Law Dict.; *Barnes v. Lee*, 1 Cranch (C. C.) 430; *Sprague v. Litherberry*, 4 McLean (U. S.) 442; *Weed v. Weed*, 25 Conn. 337; *Davidson v. Murphy*, 13 Conn. 218; *Wales v. Smith*, 13 Conn. 217, note *a*; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 108; *Weighorst v. State*, 7 Md. 450; *Taylor v. Com.*, 44 Pa. St. 131; dissenting opinion of Sneed, J., in *Moore v. State*, 3 Heisk. (Tenn.) 493.

"Daily minutes, taken by the clerk and sanctioned by the court, are only memoranda to assist the memory of the clerk in making up the records of the court." *Barnes v. Lee*, 1 Cranch (C. C.) 430.

Entry of Minutes by Judge. — Even where the court has a clerk whose duty it is to make daily minutes of the proceedings, it is not a valid objection

that the minutes have been entered up by the judge instead of by the clerk. *McClerkin v. State*, 20 Fla. 879; *Meal-ing v. Pace*, 14 Ga. 596.

2. *Pierce v. Goodrich*, 47 Me. 173; *Longley v. Vose*, 27 Me. 179; *Read v. Sutton*, 2 Cush. (Mass.) 115; *Pruden v. Alden*, 23 Pick. (Mass.) 184; *Harvey v. Brown*, 1 Ohio 268.

The minute book is no part of the records of the court. *Kentucky Gravel-road Co. v. Com.*, (Super. Ct. 1895) 16 Ky. L. Rep. 153.

A mere recital on the minutes that the defendant was sentenced is not a judgment of the court from which an appeal will lie. *People v. Lenon*, 77 Cal. 308.

"The copy of the minutes forms no part of the record, and cannot be considered as the foundation of an assign-

distinction is by no means universal. The minutes are often of the record itself, either by force of law or by the practice of courts.¹

II. CONTENTS. — What the minutes shall contain will depend on usage in the particular court, and the laws by which its conduct is governed. It may be generally said that they consist of memoranda of the various formal steps taken in a cause, and of the actual court proceedings; these latter usually transcribed from the calendar of the judge.²

ment of errors. The statute makes a clear distinction between the daily entries on the minute book, and the complete record which is to be made up in the vacation and entered in the book of records. The former is intended to prevent mistakes in entering the orders of the day, and to detect them where they are made. The latter is considered the record of the cause, and supersedes the necessity of any further recurrence to the minute book." *Harvey v. Brown*, 1 Ohio 268.

1. See generally article RECORD; also the following cases: *Washington, etc., Steam-Packet Co. v. Sickles*, 24 How. (U. S.) 333; *Cromwell v. Pittsburgh Bank*, 2 Wall. Jr. (C. C.) 569; *Matter of Coleman*, 15 Blatchf. (U. S.) 406; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 108; *Boteler v. State*, 8 Gill & J. (Md.) 381; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; *Gibson v. Partee*, 2 Dev. & B. L. (N. Car.) 530; *Peterson v. Vann*, 83 N. Car. 118; *Ruggles v. Gaily*, 2 Rawle (Pa.) 232; *Com. v. Towles*, 5 Leigh (Va.) 743; *Peterson v. State*, 45 Wis. 535; *Reg. v. Yeoveley*, 8 Ad. & El. 806, 35 E. C. L. 536.

3. Usage. — "Every entry is a statement of the act of the court, and must be presumed to be made by its direction, either by a particular order for that entry or by a general order, or by a general and recognized usage and practice which presupposes such an order. We must therefore presume that the several entries on the docket under this action were made by the clerk by proper authority." *Read v. Sutton*, 2 Cush. (Mass.) 115.

Manner of Making the Entries. — In an early case in *Ohio* it was held that the minutes should be entered with the same precision as the record itself. The court said: "It may not be improper, however, to make a remark on the manner in which the entries should be made on the daily minutes of the

court. Although the eighty-seventh section of the Judiciary Act, which requires the proceedings to be entered, read, and signed, does not prescribe the form in which the minutes shall be kept, or expressly require the orders, judgments, and decrees to be entered at length, or direct the clerk to pursue the exact form of those entries in making up the record, yet that course would be the most safe one, and would be most conformable to the spirit of the statute. This, however, has not been the common construction given to that section by the clerks throughout the state. Many of them have considered the minutes as concise memoranda of the proceedings of the day, from which full records were to be made up in the vacation, and if those memoranda were sufficiently explicit to enable them to make the record with certainty and correctness they have considered them as made in conformity with the statute. This construction has probably resulted from the reason given in the statute for requiring the duty, which is 'to prevent errors in entering the judgments, orders, and decrees of each court.' It is the opinion of this court, however, that the correct course is to make the entries with the same technical precision as is required in the complete record made up in vacation." *Harvey v. Brown*, 1 Ohio 268.

Minute Dockets. — In *Wilson v. State*, 69 Ga. 224, the court considered it to be the better practice to keep the minutes of both civil and criminal causes in the same docket, but decided that it was not an absolute requirement under the law.

Minutes of the Judge. — The minutes made by the judge in the course of the proceedings are no part of the court record, but mere private memoranda. Though designed in part as a communication to the clerk, they have no more legal force as such than an oral communication would have. *Miller*

III. SIGNING MINUTES. — It is frequently provided by the statute that the minutes shall be signed by the judge. But these laws are not usually mandatory so as to invalidate the minutes in case they are left unsigned.¹ And it seems that in those states where the statute directs that minutes shall be signed by the judge, the minutes of the court are considered as a part of the record and not mere memoranda of the clerk.²

IV. AMENDMENTS. — The power to amend its minutes to make them correspond to the truth is inherent in a court, and is liberally exercised in both criminal and civil cases.³

v. Wolf, 63 Iowa 233; *Burroughs v. Ellis*, 76 Iowa 649; *State v. Manley*, 63 Iowa 344; *Towle v. Leacox*, 59 Iowa 42; *Traer v. Whitman*, 56 Iowa 443; *Case v. Plato*, 54 Iowa 64; *Rogers v. Morton*, 51 Iowa 709; *Keller v. Killion*, 9 Iowa 329; *Moore v. Brown*, 10 Ohio 198; *Henley v. Kinley*, 16 Mo. App. 176.

By statute, Tenn. Annot. Code 1896, § 4597, the judge's notes may be considered in a proceeding to amend a record. Otherwise in the absence of statute. *Williams v. Tenpenny*, 11 Humph. (Tenn.) 176.

In *England* the judge's notes of evidence taken *viva voce* are available for the appellate court, but litigants have no right to such notes except as a matter of courtesy on the part of the judge. *Brown's Law Dict.* (2d ed.) 370.

Motion for New Trial on the Judge's Minutes. — For the minutes of the judge in their relation to motions for a new trial, see article NEW TRIAL; also *Taylor v. Holt*, 3 H. & C. 454, note *a*; *Stephenson v. Dulhanty*, 2 Nova Scotia 339; *Copp v. Etter*, 2 Nova Scotia 304.

1. *Bartlett v. Lang*, 2 Ala. 161; *Frazier v. Praytor*, 36 Ala. 692; *Wilson v. State*, 69 Ga. 224; *Justices v. House*, 20 Ga. 328. But see *Johnson v. Johnson*, 2 Heisk. (Tenn.) 521, distinguished in *Moore v. State*, 3 Heisk. (Tenn.) 493.

Minutes which are left unsigned through unavoidable accident, as the sickness or death of the judge, are not less authoritative on that account. *Moore v. State*, 3 Heisk. (Tenn.) 493; *State v. Farrow*, 8 Baxt. (Tenn.) 571.

2. *Moore v. State*, 3 Heisk. (Tenn.) 493. *Sneed, J., dissenting*; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5, where the court said: "In the course of time rolls of parchment fell into disuse, and the usage sprang up of keeping a memorial

or remembrance of the proceedings in a book, which was finally designated as the 'minute book.' But this book is a thing of very modern date. In it the clerk keeps a brief account of the proceedings of the court, but such account is never verified or attested by the signature of the judge. It is not, however, the only form of preserving a memorial or remembrance of the proceedings and acts of a court, nor is it the most satisfactory or trustworthy, because it rests entirely upon the intelligence and fidelity of the subordinate clerk who happens to have the charge of it."

3. *California*. — *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 139; *Sullivan v. Hume*, (Cal. 1893) 33 Pac. Rep. 1121.

Georgia. — *Saffold v. Banks*, 69 Ga. 289; *Brady v. Little*, 21 Ga. 132.

Indiana. — *Hartford Security Co. v. Arbuckle*, 123 Ind. 518.

Louisiana. — *State v. Grandison*, 49 La. Ann. 1012; *State v. Tessier*, 32 La. Ann. 1227; *State v. Revells*, 31 La. Ann. 387; *State v. Smith*, 31 La. Ann. 406; *Hardy v. Stevenson*, 26 La. Ann. 236; *State v. Branch*, 25 La. Ann. 115; *State v. Onnmacht*, 10 La. Ann. 198; *State v. Gates*, 9 La. Ann. 94. And see *Robertson v. Travis*, 5 La. Ann. 401.

Massachusetts. — *Tilden v. Johnson*, 6 Cush. (Mass.) 354.

North Carolina. — *State v. McAlpin*, 4 Ired. L. (N. Car.) 140.

Ohio. — *Elliott v. Plattor*, 43 Ohio St. 198.

Texas. — *Rodriguez v. State*, 32 Tex. Crim. Rep. 259; *Burnett v. State*, 14 Tex. 455; *English v. State*, 34 Tex. Crim. Rep. 190.

"The minutes of court may be corrected in a criminal as well as in a civil cause. The correction may be made out of term or at a subsequent term, and although a different judge is

As to Clerical Mistakes of minor importance, no notice to parties of a correction of the minutes or formal hearing thereon would seem necessary.¹ Otherwise where the correction would affect the rights of the litigating parties.²

By What Court. — An amendment of the minutes can be made only by the court to which they belong.³

on the bench. *State v. Folke*, 2 La. Ann. 744. There is no doubt that when the minutes fail to state the presence of a defendant in court on a criminal trial, and the fact is that he was present, the minutes may be corrected so as to show the truth. It may be done either before the lower court has lost jurisdiction by granting an appeal, or if done after appeal the corrected record will be brought up under a writ of certiorari from this court. *State v. Gates*, 9 La. Ann. 94; *State v. Carroll*, not yet reported." *State v. Revells*, 31 La. Ann. 387. See also *People v. McNulty*, (Cal. 1891) 26 Pac. Rep. 598; *People v. Murback*, 64 Cal. 372.

"The minutes can at any time be corrected, as was done, to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary." *State v. Branch*, 25 La. Ann. 115.

"When the minutes of an order are spoken to, I understand that nothing can be done at variance with the order, but additions or variations may be made, so as to carry out the intention of the court in pronouncing it." *Hendrie v. Beatty*, 29 Grant's Ch. (U. C.) 423.

Mississippi. — In Mississippi such correction can only be made during the term, except by express statutory provision, or when the error appears of record. *McCarthy v. State*, 56 Miss. 294; *Cornwell v. State*, 53 Miss. 385; *Cachute v. State*, 50 Miss. 165; *Mobley v. State*, 46 Miss. 501; *Boon v. Boon*, 8 Smed. & M. (Miss.) 318.

Not an Appealable Order. — It seems that an order of the court correcting or refusing to correct its minutes is not an

order from which an appeal will lie. *Griess v. State Invest., etc., Co.*, 93 Cal. 411; *Fay v. Wenzell*, 8 Cush. (Mass.) 315; *Rumsey v. Cunningham*, 18 Nova Scotia 20, 6 Can. L. T. 138.

1. "It was further said that the extended record was invalid because made without notice. But this was not a case for notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party who supposes he can show such cause should apply to the court to have the record set aside or expunged after it is made. Then as to the objection that the record was extended upon the application of Vinal, who was not interested in the premises demanded in this suit. If he had an interest in the demanded premises, or if he had no interest, it would not be material. The court might amend their records upon their own motion, or upon the motion or suggestion of any one interested. It is not a proceeding in which there need be any parties. It is the act of the court itself, correcting its own records to make them conform to the truth of the case." *Balch v. Shaw*, 7 Cush. (Mass.) 282.

2. *State v. Howard*, 34 La. Ann. 369; *State v. Revells*, 31 La. Ann. 387; *State v. Smith*, 31 La. Ann. 406.

3. *McBride v. Bryan*, 67 Ga. 584; *Kneeland v. State*, 63 Ga. 641; *Doyle v. Gallant*, 14 Nova Scotia 86.

The register in chancery is authorized, under section 2302 of the *Alabama Revised Code*, to act in place of a disqualified probate judge and complete his minute entries. *Box v. Delk*, 47 Ala. 729.

MISCEGENATION.

The Indictment. — Miscegenation is the intermarriage of persons of different races. Several of the states have statutes which forbid such intermarriage between white persons and negroes or those of negro ancestry. The offense is purely statutory, having no existence at common law; and in framing the indictment the form of the statute should be followed.¹ The fact of marriage is an essential ingredient, and must be positively averred and proved.²

1. *Pace v. State*, 69 Ala. 231; *Green v. State*, 58 Ala. 191; *Hoover v. State*, 59 Ala. 57; *Linton v. State*, 88 Ala. 216; *Scott v. State*, 39 Ga. 321; *State v. Gibson*, 36 Ind. 389; *Minvielle's Succession*, 15 La. Ann. 342; *Frasher v. State*, 3 Tex. App. 265; *Moore v. State*, 7 Tex. App. 608; *François v. State*, 9 Tex. App. 145; *Jones v. Com.*, 80 Va. 538.

In *Alabama*, an indictment charging that "John Blue, a negro man, and Martha Linton, a white woman, did intermarry or live in adultery or fornication with each other, against the peace," etc., has been held sufficient. *Linton v. State*, 88 Ala. 216; *Hoover v. State*, 59 Ala. 57.

In *Indiana*, a conviction for miscegenation has been had, upon an indictment charging the defendant with having "unlawfully and knowingly married, in the county and state aforesaid, one Jennie Williams, a white woman of this state, he then and there having one-eighth part or more of negro blood." *State v. Gibson*, 36 Ind. 389.

In *Texas*, the statute prohibiting miscegenation is in an alternative form, forbidding the marriage of a white person with "a negro" or with "a person of mixed blood, descended from negro ancestry to the third generation inclusive, etc." In *Frasher v. State*, 3 Tex. App. 265, the indictment charged that "on March 18, A.D. 1875, in the county of Gregg and state aforesaid, one Charles Frasher, late of the said county, being then and there a white man, did then and there unlawfully, knowingly, and feloniously marry a negro, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." The defendant moved to quash this indictment on the ground

that it did not charge any offense known to the law, and because it did not allege that said party married a negro within the third generation inclusive. But it was held that the indictment was good, and that it was not necessary to follow the alternative form of the statute. An indictment, however, might be so framed in a case like this, as to meet the proof on the trial, by containing two counts; one charging that the defendant married a negro, the other charging that he married a person of mixed blood, etc. In the same case the defendant also filed a motion in arrest of judgment, on the ground that the indictment failed to charge the name of the woman or negro that defendant was charged to have married. It was held that this defect in the indictment should have been taken advantage of by motion to quash, and not by a motion in arrest of judgment.

2. In *Moore v. State*, 7 Tex. App. 608, the court said: "In a prosecution against a white person for having knowingly intermarried with a negro, or for continuing to cohabit with such negro, within this state, after an intermarriage either in or out of this state, the fact of marriage is an essential ingredient and must be positively averred and proved. * * * The indictment should have averred that the defendant, being a white person, did knowingly intermarry with the negro without this state, and did thereafter remove to this state, and continue to cohabit with such negro within this state; or if the marriage was consummated within this state, that fact should have been alleged, with the further allegation of continued cohabitation, if the pleader designed the latter as the basis of prosecution."

MISDEMEANORS.

See the various criminal titles in this work, and consult the General Index.

MISDIRECTION.

See article *INSTRUCTIONS*, vol. 11, p. 47.

MISJOINDER.

See article *MULTIFARIOUSNESS AND MISJOINDER*; see also articles *ABATEMENT IN PLEADING*, vol. 1, p. 13; *ACTIONS*, vol. 1, p. 108; *PARTIES*.

As to misjoinder of causes or demands and parties in particular kinds of actions or actions for particular relief, see the various titles in this work and consult the General Index.

MISNOMER.

See article *NAMES*.

MISTAKE.

By E. A. CRAIGHILL, JR.

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Mistakes in Pleading, see the article *AMENDMENTS*, vol. 1, p. 458.

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I. JURISDICTION — 1. An Equitable Power. — Granting relief from a mistake, where it is made to appear satisfactorily that such mistake had been made in such a manner that the true intent of the parties is not likely to be carried out, is a well-recognized head of equitable jurisdiction.¹ Equity courts, how-

1. *Connecticut*. — *Bundy v. Sabin*, Root (Conn.) 427; *Gay v. Adams*, 1 Root 2 Root (Conn.) 209; *Doty v. Judson*, 2 (Conn.) 105.

ever, are cautious in the exercise of this power and will not relieve against a mistake unless a clear case for relief is made out.¹

Florida. — *Jackson v. Magbee*, 21 Fla. 622.

Georgia. — *Wyche v. Greene*, 11 Ga. 159; *Reese v. Wyman*, 9 Ga. 430; *Trout v. Goodman*, 7 Ga. 383.

Illinois. — *Pool v. Docker*, 92 Ill. 501.

Kentucky. — *Western German Sav. Bank v. Farmers, etc., Bank*, 10 Bush (Ky.) 669.

Maine. — *Tucker v. Madden*, 44 Me. 206; *Jordan v. Stevens*, 51 Me. 78; *Robinson v. Sampson*, 23 Me. 388.

Maryland. — *Aldridge v. Weems*, 2 Gill & J. (Md.) 36.

Missouri. — *Rayburn v. Deaver*, 8 Mo. 104; *Leitensdorfer v. Delphy*, 15 Mo. 166; *Cassidy v. Metcalf*, 66 Mo. 519; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 36; *Henderson v. Dickey*, 35 Mo. 120.

New Hampshire. — *Tilton v. Tilton*, 9 N. H. 385.

New Jersey. — *Firmstone v. De Camp*, 17 N. J. Eq. 309; *Loss v. Obry*, 22 N. J. Eq. 52; *Read v. Cramer*, 2 N. J. Eq. 277.

New York. — *De Riemer v. De Cantillon*, 4 Johns. Ch. (N. Y.) 85; *Ferree v. Ellsworth*, 1 Misc. Rep. (N. Y. C. Pl.) 93.

North Carolina. — *Harrison v. Howard*, 1 Ired. Eq. (N. Car.) 407.

Ohio. — *Gill v. Pelkey*, 54 Ohio St. 348.

Pennsylvania. — *Hamilton v. Asslin*, 14 S. & R. (Pa.) 448; *Huss v. Morris*, 63 Pa. St. 367.

South Carolina. — *Desell v. Casey*, 3 Desaus. (S. Car.) 85; *McCrae v. Hollis*, 4 Desaus. (S. Car.) 122.

Tennessee. — *Cromwell v. Winchester*, 2 Head (Tenn.) 389.

Vermont. — *Langdon v. Keith*, 9 Vt. 299.

Virginia. — *Boschen v. Jurgens*, 92 Va. 756.

Wisconsin. — *Elofrson v. Lindsay*, 90 Wis. 203.

United States. — *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233; *Hunt v. Rhodes*, 1 Pet. (U. S.) 11; *Hancock v. Cossett*, 45 Fed. Rep. 754; *Williams v. U. S.*, 138 U. S. 514.

England. — *Langley v. Brown*, 2 Atk. 202; *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 317; *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Calverley v. Williams*, 1 Ves. Jr. 210.

For a Full Discussion of the numerous

decisions on this subject see Am. and Eng. Encyc. of Law, title *Mistake*.

Maine — Jurisdiction Given by Statute. — In Maine jurisdiction to correct mistakes is expressly conferred by statute upon the equity courts; nor is such jurisdiction in terms limited to mistakes of fact. *Jordan v. Stevens*, 51 Me. 78; *Tucker v. Madden*, 44 Me. 206; *Robinson v. Sampson*, 23 Me. 388.

Will Not Give Unfair Advantage to One Party. — Equity will not assist one party in gaining an advantage from the mistakes of the other, as by decreeing specific performance of a contract entered into by mistake, but will leave him to his remedies at law. *Mansfield v. Sherman*, 81 Me. 365; *Burkhalter v. Jones*, 32 Kan. 5; *Leslie v. Thompson*, 9 Hare 268; *Webster v. Cecil*, 30 Beav. 62; *Baxendale v. Seale*, 19 Beav. 601; *Malins v. Freeman*, 2 Keen 25.

Where Equities Are Equal a court of equity will not, on account of a mistake, assist one creditor against another. *Knight v. Bunn*, 7 Ired. Eq. (N. Car.) 77; *Smith v. Turrentine*, 2 Jones Eq. (N. Car.) 253; *Anderson v. Tydings*, 8 Md. 427.

1. *Stricker v. Tinkham*, 35 Ga. 176; *Reese v. Wyman*, 9 Ga. 430; *Trout v. Goodman*, 7 Ga. 383.

Parties Should Be Put in Statu Quo. — In *Grymes v. Sanders*, 93 U. S. 55, *Swayne, J.*, said: "A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it." See also *Kinney v. Consolidated Virginia Min. Co.*, 4 Sawy. (U. S.) 382; *King v. Doolittle*, 1 Head (Tenn.) 77; *Eastman v. St. Anthony Falls Water-Power Co.*, 24 Minn. 437.

Will Not Make Contract. — In the exercise of this jurisdiction to correct mistakes equity will not make new contracts for the parties. *Brooks v. Stolley*, 3 McLean (U. S.) 523; *Vallette v. Whitewater Valley Canal Co.*, 4 McLean (U. S.) 192; *Oakley v. Ballard*, Hempst. (U. S.) 475; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1; *Stricker v. Tinkham*, 35 Ga. 176; *Warburton v. Lauman*, 2 Greene (Iowa) 420; *Stoddard v. Hart*, 23 N. Y. 556.

For a General Discussion as to what mistakes will be corrected in equity.

Courts of Law act on the contracts of parties as they find them, and have no power to rectify a mistake not apparent on the face of the instrument.¹ Such relief is purely within the province of equity courts,² and even where there may be an analogous remedy at law equity will have jurisdiction.³

2. **Mistake of Law.** — It is laid down as a general rule that a

see Am. and Eng. Encyc. of Law, title *Mistake*.

1. *Rayburn v. Deaver*, 8 Mo. 104; *Wyche v. Greene*, 11 Ga. 159; *Tucker v. Madden*, 44 Me. 206; *Elofrson v. Lindsay*, 90 Wis. 203.

A Court of Admiralty cannot exercise the power of correcting mistakes which belongs exclusively to courts having equity jurisdiction. *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S.) 6.

The District Courts of the City of New York have no equitable power for the correction of mistakes in written instruments. *Ferree v. Ellsworth*, 1 Misc. Rep. (N. Y. C. Pl.) 93.

Justice of the Peace. — In *Nance v. Metcalf*, 19 Mo. App. 190, it was held that the granting of relief against mistakes was purely an equitable power, and that a justice of the peace could not exercise such jurisdiction.

In an Action of Ejectment the court cannot correct a mistake in a written instrument not apparent on its face. The proper remedy for the correction of such mistakes is by a suit in equity. *Elofrson v. Lindsay*, 90 Wis. 203.

Under a Plea of the General Issue in Ejectment a deed absolute in form cannot be attacked on the ground that it was in fact intended to be a mortgage. *Davenport v. Turpin*, 43 Cal. 597.

2. *Rayburn v. Deaver*, 8 Mo. 104; *Nance v. Metcalf*, 19 Mo. App. 190; *Elofrson v. Lindsay*, 90 Wis. 203; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S.) 6.

In *Casgrain v. Milwaukee County*, 81 Wis. 113, Winslow, J., said: "The reformation of contracts is purely cognizable in equity. It must be done by equitable action or by equitable counterclaim. It cannot be by mere defense in an action at law."

Code Pleading — Equitable Defense at Law. — In an action to recover a balance on a contract to deliver beef, the defendant pleaded a mistake in the agreement. It was held that under the *Missouri Rev. Stat.*, 1879, § 3461, providing that there shall be but one form of civil action, the plea was permissi-

ble as an equitable defense to an action at law. *Torrey v. U. S.*, 42 Fed. Rep. 207.

In *New York* it has been held that an equitable defense of a mistake in a written instrument can be litigated upon a jury trial. *Pitcher v. Hennessey*, 48 N. Y. 415.

Where, in an action at law for the recovery of real property, the defendant in his answer set up a mistake, it was held that the issue raised was equitable in its nature, and that section 5130 of the *Ohio Revised Statutes*, providing that issues of fact arising in actions for real property should be tried by a jury, unless a jury trial is waived or reference be ordered, did not apply to the action. *Gill v. Pelkey*, 54 Ohio St. 348.

3. In *Hancock v. Cossett*, 45 Fed. Rep. 754, Jackson, J., said: "Even if there was a complete remedy at law, it is settled that where fraud or mistake is the ground of relief, the jurisdiction of a court of equity is not ousted by the concurrent remedy at law."

Relief Cognizable in Court of Law. — Where a suit in equity is brought to correct a mistake in a deed, the court will grant relief cognizable in a court of law. *Hawley v. Simons*, (Ill. 1887) 14 N. E. Rep. 7.

Where Assumpsit Would Lie. — A bill in equity will lie to correct a single bill from which the word "dollars" has been accidentally omitted, and to enforce its collection against both principal and surety therein. Although assumpsit would lie, yet the remedy is not so ample as to prevent a court of equity from taking jurisdiction to enforce the original contract, the bill given being void in law. *Newcomer v. Kline*, 11 Gill & J. (Md.) 457.

Where Relief Might Be Had by Appealing. — The plaintiff brought an action of ejectment to recover land for which he held a sheriff's deed, wherein was a mistake. On judgment being given against him, he filed a bill to correct the mistake. It was held that the suit in equity for this purpose was proper, notwithstanding that, by appealing, he

mistake of law,¹ unconnected with a mistake of fact, and where there are no indications of fraud, imposition, or undue advantage entering into the agreement, will not be corrected by a court of equity.² But, while the rule is so stated in general terms, it is subject to so many modifications and exceptions that it is doubtful whether a mistake of law is not now as much a matter for equitable relief as a mistake of fact.³

might have reversed the judgment in the ejectment suit. *Hawley v. Simons*, (Ill. 1887) 14 N. E. Rep. 7.

1. **Definition.**—A mistake of law is an erroneous conclusion as to the legal effect of known facts. *Anderson's Law Dict.*, title Mistake; *Hurd v. Hall*, 12 Wis. 113; *Birkhauser v. Schmitt*, 45 Wis. 116; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355.

In *Hurd v. Hall*, 12 Wis. 113, Dixon, C. J., said: "A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment, upon facts as they really are; and, like a correct opinion, which is law, necessarily presupposes that the person forming it is in full possession of them. The facts precede the law, and the true and false opinion alike imply an acquaintance with them. Neither can exist without it. The one is the result of a correct application to them of legal principles, which every man is presumed to know, and is called law; the other the result of faulty application, and is called a mistake of the law."

2. *Alabama*.—*Hardigree v. Mitchum*, 51 Ala. 151; *Gwynn v. Hamilton*, 29 Ala. 233.

California.—*Goodenow v. Ewer*, 16 Cal. 461; *Smith v. McDougal*, 2 Cal. 586.

Georgia.—*Newell v. Stiles*, 21 Ga. 118.

Illinois.—*Goltra v. Sanasack*, 53 Ill. 458; *Sibert v. McAvoy*, 15 Ill. 106; *Shafer v. Davis*, 13 Ill. 395; *Broadwell v. Broadwell*, 6 Ill. 599; *Beebe v. Swartwout*, 8 Ill. 162; *Oswald v. Sproehle*, 16 Ill. App. 368; *Calverly v. Harper*, 40 Ill. App. 96.

Indiana.—*Baker v. Pyatt*, 108 Ind. 61; *Zenor v. Johnson*, 107 Ind. 69; *Williamson v. Hitner*, 79 Ind. 233; *Allen v. Anderson*, 44 Ind. 395; *Nelson v. Davis*, 40 Ind. 366.

Mississippi.—*Nabours v. Cocke*, 24

Miss. 44; *Lyon v. Sanders*, 23 Miss. 530.

Missouri.—*Norton v. Highleyman*, 88 Mo. 621; *Price v. Estill*, 87 Mo. 378.

New Jersey.—*Bentley v. Whittemore*, 18 N. J. Eq. 366.

New York.—*Gilbert v. Gilbert*, 9 Barb. (N. Y.) 532; *Champlin v. Laytin*, 6 Paige (N. Y.) 189; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166.

North Carolina.—*Sandlin v. Ward*, 94 N. Car. 490.

Pennsylvania.—*Clapp v. Hoffman*, 159 Pa. St. 531; *Peters v. Florence*, 38 Pa. St. 194; *Rankin v. Mortimere*, 7 Watts (Pa.) 372.

South Carolina.—*Porter v. Jefferies*, 40 S. Car. 92.

South Dakota.—*Brown v. Edmonds*, 5 S. Dak. 508.

Tennessee.—*Trigg v. Read*, 5 Humph. (Tenn.) 529; *Bell v. Steel*, 2 Humph. (Tenn.) 148.

Vermont.—*Mellish v. Robertson*, 25 Vt. 603.

West Virginia.—*Shriver v. Garrison*, 30 W. Va. 456.

Wisconsin.—*Birkhauser v. Schmitt*, 45 Wis. 316.

United States.—*U. S. v. Ames*, 99 U. S. 35; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85; *Lamborn v. Dickinson County*, 97 U. S. 181; *Upton v. Tribilcock*, 91 U. S. 45; *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 32; *Allen v. Galloway*, 30 Fed. Rep. 466; *Woolworth v. McPherson*, 55 Fed. Rep. 558.

In *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 60, Chancellor Kent said: "The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

3. **A Full Discussion** of the numerous cases on this subject is not within the scope of this work. See Am. and Eng. Encyc. of Law, title *Mistake*.

3. Mistake of Fact. — Where the parties to a transaction have entered into it under a mutual mistake of fact,¹ equity has the power to relieve them, on a proper showing, from the consequences of such mistake.² What particular mistake of fact will, and what will not, be corrected in equity is not a matter within the scope of this work.³

4. Requisites for Exercise of Jurisdiction — Mistake Must Be Material. — In order that a mistake may come within the cognizance of a court of equity it must be shown to be in relation to a material fact.⁴

1. Definition. — "Mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in an unconsciousness, ignorance, or forgetfulness of a fact past or present, material to the transaction; or in the belief in the present existence of a thing material to the transaction, which does not exist, or in the past existence of a thing which has not existed." Kerr on Fraud and Mistake 406.

In *Hurd v. Hall*, 12 Wis. 112, Dixon, C. J., observes: "An error of fact * * * is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. * * * A mistake of fact has, in legal parlance, a much more enlarged signification [than a mistake of law], and extends to and includes the case of a party who, through mere ignorance of the existence or nonexistence of a material fact, is induced to do an act or enter into a contract injurious to himself, where, if he had been informed of the existence or nonexistence of such fact, he would not have performed such act or made such contract. Ignorance of the existence or nonexistence of a material fact precludes the idea that the party, at the time of the transaction, should have been influenced by it, for it is impossible that the mind should be moved by that of which it knows nothing. This ignorance of facts must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed, that if a party might, by the exercise of reasonable diligence, have ascertained the facts he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The later cases establish the doctrine that wher-

ever there is a clear, *bona fide* mistake, ignorance, or forgetfulness of facts, the contract may, on that account, be avoided."

2. *Ruffner v. McConnel*, 17 Ill. 212; *Sibert v. McAvoy*, 15 Ill. 106; *Shafer v. Davis*, 13 Ill. 395; *Broadwell v. Broadwell*, 6 Ill. 599; *Fleetwood v. Brown*, 109 Ind. 567; *Western German Sav. Bank v. Farmers, etc.*, Bank, 10 Bush (Ky.) 669; *Lane v. Holmes*, 55 Minn. 379; *Nabours v. Cocke*, 24 Miss. 44; *Nicholson v. Janeway*, 16 N. J. Eq. 285; *Mays v. Dwight*, 82 Pa. St. 462; *Hurd v. Hall*, 12 Wis. 112.

3. For a Full Discussion of the subject see Am. and Eng. Encyc. of Law, title *Mistake*.

4. Alabama. — *Trippe v. Trippe*, 29 Ala. 637.

Connecticut. — *Segur v. Tingley*, 11 Conn. 134; *Essex v. Day*, 52 Conn. 483.

Florida. — *Ladd v. Chaires*, 5 Fla. 395.

Illinois. — *Hubbard v. Hobson*, 1 Ill. 190.

Iowa. — *Montgomery County v. American Emigrant Co.*, 47 Iowa 91.

Kentucky. — *Western German Sav. Bank v. Farmers, etc.*, Bank, 10 Bush (Ky.) 669; *Harrod v. Cowan*, Hard. (Ky.) 551.

Mississippi. — *Nabours v. Cocke*, 24 Miss. 44.

Missouri. — *Henderson v. Dickey*, 35 Mo. 120.

New Jersey. — *Nicholson v. Janeway*, 16 N. J. Eq. 285.

New York. — *Dambmann v. Schulting*, 75 N. Y. 55; *Stettheimer v. Killip*, 75 N. Y. 282; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154.

Pennsylvania. — *Mays v. Dwight*, 82 Pa. St. 462; *Miles v. Stevens*, 3 Pa. St. 21.

Tennessee. — *Trigg v. Read*, 5 Humph. (Tenn.) 529.

Must Be Mutual. — It is laid down as a general rule that equity will not correct a mistake unless it be common to all the parties to the transaction.¹ But while a written contract will not be

Texas. — *Ross v. Armstrong*, 25 Tex. Supp. 354.

Virginia. — *Weaver v. Carter*, 10 Leigh (Va.) 39.

United States. — *M'Ferran v. Taylor*, 3 Cranch (U. S.) 270; *Grymes v. Sanders*, 93 U. S. 55.

England. — *Stone v. Godfrey*, 5 DeG. M. & G. 76.

For a Full Discussion of the subject, see Am. and Eng. Encyc. of Law, title *Mistake*.

Harmless Mistake. — In *Rue v. Meirs*, 43 N. J. Eq. 377, the court said: "A mistake which is harmless and does no injury needs no correction."

1. *Arkansas.* — *State v. Paup*, 13 Ark. 129.

California. — *Barfield v. Price*, 40 Cal. 535.

Connecticut. — *Brainerd v. Arnold*, 27 Conn. 617.

Georgia. — *Newell v. Stiles*, 21 Ga. 118.

Illinois. — *Emery v. Mohler*, 69 Ill. 221; *Hamlon v. Sullivan*, 11 Ill. App. 423.

Indiana. — *Nelson v. Davis*, 40 Ind. 366; *Roszell v. Roszell*, 109 Ind. 354.

Iowa. — *Hallam v. Corlett*, 71 Iowa 446; *Fritzler v. Robinson*, 70 Iowa 500.

Kansas. — *Conaway v. Gore*, 24 Kan. 389.

Maine. — *Andrews v. Andrews*, 81 Me. 337.

Maryland. — *Stiles v. Willis*, 66 Md. 552; *Renshaw v. Lefferman*, 51 Md. 277.

Massachusetts. — *Loud v. Barnes*, 154 Mass. 344; *German-American Ins. Co. v. Davis*, 131 Mass. 316; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

Michigan. — *Ludington v. Ford*, 33 Mich. 123.

Mississippi. — *Nabours v. Cocke*, 24 Miss. 44.

New Jersey. — *Ramsey v. Smith*, 32 N. J. Eq. 28; *Morris v. Penrose*, 38 N. J. Eq. 629.

New York. — *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240; *Nevius v. Dunlap*, 33 N. Y. 676; *Botsford v. McLean*, 45 Barb. (N. Y.) 478; *Kent v. Manchester*, 29 Barb. (N. Y.) 595; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Ranney v. McMullen*, 5 Abb. N. Cas. (N. Y.

Super. Ct.) 246; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246; *Lanier v. Wyman*, 5 Robt. (N. Y.) 147.

North Carolina. — *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445.

Oregon. — *Remillard v. Prescott*, 8 Oregon 37.

Pennsylvania. — *Schettiger v. Hople*, 3 Grant's Cas. (Pa.) 54.

Rhode Island. — *Diman v. Providence, etc., R. Co.*, 5 R. I. 130.

South Carolina. — *Kennerty v. Etlan Phosphate Co.*, 21 S. Car. 226.

Texas. — *Ross v. Armstrong*, 25 Tex. Supp. 354.

United States. — *Durham v. Fire, etc., Ins. Co.*, 22 Fed. Rep. 468; *Harvey's Case*, 13 Ct. of Cl. 322.

For a Full Discussion of the subject, see Am. and Eng. Encyc. of Law, title *Mistake*.

In *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 373, the court said: "It would be the height of injustice to alter a contract on the ground of mistake, where the mistake arises from misconception by one of the parties, in consequence of his imperfect explanation of his intentions. * * * If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it further be shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract."

In *Diman v. Providence, etc., R. Co.*, 5 R. I. 130, Ames, C. J., said: "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them, but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agree-

reformed on account of the mistake of one of the parties, equity will sometimes grant relief by rescinding the contract if the parties can be placed *in statu quo* and no injustice will result therefrom.¹

Must Be Unintentional. — It is further laid down that for equity to rectify a mistake it must appear that such mistake was unintentional.²

Must Be Free from Negligence. — And it is a further prerequisite to the correcting of a mistake in equity that the transaction must be free from negligence.³

II. HOW MISTAKE SET UP — 1. Must Be Alleged. — It is a general rule that a party seeking relief from a mistake in equity must allege such mistake.⁴ But it has been held that, where the

ment, who averred and proved that he signed it as it was written by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other."

Use of the Word "Mutual." — In *Botsford v. McLean*, 45 Barb. (N. Y.) 478, the court said: "A little confusion and misconception, I think, has crept into the cases from the inexact use of the word 'mutual' as applied by way of description or classification of the kind of mistakes which courts of equity would reform. According to the real signification of the word 'mutual' in such connection, and the ordinary acceptance and understanding of the term, mutual mistake would mean a mistake reciprocal and common to both parties, when each alike labored under the same misconception in respect to the terms of the written instrument."

1. *Benson v. Markoe*, 37 Minn. 30; *Douglas v. Grant*, 12 Ill. App. 273; *Rider v. Powell*, 28 N. Y. 310; *Moffett Co. v. Rochester*, 82 Fed. Rep. 235; *Paget v. Marshall*, 28 Ch. Div. 255.

2. *Ware v. Cowles*, 24 Ala. 446; *Betts v. Gunn*, 31 Ala. 219; *Dunham v. New Britain*, 55 Conn. 378; *Dwight v. Pomeroy*, 17 Mass. 303; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Knight v. Bunn*, 7 Ired. Eq. (N. Car.) 77; *Westbrook v. Harbeson*, 2 McCord Eq. (S. Car.) 112; *Towner v. Lucas*, 13 Gratt. (Va.) 705; *Broughton v. Coffey*, 18 Gratt. (Va.) 184; *Townshend v. Stangroom*, 6 Ves. Jr. 328.

3. *Georgia*. — *Massey v. Cotton States L. Ins. Co.*, 70 Ga. 794; *Lamb v. Harris*, 8 Ga. 546.

Illinois. — *Bonney v. Stoughton*, 122 Ill. 536.

Indiana. — *Toops v. Snyder*, 70 Ind. 554.

Maryland. — *Wood v. Patterson*, 4 Md. Ch. 335; *Kearney v. Saseer*, 37 Md. 264.

Missouri. — *Cannon v. Sanford*, 20 Mo. App. 590; *Brown v. Fagan*, 71 Mo. 563.

New Jersey. — *Voorhis v. Murphy*, 26 N. J. Eq. 434.

New York. — *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566.

North Carolina. — *Capehart v. Mhoon*, 5 Jones Eq. (N. Car.) 178.

Oregon. — *Foster v. Schmeer*, 15 Oregon 363.

Pennsylvania. — *Wallace v. Hussey*, 63 Pa. St. 24; *Weller's Appeal*, 103 Pa. St. 594.

Rhode Island. — *Rhode Island Exch. Bank v. Hawkins*, 6 R. I. 198.

South Carolina. — *Kennerty v. Edwan Phosphate Co.*, 21 S. Car. 226.

Tennessee. — *Pearce v. Suggs*, 85 Tenn. 724; *Trigg v. Read*, 5 Humph. (Tenn.) 529.

Texas. — *Robertson v. Smith*, 11 Tex. 211; *Rowe v. Horton*, 65 Tex. 89; *Kuhlman v. Baker*, 50 Tex. 630; *Smith v. Fly*, 24 Tex. 353.

4. *Pierce v. Brassfield*, 9 Ala. 573; *Free v. Melkel*, 39 Ind. 318; *Crossland v. Shober*, Winst. Eq. (N. Car.) 10; *Grubb's Appeal*, 90 Pa. St. 228; *Rowe v. Horton*, 65 Tex. 89; *Burley v. Weller*, 14 W. Va. 264. See also *Davenport v. Turpin*, 43 Cal. 597. And see the cases cited *infra*, III. 2. *Pointing Out Mistake*.

In *Anderson v. Logan*, 105 N. Car.

defendant sets up an agreement as a defense to a suit, the plaintiff may show a mistake therein without pleading it.¹

Alleging Both Fraud and Mistake. — Where the allegations of a bill point to both mistake and fraud, the bill is sustainable on the ground of mistake, although no fraud be shown.²

2. By Bill or Answer. — Equity will grant relief against a mistake whether it is set up affirmatively by bill or in the answer by way of defense.³

In a Collateral Proceeding a mistake in a written instrument cannot be corrected.⁴

3. Issue to Jury. — In a suit for the correction of a mistake an issue of the question of mistake may, in the discretion of the court, be framed for a jury.⁵

266, it was held that a defendant who wished to prove that there was an actual mistake by which the word "heirs" was omitted from the deed which he proposed to offer in evidence must formally allege such mistake in his answer.

1. In *Meyer v. Lathrop*, 73 N. Y. 315, the plaintiff sued to foreclose a mortgage. It appeared in the evidence that the plaintiff received from W., then the owner of the mortgaged premises, twelve promissory notes executed by W., and gave to the latter a receipt stating that he received the notes in full for principal and interest of the bonds and mortgages, and agreeing to assign to such parties as W. might designate when called for. It was held that the agreement was a discharge of the mortgages, but that evidence could be admitted to prove that it was not the real agreement of the parties, and was executed under a mistake as to its nature and effect, and that, as the action was not based upon this agreement, it was not necessary for the plaintiff in his bill to set up the mistake and ask for relief; but upon the defendant's setting up the agreement in defense, the plaintiff could then show the mistake.

Iowa — Instrument Not Alleged in Petition. — In *McAnnulty v. Seick*, 59 Iowa 586, it was held that where, in an action to recover possession of certain goods, the plaintiff's petition did not allege that his title to the property was evidenced by a bill of sale, the defendant might show that such bill of sale was intended as a mortgage without pleading such fact.

2. *Williams v. U. S.*, 138 U. S. 514.

Mistake Need Not Be Set Up Independently. — In *Smith v. Babcock*, 2 Woodb.

& M. (U. S.) 246, it was held that a bill charging falsehood and fraud in a sale might contain enough to set aside the sale for mistake without setting up the mistake independently. The court, however, considered it to be the better course to set up the mistake independently. See also *Mason v. Crosby*, 1 Woodb. & M. (U. S.) 342. But see *Leighton v. Grant*, 20 Minn. 345, wherein it was held that a mere mistake could not be proved under an answer alleging only actual fraud.

3. *Chamberlain v. Thompson*, 10 Conn. 243; *Rogers v. Atkinson*, 1 Ga. 12; *Trout v. Goodman*, 7 Ga. 383; *Wyche v. Greene*, 11 Ga. 159; *Leitensdorfer v. Delphy*, 15 Mo. 160; *Hook v. Craighead*, 32 Mo. 405; *Barlow v. Elliott*, 56 Mo. App. 374; *Smith v. Allen*, 1 N. J. Eq. 43. But see *Webster v. Webster*, 33 N. H. 18.

Cross-bill Not Necessary. — In a suit to foreclose a mortgage it appeared that certain ores which, by the agreement of the parties, should have been excepted from the mortgage, were embraced therein. The defendants set up the mistake by answer, and also filed a cross-bill to reform the mortgage. It was held that the cross-bill was not necessary, though not improper, and that the defendants would be protected by a decree upon the original bill declaring that the complainant was not entitled to have the ores sold. *Ames v. New Jersey Franklinite Co.*, 12 N. J. Eq. 66. See also *Trippe v. Trippe*, 29 Ala. 637; *Scholefield v. Lockwood*, 32 Beav. 436. But see *Webster v. Webster*, 33 N. H. 18.

4. *Mayo v. Feaster*, 2 McCord Eq. (S. Car.) 137; *Cady v. Potter*, 55 Barb. (N. Y.) 463.

5. *Stockbridge Iron Co. v. Hudson*

II. PLEADING — 1. **In General.** — An equity court will not grant relief against a mistake unless the pleading contains allegations sufficient to prove the party within the rule of equitable relief under this head of equity jurisdiction.¹

Materiality of Mistake. — Thus, it should be alleged that the mis-

Iron Co., 102 Mass. 45; *Beaumont v. Bramley*, 1 T. & R. 41.

Under the Pennsylvania Practice it was early held that the question as to the existence of a mistake is one for a jury, but that the court must decide whether the facts found are sufficient to establish such a mutual mistake as to justify a correction thereof. *Schettiger v. Hopple*, 3 Grant's Cas. (Pa.) 54.

1. *White v. Denman*, 1 Ohio St. 110; *Stricker v. Tinkham*, 35 Ga. 176. See also *Born v. Schrenkeisen*, 110 N. Y. 55. And see cases cited in following sections.

In *Stover v. Poole*, 67 Me. 217, it was held that to obtain relief on the ground of mistake it must appear in the bill what it is that is relied upon; and that the proof must follow the allegation, so that the court may know exactly what relief is sought.

In *Jenkins v. German Lutheran Cong.*, 58 Ga. 125, the court said: "A plea the object of which is to set aside the solemn contract of a party under his hand and seal should specify distinctly the grounds thereof."

Need Not Allege Demand for Correction. — In an action to correct a mistake in a mortgage, the complaint need not allege a demand for a correction before the commencement of the action. *Walls v. State*, 140 Ind. 16. See also *Robbins v. Battle House Co.*, 74 Ala. 499.

Inconsistent Allegations. — Where the allegations of the bill setting up a mistake in a deed are not consistent with each other, equity will not grant relief. *Rowe v. Horton*, 65 Tex. 89.

Deed Not Filed with Complaint. — Where, in a suit to rectify a mistake in a deed, the deed was not filed with the complaint, it was held that the merits of the case having been fairly determined, the judgment would not be set aside. *Baker v. Pyatt*, 108 Ind. 61.

Sufficient Allegations. — In *Gassert v. Black*, 11 Mont. 185, a cross-complaint for the reformation of a mortgage which alleged that the parties agreed that the mortgage should not be foreclosable on default in the interest; that they intended that the written agree-

ment should express this agreement; and that the mortgage, by a mutual mistake, contained a provision making it subject to foreclosure on nonpayment of annual interest, was held sufficient.

Insufficient Allegations. — In a suit to correct a mistake in an administration bond, the petition alleged that by accident or mistake the bond omitted to specify the penal sum, but failed to allege any specific sum which was supposed to have been inserted, nor did it allege that the bond was executed in blank with authority to fill it up, which those interested neglected to do. It was held that the petition was defective in not expressly pointing out what the penalty was. *State v. Frank*, 51 Mo. 98.

A bill was filed by a mortgagee to correct a misdescription in a mortgage. A second mortgagee was made a party, and the bill alleged that he knew of the mistake when he took the mortgage, and it was proved that the mortgage was taken for a pre-existing debt. On appeal it was held that a judgment in favor of the holder could not be sustained on those grounds, since the fact that the mortgage was given for a pre-existing debt was not alleged in the petition. *Cox v. Esteb*, 68 Mo. 110.

In *Clark v. Hart*, 57 Ala. 390, an allegation in the bill was as follows: "It was never conceived by either of said parties that it was necessary to reduce all said contract to writing in order to make the same binding between the parties thereto, or good and valid and provable against said note." It was held that such an allegation negatived any theory of accidental omission and did not present a case for equitable relief.

In a suit to reform a warrant drawn in favor of the complainant on a city treasury, but by mistake designating the wrong fund out of which the warrant should be paid, the bill is fatally defective if it fails to allege that there were in the hands of the treasurer funds applicable to the purpose, sufficient to meet the order. *East St. Louis v. L. M. Rumsey Mfg. Co.*, 34 Ill. App. 458.

take is material and goes to the essence of the object in view, and is not merely incidental.¹

Freedom from Negligence. — And it should also be alleged that the mistake did not occur through the carelessness or negligence of the party seeking relief.²

2. Pointing Out Mistake. — A pleading which seeks the correction of a mistake should allege such mistake distinctly and particularly.³ The reason for this rule is manifest. The equitable

1. *Wood v. Evans*, 43 Mo. App. 230.

2. *Hyland v. Hyland*, 19 Oregon 51; *Meier v. Kelly*, 20 Oregon 86.

3. *Barton v. Sackett*, 3 How. Pr. (N. Y. Supreme Ct.) 358; *Stricker v. Tinkham*, 35 Ga. 176; *Farley v. Bryant*, 32 Me. 474; *State v. Frank*, 51 Mo. 98. And see *Luzadder v. State*, 131 Ind. 598; *Martin v. State*, 132 Ind. 600.

In *Durham v. Fire, etc., Ins. Co.*, 22 Fed. Rep. 468, *Deady, J.*, said: "A party seeking to have an instrument reformed must show, as well by his pleading as in proof, in what the mistake consists, and that it is mutual. In other words, it must appear that the contract, as reduced to writing, does not contain what both parties intended it should. And to this end it must be shown in what they did agree."

Allegation Too Indefinite. — In a suit to set aside an agreement for mistake the only allegation as to mistake was that for want of counsel and well-considered legal advice, W. (one of the complainants) was led into error in signing the agreement. It was held that the allegation of mistake was not sufficiently definite to invoke the jurisdiction of the court. *Salinas v. Stillman*, 66 Fed. Rep. 677.

Sufficient Allegations of Mistake. — In an action to correct a mistake in a mortgage, the complaint alleged that the property was part of the southwest quarter of section thirty-one, town five north, range one east, beginning seventy-two poles west of the northeast corner of "said quarter section," and that by mistake the mortgage described the land as being seventy-two poles west of the northeast corner of "said section." It was held that this was a sufficient description of the land and of the mistake sought to be corrected. *Walls v. State*, 140 Ind. 16.

In an action to correct a mistake in a contract for the sale of land, a complaint averring that the agreement was to sell an undivided two-fifths of the land described in the written memo-

randum; that the parties intended to insert therein a description of the undivided two-fifths, but that by mistake in drawing said memorandum the description of said lot of land was therein set forth incorrectly — definitely setting forth the mistake and how it occurred — was held to be a sufficient averment that the mistake was a mutual mistake of the parties to the agreement. *Newton v. Hull*, 90 Cal. 487.

A complaint alleged that, upon the dissolution of a partnership between the parties with relation to a certain business, it was agreed that the plaintiffs should assume all the debts of the firm relating to such business, and, to carry out such arrangement, they executed to the defendant a bond conditioned, by its terms, that they should pay all the debts of the firm and save him harmless therefrom; that at that time the individual members of the firm held stock in a certain manufacturing company, and there was then outstanding a note executed in the firm name (and by other makers) which was not given for any debt of the firm and was not in any way connected with its said business, but was given for the benefit of such manufacturing company, the makers of the note being in reality sureties for said company; that the said note was not intended or understood by the parties to be included among the liabilities of the firm assumed by the plaintiffs or covered by the conditions of their bond; and that if the bond was so written as to bear such construction and so as apparently to require the plaintiffs to save the defendant from all liability thereon, it was so written by mistake, and said bond, so written and construed, did not express the real agreement, understanding, and intentions of the parties. It was further alleged that the plaintiffs had paid a judgment on said note, one-third of which ought, in equity, to be paid by the defendant. Judgment was demanded for a reformation of the

jurisdiction for the correction of mistakes is exercised only in order that the real intention of the parties may be carried out; and if the particulars wherein there has been a failure to express correctly the intention of the parties are not pointed out, the court will have nothing to guide it in making the correction. The fact that the expression "by mistake" is interspersed through the pleading will not be sufficient to invoke the aid of equity, where the particular circumstances constituting the mistake are not alleged.¹

How Mistake Occurred. — Where a mistake is set up, the pleading should allege the circumstances which gave rise to and occasioned such mistake,² and show who brought it about.³

How Complainant Injured. — It has been held that a party seeking relief from a mistake should allege how he is injured by such mistake.⁴

3. Showing Real Intention. — Where relief is sought in equity on the ground that, by mistake, an agreement, as it stands, does not conform to the actual agreement made by the parties, the agreement really intended should be set out,⁵ and it should be

bond and for one-third of the amount so paid by the plaintiffs. It was held, on demurrer *ore tenus*, that the complaint sufficiently alleged a mistake in the bond, and not a mere misunderstanding of the words employed therein. *Hagenah v. Geffert*, 73 Wis. 636.

In *Ward v. Waterman*, 85 Cal. 488, the complaint alleged that prior to the conveyance of certain property to S., a trustee, certain persons named in the declaration of trust were and had been the equitable owners of the property described in the complaint; that at the time of the conveyance, the plaintiff was absent from the state; that before he left it was understood and agreed between himself and the others in interest that the title should be vested in some one person, for convenience of management and sale and distribution of the proceeds, and that a declaration should be made and executed showing the nature and character of the trust and the relative interests of the respective parties; and that it was agreed between the plaintiff and W., one of the owners, that when such declaration was made, W. should have it show that the proceeds of the interest of W. were to be paid to the complainant until the debt from W. to the complainant was satisfied; that when the declaration of trust came to be executed it was executed on behalf of the complainant by his attorney in fact, who knew nothing of the arrangement be-

tween his principal and W., and by a mutual mistake on the part of the complainant, by his representative, and of W., the declaration failed to state the truth in this regard, and showed upon its face that one-eighth of the proceeds of the sale of said property, less the costs and expenses of the trust, was to be paid to said W. It was held that the complaint alleged sufficient to show a mutual mistake and to warrant a correction thereof.

1. *Magniac v. Thomson*, 2 Wall. Jr. (U. S.) 209.

2. *White v. Richmond, etc.*, R. Co., 110 N. Car. 456; *Carr v. Dickson*, 58 Ga. 144; *Gamble v. Knott*, 40 Ga. 199.

3. *Gamble v. Knott*, 40 Ga. 199.

Party Against Whom Relief Sought — Mistake of Law. — In a plea setting up a mistake of law as a defense it should be alleged that the party against whom relief is sought brought about the mistake. *Jenkins v. German Lutheran Cong.*, 58 Ga. 125.

4. *Stoddard v. Murdock*, 37 Mo. 580.

That Respondent Meditates Unfair Advantages. — A petition in chancery for the correction of a mistake in a written instrument should show not only that the respondent is able to take an unfair advantage of the mistake, but that he meditates doing so. *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16.

5. *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Thompsonville Scale Mfg.*

shown in what way the defective instrument fails to express the real intention.¹ It is not sufficient to allege generally that the intent was different; there must be an express averment, stating the particulars, that the instrument, as it exists, differs from the intention of the parties.²

4. Mutuality of Mistake. — Where a mistake is set up and relief is sought thereupon, it must be alleged that such mistake was mutual.³

Co. v. Osgood, 26 Conn. 16; *Meier v. Kelly*, 20 Oregon 86; *Hyland v. Hyland*, 19 Oregon 51. And see in general, article RESCISSION, REFORMATION, AND CANCELLATION.

In *Coles v. Bowne*, 10 Paige (N. Y.) 526, it was held that a party who files a bill to correct a mistake in a written agreement, in a case where the court has the power to make a correction therein, must not only state in his bill the agreement as it ought to have been reduced to writing, but also the substance of the written agreement itself. And the party alleging a mistake in the written agreement holds the affirmative, and must satisfy the court, beyond all reasonable doubt, that such an agreement as he claims to have been made was in fact made between the parties, and that a mistake has occurred in reducing such agreement to writing.

Language Used Different from That Intended. — Where it is sought to correct a mistake in a written instrument, the bill is defective unless it alleges that the language used is different from that intended to be used. *Burt v. Wilson*, 28 Cal. 637.

Waiver of Defect by Answering. — Where the plaintiff, a married woman, in a suit against her husband, as defendant, to have reformed a certain deed executed by him to her, alleged in her complaint that, for a valuable consideration, the defendant bargained and sold to her certain real property; that he promised and agreed with her that he would execute and deliver a deed conveying to her the said property during her natural life, and then to her heirs and assigns forever, and that the defendant executed and delivered to the plaintiff a deed of conveyance to the property, but by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that the defendant instructed and directed the person who wrote the deed to insert the said words, but he inadvertently and through mistake

omitted to write in the same; that the plaintiff relied upon the word of the defendant, and, being ignorant of business of that kind, did not read the deed, nor find out the mistake until a short time before bringing the suit; it was held that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, but that the fault only constituted a defective statement of cause of suit, and not a defective cause of suit, and that, therefore, the defendant waived the defect by filing an answer to the complaint. *Hyland v. Hyland*, 19 Oregon 51.

1. *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Meier v. Kelly*, 20 Oregon 86; *Hyland v. Hyland*, 19 Oregon 51.

In *Foster v. Schmeer*, 15 Oregon 363, it was held that in pleading a mistake in a contract the pleader should set out the terms of the contract as the parties made it; what they each undertook and agreed to do; and show why its terms happened to be left out when an attempt was made to reduce it to writing, or how terms not agreed upon came to be inserted.

Setting Forth Defective Instrument. — Where a suit is brought to correct a mistake in a written instrument, the petition should set forth both the defective instrument and the agreement really intended by the parties. *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16.

Sufficient Averment. — In a suit to correct a mistake in a deed, the complaint alleged that it was the mutual intention and understanding of the parties that the land in controversy should be described in and conveyed by the deed. This was held to be a sufficient averment of agreement to convey the land, and that it was owing to a mutual mistake that the deed failed to describe the land. *Seegelken v. Corey*, 93 Cal. 92.

2. *U. S. v. Munroe*, 5 Mason, (U. S.) 572; *Wall v. Arrington*, 13 Ga. 86.

3. *Kent v. Manchester*, 29 Barb. (N.

5. Prayer for Relief.—Where the aid of an equity court is sought for the correction of a mistake the pleading should conclude with a prayer for such relief.¹

IV. PROOF.—The proof of a mistake must follow the allegations in the pleading, so that the court may know exactly what relief is sought.² In order to invoke the aid of the court, it must

Y.) 595; *Story v. Conger*, 36 N. Y. 673; *White v. Richmond*, etc., R. Co., 110 N. Car. 456; *Durham v. Fire*, etc., Ins. Co., 22 Fed. Rep. 468.

Sufficient Allegations.—A bill for the correction of a deed alleged that the plaintiff's father, desiring to divide his property among his children, executed to the plaintiff for a valuable consideration a deed for certain land; that after the plaintiff had taken possession of the land (describing it) given to him, and after the death of the father, he discovered that his deed did not describe his land, but, by the mistake of the scrivener, had been made to describe other lands (describing them), which his father did not own; that the land first described and of which he was in possession, was the land which the father intended to give him, and the land which he and all the other children supposed he was receiving. This was held to be a sufficient allegation of a mutual mistake on the part of the contracting parties. *Baker v. Pyatt*, 108 Ind. 61.

In an action for breach of a contract it appeared that the defendant had agreed to run the plaintiff's boat from Oswego to Martinsburgh, "risk of navigation assumed" by plaintiff, but that the defendant was prevented from performing by the fact that the boat was too large to pass through the locks on the Black river canal. In his answer the defendant averred that, by the verbal agreement between the parties, in pursuance of which the written contract was intended to be drawn, it was understood that the risk as to the practicability of the boat passing through the locks was to be assumed by the plaintiff; and he asked to have the written contract reformed to correspond with the agreement, should such correction become necessary. The court decided that the words in the contract did not include this risk. It was held that with this construction the answer sufficiently alleged a mutual mistake. *Pitcher v. Hennessey*, 48 N. Y. 415.

When Rule Does Not Apply.—The rule

that it is necessary to allege and prove that the mistake was mutual applies only to cases where the suit is to reform the agreement itself. Wherever the mistake arises through the carelessness of the scrivener, or by any other inadvertence in reducing the agreement to writing, so that the instrument does not express the agreement actually made, it may be reformed by the court. *Born v. Schrenkeisen*, 110 N. Y. 55.

1. *U. S. v. Munroe*, 5 Mason (U. S.) 572; *Wall v. Arrington*, 13 Ga. 88; *Gamble v. Daugherty*, 71 Mo. 599; *Born v. Schrenkeisen*, 110 N. Y. 55.

Omission of Prayer—Waiver of Objection.—Where a defendant in his answer alleged facts entitling him to the correction of a mistake in the contract sued on, but omitted to pray for such relief, and the proof of the facts was given on the trial without objection, the omission not being called to the attention of the court in any way, it was held that the objection had been waived. *Born v. Schrenkeisen*, 110 N. Y. 55.

Where Correction Not Necessary.—In *Barlow v. Elliott*, 56 Mo. App. 374, it was held that where, in an action to enforce a contract, the defendant pleaded a mutual mistake, it was not necessary that the answer should pray for affirmative relief if no reformation of the instrument was needed for the defendant's protection.

2. *Stover v. Poole*, 67 Me. 217.

A Variance between the proof and the allegations in the bill is fatal. *Lockhart v. Cameron*, 29 Ala. 355. See also *Crabb v. Thomas*, 25 Ala. 212; *Brantley v. West*, 27 Ala. 542.

Proof Exceeding Allegations.—Although the proof may exceed the allegations of the bill, the relief must be confined to the agreement set up in the bill. *Athey v. McHenry*, 6 B. Mon. (Ky.) 50.

Affirmative Defense—Must Be Sustained by Evidence.—Where an answer under the code sets up a mistake in a written instrument, the defense is an

be strong, clear, and satisfactory,¹ especially where the mistake is denied by the other party.²

V. PARTIES. — It is the general rule that a mistake in an instrument can be corrected in equity only when the litigation is between the original parties or those in privity with them.³

All parties who would be affected by the correction of the mistake must be made parties to the suit.⁴

affirmative one, and the finding against its existence is necessitated unless it be sustained by evidence offered in its support. *Yosemite Valley, etc., Com'rs v. Barnard*, 98 Cal. 199.

1. See Am. and Eng. Encyc. of Law, title *Mistake*.

2. *Lyman v. United Ins. Co.*, 2 Johns. Ch. (N. Y.) 630; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; *Keiselbrack v. Livingston*, 4 Johns. Ch. (N. Y.) 144; *Kent v. Manchester*, 29 Barb. (N. Y.) 595; *Gill v. Clagett*, 4 Md. Ch. 470; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435; *Wall v. Arrington*, 13 Ga. 88; *Griswold v. Smith*, 10 Vt. 452; *Shattuck v. Gay*, 45 Vt. 87.

In *Irnham v. Child*, 1 Bro. C. C. 92, Lord Thurlow said that a mistake "should be proved as much to the satisfaction of the court as if it were admitted. The difficulty of this is so great that there is no instance of its prevailing against a party insisting that there was no mistake." But the whole weight of modern authority is against this doctrine, and it is now the general rule that, where the proof of a mistake is satisfactory, relief will be granted notwithstanding the mistake is denied by the other party. For a full discussion of the subject, see Am. and Eng. Encyc. of Law, title *Mistake*.

3. *Cady v. Potter*, 55 Barb. (N. Y.) 463; *East v. Peden*, 108 Ind. 92. See also *Casler v. Sitts*, 6 Hun (N. Y.) 659. And see in general, article RESCISSION, CANCELLATION, AND MISTAKE.

In *Adams v. Stevens*, 49 Me. 362, it was held that a mistake in an instrument could be corrected only when the litigation was between the original parties to the agreement. See also

Mayo v. Feaster, 2 McCord Eq. (S. Car.) 137.

Grantees of the Original Parties to a deed may maintain a suit for the correction of a mistake therein. *May v. Adams*, 58 Vt. 74; *Elwood v. Stewart*, 5 Wash. 736.

Person Holding Beneficial Interest. — In *Nevius v. Dunlap*, 33 N. Y. 676, it was held that a person for whose benefit a contract was made may maintain a suit to correct a mutual mistake therein, although the consideration proceeds from another.

Trustee Holding No Beneficial Interest. — Where the trustee named in a deed holds the naked legal title without any beneficial interest in the property, the *cestui que trust* is the proper party to apply to a court of equity for the correction of an alleged mistake in the drawing of the deed; and a bill filed for that purpose by the trustee alone is wanting in equity. *Stone v. Hale*, 17 Ala. 557.

Persons Not in Privity. — Persons who are not parties to a marriage settlement sought to be corrected, nor heirs at law of parties to it, and who are not embraced within the scope of the marriage consideration, cannot bring a suit for the correction of a mistake in such settlement, although provision is made for them therein. *Cook v. Walker*, 21 Ga. 370.

Husband Owner of Land — Wife Not a Party. — In a suit to correct mistakes in a deed of trust it was held that, the husband being the owner of the land, the wife need not be joined as a party. *Hoyt v. Oliver*, 59 Mo. 188.

4. *Dod v. Paul*, 42 N. J. Eq. 154; *Daggett v. Ayer*, 65 N. H. 82; *Busby v. Littlefield*, 31 N. H. 193.

MISTRIAL.

See articles *JURY*, vol. 12, p. 223; *NEW TRIALS*; *TRIALS*.

MITIGATION—MITIGATING CIRCUMSTANCES.

See articles *ANSWERS IN CODE PLEADING*, vol. 1, p. 827; *DAMAGES*, vol. 5, p. 700; *LIBEL AND SLANDER*, vol. 13, p. 26; *PLEAS AT LAW*; and see General Index to this work.

MITTIMUS.

See article *COMMITMENTS*, vol. 4, p. 566.

MIXED ACTION.

See articles *EJECTMENT*, vol. 7, p. 260; *REAL ACTIONS*; *REAL PROPERTY*.

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As to actions for injuries caused by, see article *COUNTIES*, vol. 5, p. 297; *MUNICIPAL CORPORATIONS*, *post*.

MONEY COUNTS.

BY CHARLES C. MOORE.

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1. *Averments Common to All the Counts*, 51.
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I. SCOPE OF THE ARTICLE.—The demands recoverable under the common counts, including the money counts, have been fully considered in the article ASSUMPSIT, vol. 2, pp. 1002-1026. This article will treat of the form and sufficiency of the allegations in the common money counts. For a like treatment of other common counts, see articles ACCOUNTS AND ACCOUNTING, vol. 1, p. 88; LANDLORD AND TENANT, vol. 12, p. 852; SALES; WORK AND LABOR.

II. USE AND UTILITY OF MONEY COUNTS—1. In General—Special Allegations Unnecessary.—The use of the common counts, in cases where recovery may be had thereunder, is beneficial to the plaintiff in discharging him from the necessity of alleging the special circumstances out of which, in judgment of law, the indebtedness or liability arises.¹

Avoiding Peril of Variance.—If the special circumstances alone are alleged, no other facts materially different can be proved.² But where the common money counts are used together with one or more special counts, and the plaintiff fails to recover on the latter because of a variance, the proof may still be sufficient to enable him to recover on his common counts.³

1. *Ball v. Fulton County*, 31 Ark. 385; *Lockwood v. Kelsea*, 41 N. H. 188; *Cory v. Somerset*, 47 N. J. L. 181; *Grannis v. Hooker*, 29 Wis. 67; *Moses v. Macferlan*, 2 Burr. 1005. See also *Morgan Park v. Gahan*, 35 Ill. App. 648; *Chicago Exhaust, etc., Pipe Co. v. Johnson*, 44 Ill. App. 224; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83; *Phippen v. Morehouse*, 50 Mich. 537; *McCoy v. Oldham*, 1 Ind. App. 372; *Spears v. Ward*, 48 Ind. 541. Compare *Frazer v. Sanders*, 3 Brev. (S. Car.) 13.

"A plaintiff has, therefore, the right to allege the special circumstances that create the liability, or allege that the defendant had and received money to the use of the plaintiff, and prove it by the special circumstances." *American Nat. Bank v. Wheelock*, 45 N. Y. Super. Ct. 222.

Illustration.—In *Folsom v. School Dist. No. 5*, 91 Ill. 404, an action against a school district for money lent, the court said: "It is insisted by counsel for appellees [defendant] that in declarations against a quasi corporation of limited powers, such as

the school directors of a district, the cause of action must be specifically set out, so that the court may see affirmatively that the liability sued upon is one authorized by the statute. No authority is produced in support of this position on the question of pleading. It would seem that if there be any case embraced in the common counts for which the defendants under any circumstances could become liable, the allegation contained in the common counts must be held to embrace everything in detail necessary to sustain the action."

2. *American Nat. Bank v. Wheelock*, 45 N. Y. Super. Ct. 222. See also *Engle v. Campbell*, 42 Mich. 565, and generally article VARIANCE.

3. *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Hopkins v. Orr*, 124 U. S. 510, where the court said: "Upon the testimony that the defendant admitted his indebtedness on the note given in evidence, that note, though varying from the description in the special count, was admissible under the common counts as evidence of money had

2. **At Common Law.** — That the common money counts were a well-recognized form of declaring at common law has been amply shown in a preceding article.¹

3. **Under the Codes.** — According to the weight of authority, the money counts may be used in those states where the code practice has been adopted, and are not inconsistent with the provision that a complaint must state the facts constituting the cause of action in ordinary and concise language.² At least, an objection for generality must be taken by motion to make more definite and certain, and not by demurrer for want of sufficient facts.³

4. **In a Plea or Answer.** — The common money counts may be used in a plea or answer of set-off⁴ or counterclaim⁵ in the same manner as in a declaration or complaint.

III. JOINDER IN SINGLE COUNT OR WITH SPECIAL COUNT — 1. Whether Permissible — Single Count. — By the common-law practice in England and in some of the United States the common counts may be consolidated into one count, sometimes termed an

and received by the defendant to the plaintiff's use." [Citing *Grant v. Vaughan*, 3 Burr 1516; *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *Goodwin v. Morse*, 9 Met. (Mass.) 278.] See also *Gormley v. Bunyan*, 138 U. S. 623; *Wilson v. King*, 83 Ill. 237.

1. See article ASSUMPSIT, vol. 2, pp. 1012, 1015, 1016.

2. *Pleasant v. Samuels*, 114 Cal. 37; *Quimby v. Lyon*, 63 Cal. 394; *Grannis v. Hooker*, 29 Wis. 65; *Ball v. Fulton County*, 31 Ark. 385; *Campbell v. Shiland*, 14 Colo. 491; *Field v. Brown*, 146 Ind. 293. See also *Doherty v. Shields*, 86 Hun (N. Y.) 303; *Fox v. Pullman Palace Car Co.*, 16 Mo. App. 122. And see article COMPLAINTS AND PETITIONS IN CODE PLEADING, vol. 4, p. 611.

Contra. — For authorities taking a contrary view see *Penn Mut. L. Ins. Co. v. Conoughy*, (Neb. 1898) 74 N. W. Rep. 422, and article COMPLAINTS AND PETITIONS IN CODE PLEADING, vol. 4, p. 612.

Amendment. — Even if the money counts be regarded as a defective mode of pleading, an amendment should be allowed if asked for. *California State Tel. Co. v. Patterson*, 1 Nev. 150.

In Connecticut the common counts, as used in common-law pleading, are forbidden by the Practice Act of 1879. They may be used, however, as a mode of instituting an action, when any of them is an appropriate general statement of the cause of action, but they

do not call for any answer from the defendant, and will not support a judgment by default. They are "rather in the nature of a summons, requiring a full complaint to be filed on return of the writ. This may be done either by filing a bill of particulars and striking out all counts not applicable thereto, or by amending the complaint by filing a substituted complaint, or such other amendment as may be necessary to show the cause of action as fully as is required in other cases; and such amendment (being analogous to a complaint filed upon return of a summons, when actions are commenced by summons only) must be made after return of the writ and before the defendant is called upon to plead, or a default can be taken." *New York Breweries Corp. v. Baker*, 68 Conn. 337, followed in *McNamara v. McDonald*, 69 Conn. 484, where the court said: "Under the Practice Act the form known as 'the common counts' can be used only as an entire complaint for the commencement of an action. It can never follow a special count."

3. *Terrell v. Butterfield*, 92 Ind. App. 655, and article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

4. See *Rollins v. Duffy*, 14 Ill. App. 69.

5. *Chapman v. Frank*, 12 Daly (N. Y.) 402. See also *Roldan v. Power*, 14 Misc. Rep. (N. Y. Super. Ct.) 484.

omnibus count.¹ In code pleading the consolidated money counts may be used where the defendant takes no proper objection.²

Joinder with Special Counts. — Although it is said that in common-law practice where the money counts are applicable their use is preferable to a special count,³ there is no legal objection to their joinder with special counts setting out the facts from which the alleged cause of action arises.⁴

2. Effect on Trial of Cause — Theory of the Case. — Where the common counts are joined with a special count, but the whole case

1. *Cape Elizabeth v. Lombard*, 70 Me. 396 [followed in *Griffin v. Murdock*, 88 Me. 254], where the court said: "It was held good by Chief Justice Saunders, and commended by Sergeant Williams in his note to *Webber v. Tivill*, 2 Saund. 122, as a practice avoiding prolixity of pleading and saving expense."

In Connecticut prior to the Practice Act of 1879 the common counts were ordinarily grouped in one count in *indebitatus assumpsit*. *New York Breweries Corp. v. Baker*, 68 Conn. 343.

Form of Omnibus Count. — In *Cape Elizabeth v. Lombard*, 70 Me. 397, the declaration, after alleging an indebtedness "on the day of the purchase of this writ," in a sum stated, for goods sold and delivered and work and labor done and materials furnished, proceeded as follows: "And also for other money before then lent by the plaintiffs to said defendant at his request; and also for other money before then paid by the plaintiffs for the use of said defendant at his request; and also for other money before that time had and received by the said defendant for the use of the plaintiffs; * * * in consideration thereof then and there promised the plaintiffs to pay him the several moneys aforesaid on demand. Yet said defendant has never paid any of said moneys, but wholly neglects and refuses so to do."

2. A complaint which seeks to recover money "loaned to the defendant and paid for his use and benefit" is sufficient in the absence of a motion to make the allegation more certain or to compel the plaintiff to elect whether he claims to recover for money loaned or for money advanced and paid out for the defendant at his request. *Dodge v. McMahan*, 61 Minn. 175.

3. *Johnson v. Jennings*, 10 Gratt. (Va.) 4.

4. "That joinder of common and special counts in assumpsit is not a misjoinder needs no authority." *Trench v. Hardin County Canning Co.*, 67 Ill. App. 269.

"The general count for money had and received, when united with special ones giving notice, ought to be encouraged, as tending to the easy and commodious attainment of justice." *Boyd v. Logan*, Cooke (Tenn.) 394.

"It is very common to insert a special count with common counts under the commonest principles of pleading." *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

That the money counts may properly be joined with special counts, see further *Howison v. Oakley*, (Ala. 1898) 23 So. Rep. 820; *Johnson v. Glover*, 121 Ill. 283; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83; *Johnson v. Jennings*, 10 Gratt. (Va.) 4; *Nutter v. Sydenstricker*, 11 W. Va. 535; *White v. Miner's Nat. Bank*, 102 U. S. 658; and *supra*, p. 48, note 3.

Election Not Required. — In *Tregent v. Maybee*, 54 Mich. 226, the plaintiff joined the common counts with a special count alleging the fraudulent obtaining of the moneys sued for and waiving the tort. It was held that the court properly refused to require the plaintiff to elect as to which of the counts he would rely upon for a recovery in the case.

Requisites of Special Count. — Where a plaintiff uses the common count for money had and received, but elects to add another count in which he states the facts upon which he bases his right of recovery, "he is required by the established rules of pleading to state the facts or matter to be put in issue in an intelligible form, although such statement may be as brief as is consistent with perspicuity." *Shields v. Sheffield*, 79 Ala. 91.

is based upon the latter and all of the testimony is directed thereto, the defendant cannot at the last moment of the trial abandon his special count and recover on the common counts upon a different theory.¹

IV. THE ALLEGATIONS — 1. Averments Common to All the Counts — Indebtedness. — The counts are usually preceded by an allegation that the defendant is indebted to the plaintiff in a sum stated.²

An Allegation of Time is unnecessary,³ and if made is immaterial.⁴

Promise to Pay, Demand, and Refusal. — The counts usually conclude by alleging that the defendant, being so indebted, promised to pay the amount upon request, and that he has not paid the same though often requested and demanded.⁵

1. *Wyatt v. Herring*, 90 Mich. 581. See generally article THEORY OF THE CASE.

Theory of Case Declared at the Outset. — The plaintiff may recover on his common counts where he abandons his special count at the inception of the trial and proceeds on his declared purpose of seeking recovery on the common counts. *Berringer v. Cobb*, 58 Mich. 557.

2. See *Chitty Pl.* 362; precedent in *Cape Elizabeth v. Lombard*, 70 Me. 397, and 2 *Swift's (Conn.) Digest* (2d ed.) 457.

Indebtedness Unpaid. — An allegation that the defendant received a large sum of money as an officer of the plaintiff corporation, and that "although he has often been requested so to do has failed and refused to account for and pay over said money" to the plaintiff, sufficiently shows an unpaid indebtedness. *Smythe v. Scott*, 124 Ind. 183.

In *Wagoner v. Wilson*, 108 Ind. 210, the court, in disposing of an objection to a paragraph of the complaint, said: "The paragraph contains the averment, following the statement that the plaintiff advanced and loaned fifteen hundred dollars to and for the use of defendants, that the defendants 'have refused to pay the plaintiff though often requested so to do.' This, though not a direct and explicit allegation that the money advanced remained unpaid, made it reasonably certain by inference that the sum advanced was due and unpaid at the time the complaint was filed." *Citing* *Higert v. Indiana Asbury University*, 53 Ind. 326; *Catterlin v. Armstrong*, 101 Ind. 258; *Hartlep v. Cole*, 94 Ind. 513.

In Maryland the code requires that

the words "for money payable by the defendant to the plaintiff" shall be prefixed to all the common counts, though their insertion in the first count makes it unnecessary to repeat them in the following counts. *Pearce v. Watkins*, 68 Md. 534; *Merryman v. Rider*, 34 Md. 98, where the court said: "These words are the gist of the indebitatus counts, and it has been held under the English Common Law Procedure Act, the provisions of which in this respect are almost identical with the code, that their omission is fatal on demurrer."

3. *Kraner v. Halsey*, 82 Cal. 209, holding that if a count for money paid does not state when the money was paid it is not for that reason subject to a code demurrer on the ground that the cause of action is barred by the statute of limitations.

4. *Baxter v. Paine*, 16 Gray (Mass.) 273.

5. See 2 *Swift's Conn. Digest* (2d ed.) 457, wherein the full form of the general indebitatus count — an omnibus count mentioned *supra*, p. 49 — is given as follows: "In a plea of the case, whereupon the plaintiff declares and says that the defendant, on the — day of —, was indebted to the plaintiff in the sum of — for — (here the subject-matter of the debt must be stated, as for lands or goods sold, services performed, money lent, paid, or had and received), at the special instance and request of the defendant, and being so indebted he, the defendant, afterwards on the day and year aforesaid, in consideration thereof, undertook and faithfully promised the plaintiff to pay to him said sum of money when he should be thereto afterwards requested; yet the plaintiff says that the defendant, his

2. Money Lent — Form of the Count. — The count for money lent alleges that the defendant was indebted to the plaintiff in a sum stated "for so much money by the plaintiff before that time lent and advanced to the defendant at his special instance and request."¹

Money Lent to a Third Person. — An allegation that a sum was lent to a third person at the defendant's request is bad at common law, even after verdict.²

said promise and undertaking not regarding, has never performed the same, though often requested and demanded, which is to the damage of the plaintiff the sum of —."

Promise to Pay. — *At Common Law* the common count was fatally defective without an averment of a promise to pay. *New York Breweries Corp. v. Baker*, 68 Conn. 343, citing *Lee v. Welch*, 2 Stra. 793. The point was expressly left undecided in *Woodstock v. Hancock*, 62 Vt. 348. It was there held, however, that under a statute providing that a town furnishing supplies to an indigent transient prisoner might recover of the town of his settlement in an action "for money laid out and expended," assumpsit would lie without an allegation of a promise to pay.

The promise to pay is a mere legal inference, and omission of the allegation is cured by verdict, *Maddox v. Brown*, 9 Port. (Ala.) 118; but not by a judgment by default. *Lee v. Welch*, 2 Stra. 793.

In an action by an administrator with the will annexed, the declaration, alleging that the defendant received money to the use of the testator in his lifetime and in consideration thereof promised to pay him the amount so received, it appeared that the money was received after the death of the testator and that the promise which the law implies was made to his executor, the predecessor of the plaintiff. The court held that the action could not be maintained upon the declaration as it stood, but that the plaintiff could amend by alleging the receipt of the money after the testator's death and a promise to his executor, and thus recover the amount. *Stanley v. Stanley*, 42 Conn. 539.

In Code Pleading, where averments of conclusions of law are peculiarly odious, a promise to pay need not be alleged. *Kraner v. Halsey*, 82 Cal. 209. *De La Gaerra v. Newhall*, 55 Cal. 21; *Campbell v. Shiland*, 14 Colo. 491.

Request or Demand. — Although an allegation of request or demand is usually inserted (see the precedent *supra*, this note), it is not essential to the sufficiency of the declaration. *Quimby v. Lyon*, 63 Cal. 394; *Spears v. Ward*, 48 Ind. 541; *Field v. Brown*, 146 Ind. 293 [*distinguishing State v. Sims*, 76 Ind. 328]; 1 Chitty Pl. 339. See also *Hawley v. Sage*, 15 Conn. 56.

Money Paid by Mistake under such circumstances that it may be recovered back under a count for money had and received may be so recovered without alleging that the plaintiff had notified the defendant of the supposed error and demanded the money. *Beadenbaugh v. Cooper*, 13 Rich. L. (S. Car.) 42. See also *supra*, p. 48, note 1.

Objection for Defective Allegation, How Taken under the Code. — In *Terrell v. Butterfield*, 92 Ind. 1, a complaint for money had and received, the court said: "It is further objected by the appellants' counsel that the complaint is bad on demurrer, because it did not contain the allegation that, 'being so indebted, they, the said defendants, in consideration thereof, undertook and then and there faithfully promised,' etc., and also 'for the reason that it alleges no breach of duty on the part of the defendants.' Appellee's complaint was not objectionable on either of the grounds suggested by counsel; but if it had been, the objections could not have been reached or made available in the palmiest days of special pleading under the common law, by a general demurrer, or in any other mode than by a special demurrer. Under the code special demurrers are unknown; and in lieu thereof, as a general rule, motions to make pleadings more certain and specific now perform the functions of special demurrers."

1. 2 Swift's Conn. Digest (2d ed.) 459.

2. *Marriot v. Lister*, 2 Wils. 141, where judgment for the plaintiff was arrested.

3. Money Paid — Form of the Count. — The count for money paid alleges an indebtedness to the plaintiff "for so much money by the plaintiff before that time paid, laid out, and expended, to and for the use of the defendant, at his special instance and request."¹

Defendant's Instance and Request. — There must be a direct allegation that the money was paid at the defendant's request.²

To the Defendant's Use. — The count should allege that the payment was for the use of the defendant.³

To Whom Paid. — Although recovery can be had on this count only for money paid to a third person,⁴ neither the fact of payment to a third person nor his name need be alleged.⁵

4. Money Had and Received — Form of the Count. — The count for money had and received alleges an indebtedness to the plaintiff "for money had and received by the defendant to and for the use of the plaintiff."⁶

Of Whom the Money Was Received need not be alleged.⁷

To Whose Use. — It should be alleged that the money was received to the use of the plaintiff,⁸ but a declaration defective in that

1. 2 Swift's Conn. Digest (2d ed.) 459. See also the precedents in *White v. Miner's Nat. Bank*, 102 U. S. 659; *Campbell v. Shiland*, 14 Colo. 491.

Recovery may be had on this count although the statute also provides for another remedy in the particular case. *Betts v. Hilliard*, 2 Root (Conn.) 131.

2. In every declaration for money paid for the use of another it must be * * * laid to have been paid *at his request*." *Taylor v. Cotten*, 6 Ired. L. (N. Car.) 69.

"**Implied**" Request. — An allegation that the money was paid at the "implied" instance, etc., of the defendant is bad on demurrer. *Wharton v. Franks*, 9 Port. (Ala.) 232, where the court said: "The objection to it is that it is an attempt to innovate on settled and well-established forms. It is true that money may be laid out for another which the law will imply to have been laid out at his instance, but we know of no case in which a declaration has ever been allowed without charging the legal implication in direct terms."

3. *Murray v. Estes*, 19 N. V. App. Div. 209.

Clerical Error. — In *Brown v. McHugh*, 35 Mich. 50, the declaration, instead of alleging that the money was paid to the defendant's use, stated that it was paid to the defendant. It was held that if the evident misprision, as the court regarded it, was worthy of

objection in any form, the defect should have been pointed out by demurrer, and could not be urged under the general issue.

In an Affidavit to Hold to Bail a high degree of certainty is required in the allegations, and nothing will be intended. In *Fricke v. Poole*, 9 B. & C. 543, 17 E. C. L. 439, it was held that statements in such an affidavit that defendant was indebted to the plaintiff for money "paid, laid out, and expended," and lent and advanced by the plaintiff "to" the defendant and at his request, were insufficient because they did not show that the money was laid out and expended *for* the defendant.

4. *Conklin v. Smith*, 3 Ind. 284, where the court emphasizes the point by italics.

5. *Vanderveer v. M'Mackin*, 6 N. J. L. 213.

6. 1 Chitty Pl. (16th Am. ed.) 362.

In *Betts v. Bache*, 14 Abb. Pr. (N. Y. Super. Ct.) 279, a complaint alleging that "the defendant received" a certain sum "belonging to, or on account of, the plaintiff, and which is now due him," was held to state facts sufficient to constitute a cause of action.

7. *Lawrence v. Clark*, 1 Root. (Conn.) 348. But see *California State Tel. Co. v. Patterson*, 1 Nev. 150.

8. *California State Tel. Co. v. Patterson*, 1 Nev. 150; *Lathrop v. Ellsworth*, (Supreme Ct.) 15 N. Y. Supp. 873;

particular is cured by verdict;¹ and it is not necessary to aver in terms that the plaintiff is the legal owner of the money.²

Variance. — Proof of a loan of money will not support an action against the borrower for money had and received.³

State v. Sims, 76 Ind. 328; Judson v. Eslava, Minor (Ala.) 2. See also Roldan v. Power, 14 Misc. Rep. (N. Y. Super. Ct.) 484.

A complaint alleging that the money was received "for the use of the plaintiff" negatives a gift. Burke v. Milwaukee, etc., R. Co., 83 Wis. 413.

Partial Recovery. — The count is good for any portion of the sum which it can be proved that the defendant received. Tuttle v. Ridgeway, 62 Ill. 515.

1. Judson v. Eslava, Minor (Ala.) 2.
2. Alexander v. Gaar, 15 Ind. 89.
3. Scarborough v. Blackman, 108 Ala. 656.

MONEY IN COURT.

See article *FUNDS AND DEPOSITS IN COURT*, vol. 9, p. 787.

MONOPOLIES.

TRUSTS AND TRADE COMBINATIONS.

By S. B. FISHER.

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I. ACTIONS FOR DAMAGES FOR CONSPIRACIES TO CONTROL TRADE

— 1. *At Common Law — Conspiracy to Refuse to Sell.* — At common law a conspiracy cannot be made the subject of a civil action, although damages result; unless something is done which without the conspiracy would give a right of action. An act which if done by one alone constitutes no ground of action cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The true test is whether or not the act accomplished after the conspiracy has

been formed is itself actionable.¹ In accordance with this rule, in an action for damages resulting from a conspiracy to refuse to sell to the plaintiff, it should be shown not only that the defendants refused to sell, but that they induced third persons to refuse to sell to the plaintiff, to his injury.²

2. **Under State Laws** — *a. PARTIES.* — Where, in an action for damages for a conspiracy to control a certain trade, thereby injuring the plaintiff in his business, one of the defendants is a partner of the plaintiff in matters affected by the conspiracy, he is not a necessary party plaintiff.³ In such case partners may and should sever.⁴

b. TEST OF SUFFICIENCY OF COMPLAINT. — In an action to recover damages for injuries to one's business by a conspiracy, the various allegations of the complaint are to be tested by the same rule as in other cases of conspiracy.⁵

c. AVERMENTS — In General. — The plaintiff in an action for damages for injuries resulting from a conspiracy to monopolize trade should set out by way of inducement the circumstances under which the injury complained of was committed, the conspiring together and common purpose of the defendants, and the means used to accomplish their common purpose,⁶ the object to be attained,⁷ the overt acts of one or more of the defendants,

1. *Delz v. Winfree*, 80 Tex. 400. See generally Am. and Eng. Encyc. of Law (2d ed.), tit. *Conspiracy*, vol. 6, p. 830.

2. *Olive v. Van Patten*, 7 Tex. Civ. App. 630; *Delz v. Winfree*, 80 Tex. 400.

Sufficient Statements of Cause of Action. — In *Olive v. Van Patten*, 7 Tex. Civ. App. 630, decided under the common-law rule stated in the text, it was alleged in the plaintiff's petition that the parties composing the "Lumber Dealers' Association of Texas" had combined for the purpose of maintaining a high price for lumber against citizens of the state, and had maliciously influenced others from dealing with plaintiffs in their business of selling lumber, to their injury. Such allegations were held to show cause of action.

In *Delz v. Winfree*, 80 Tex. 400, a petition by a butcher charging conspiracy among cattle dealers, to his injury, went further than to charge that the defendants refused to sell to him. It charged that they not only did that, but that they induced a third person to refuse to sell to him. It did not appear from the petition that their interference with the business of the plaintiff was done to serve any legitimate purpose of their own, but that it was

done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him. It was held that the petition alleged a cause of action, and that it was error to sustain a demurrer to it.

3. *Murray v. McGarigle*, 69 Wis. 483. In this case the court said: It may be true that the defendant and the plaintiff were partners in matters affected by the conspiracy, but he is charged as one of the conspirators, which makes his blame greater and less excusable, and he is not interested in the damages."

4. *Murray v. McGarigle*, 69 Wis. 483.

5. *Murray v. McGarigle*, 69 Wis. 483.

6. *Murray v. McGarigle*, 69 Wis. 483.

Allegation of Libel — Joinder of Causes. — In a complaint for conspiracy to injure the plaintiff, an allegation that one of the means used to carry out the common design of the conspiracy to injure the plaintiff's business and reputation was the publishing of a libel against him, is not to be construed as joining a cause of action for libel with that for a conspiracy, but only as stating matter of aggravation. *Murray v. McGarigle*, 69 Wis. 483.

7. *Murray v. McGarigle*, 69 Wis. 483.

in pursuance of such common purpose,¹ and the resulting injury and damage to the plaintiff.²

Averment that Act Was That of Corporation. — In stating his cause of action against a corporation for damages for injuries caused by a combination to ruin his business it is proper for the plaintiff to charge that the acts complained of were the acts of the corporation.³ It is not necessary, nor, in fact, is it proper, to aver that they were done by and through the authorized agent of the corporation.⁴

d. JUDGMENT. — In an action for damages for a combination to injure the plaintiff's business it is not essential that the complaint should state a good cause of action against all the defendants, since, as in other actions of tort, judgment may be entered

1. *Murray v. McGarigle*, 69 Wis. 483.

In a complaint charging a conspiracy to control a certain trade in a certain city, an allegation that "in further pursuance of such conspiracy, said B. refused to furnish any coal," especially such contracts with members of the Robert Chivas Post, is not so indefinite as to justify an order to specify with what particular members he made such contracts. This could be more properly supplied by the testimony. *Murray v. McGarigle*, 69 Wis. 483.

In *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153, it was alleged in the complaint that the defendants, other than the Standard Oil Company, formed a conspiracy to injure the plaintiff, and did certain acts injurious to the plaintiff, in pursuance of such conspiracy, prior to the time at which the defendant, the Standard Oil Company, was organized; that after the defendant was organized it joined and became a party to the conspiracy and ratified said previous actions; that after the organization of that defendant, the conspirators, by letters and other means, requested various customers of the plaintiff not to purchase oil from it, representing that the plaintiff's oil was of inferior quality, and that the plaintiff had no right to make such oils and vend the same on the market; that the conspirators threatened the defendant's customers with lawsuits and expenses if they continued to patronize the plaintiff and purchase its commodities, and employed one Stearn to make such statements, and that he did make the same at the city of Boston, and in other places in the state of Massachusetts, and in various parts of New England,

to certain customers of the plaintiff, and, by reason thereof, the plaintiff lost many of its said customers and much of its trade and business and suffered great loss and damage in consequence thereof; that the said conspirators, by their agents and servants, did falsely represent to the customers of the plaintiff that said conspirators, or some of them, had patents that covered the entire product of the plaintiff's manufacture, and that the plaintiff had no right to make the oil it was then manufacturing, and that all who bought oil of the plaintiff were infringing the patents of some one or all of the said conspirators, and that one or more of said conspirators would bring actions for such infringements against each and every of the customers of the plaintiff who bought oils or dealt with the plaintiff, by reason of which they prevented many of the plaintiff's customers from purchasing oil from it. It was held that it was manifest that by the use of the term "conspirators" the plaintiff intended to charge all of the defendants, including the Standard Oil Company, with the illegal acts alleged to have been done.

2. *Murray v. McGarigle*, 69 Wis. 483.

3. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153.

4. "It is a matter of proof upon the trial to establish that the person who did the act was the authorized agent of the defendant, for it can only act through its officers and agents. When a change is made in a pleading against a corporation by its corporate name, the legal inference is that some person or persons in its employ did the act imputed." *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153.

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against either of the defendants when more than one is joined, if the proofs establish a cause of action.¹ On the trial it is not necessary to prove a conspiracy between the defendants as alleged in the complaint, except for the purpose of securing a joint recovery against all.²

3. Under United States Statutes Prohibiting Monopolies. —

a. JURISDICTION. — One who is injured in his business or property by reason of a violation of interstate commerce laws prohibiting combinations or conspiracies in restraint of interstate commerce may sue therefor in any Circuit Court of the United States, in the district in which the defendant resides or is found, without regard to the amount in controversy.³

b. COMPLAINT. — In an action for damages caused by the violation of the Act of Congress of July 2, 1890, which makes it illegal to enter into a contract or conspiracy in restraint of interstate trade, and also to monopolize or attempt to monopolize or combine or conspire with others to monopolize such trade, the complaint or declaration should allege that the plaintiff is, or has been since the passage of such act, engaged in interstate trade and commerce;⁴ also that the defendants, or some of them, are

1. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153. In this case the court, in holding the complaint sufficient, said: "It is wholly immaterial to examine the complaint for the purpose of ascertaining whether a good cause of action is stated against the other defendants or not, for the reason that in actions of tort judgment may be entered against either of the defendants, when more than one is joined, if the proofs establish a cause of action against the defendants. It is not questioned but what the complaint set forth a good cause of action in tort against the four persons named as defendants, and a joint judgment may be entered against them if the facts charged be sustained upon the trial. They are charged with having conspired together to injure the plaintiff in its business, and with having done certain overt acts in carrying out their purpose which have resulted in a pecuniary loss to the plaintiff. The plaintiff contended, on the argument, that the complaint charged, in proper and sufficient terms, that the defendant, the Standard Oil Company of New York, had joined the conspiracy after it had been formed by the defendants, and since that time all the defendants have done certain overt acts in furtherance of such common design and purpose, and that it was jointly liable with

the other defendants for all the damages resulting to the plaintiff growing out of the unlawful combination as it was originally formed. It is clear, as it seems to me, that it is unnecessary to determine whether the complaint will bear that construction or not, in view of the rule that in actions of tort judgment may be entered against such of the defendants against whom a cause of action is made out. The single inquiry now before us is whether, upon the facts as stated, a judgment may be rendered against this defendant if the plaintiff fails to prove a like cause of action against all or either of the other defendants. On the trial it is not necessary to prove a conspiracy between the defendants, if one is alleged in the complaint, except for the purpose of securing a joint recovery against all."

2. *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (N. Y.) 153.

3. Act Cong., July 2, 1890, § 7. See *Dueber Watch Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 55 Fed. Rep. 851.

4. *Dueber Watch Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 55 Fed. Rep. 851. In this case the court said: "An examination of the complaint in the light of the provisions of the Act of July 2, 1890, and the decisions construing that act, leads to the conclusion

engaged in such trade,¹ and that the rights of the general public have been invaded, or interstate commerce injuriously affected, by the defendants' acts as described in the complaint.²

that the complaint, in its present form, at least, cannot be sustained. * * * There is no allegation in the complaint that the plaintiff is engaged, or has at any time since the passage of the act been engaged, in interstate trade and commerce. There is an allegation that the plaintiff is engaged in the business of manufacturing watch cases throughout all the states of the United States and in foreign countries. This allegation is probably a mistake of the pleader, but if it were true it would not be a compliance with the requisites of the law. A corporation may have an operating manufactory in every state of the Union and yet not be engaged in interstate commerce."

1. *Dueber Watch Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 55 Fed. Rep. 851.

Provisions of Act of July 2, 1890.—This act, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," makes illegal all combinations "in restraint of trade or commerce among the several states," and provides that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor and recover threefold damages." See *Bishop v. American Preservers' Co.*, 51 Fed. Rep. 272.

2. *Dueber Watch Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 55 Fed. Rep. 851; *Bishop v. American Preservers' Co.*, 51 Fed. Rep. 272.

Complaint Insufficient for Want of Proper Allegations.—In *Dueber Watch Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 55 Fed. Rep. 851, which was an action for damages resulting from a violation of the Act of July 2, 1890, the complaint alleged that prior to November 16, 1887, the plaintiff was engaged in manufacturing watch cases throughout all the states of the United States and in foreign countries, employing a large number of skilled artisans who were and are able to produce 25,000 watch cases per month; that prior to said date the plaintiff had a ready market for its goods throughout the United States and Canada, and realized a profit of, at least, \$175,000 per an-

num; that on November 16, 1887, the defendants, who were and are engaged in selling watches and watch cases, mutually agreed, and notified the watch dealers throughout the United States and Canada, including some of the plaintiff's customers, "that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever, who thereafter should buy or sell any goods manufactured by this plaintiff;" that upon being informed of said agreement a large number of dealers who had previously purchased the plaintiff's goods withdrew their patronage and ceased to deal in the plaintiff's goods; that the defendants refused to sell their goods to the plaintiff's customers, giving as a reason that the said customers dealt in the plaintiff's goods and the defendants declined to have any business relations with them unless they would agree not to deal in the plaintiff's goods; that prior to November 16, 1887, the defendants agreed among themselves that they would maintain an arbitrary fixed price for their goods, and pursuant thereto they have fixed and maintained an arbitrary price which the public must pay for their goods; that said agreement of November 16, 1887, was for the sole purpose of compelling the plaintiff to join with the defendants in their previous agreement to fix and maintain arbitrary prices for watch cases; that all of said acts of the defendants were for the purpose of establishing a monopoly in watch cases, their object being to crush competition and drive the plaintiff from the business, unless it joined the conspiracy; that the defendants by their agreements intended to injure and impoverish the plaintiff and deprive it of all profits and break up its business; that the defendants have used the extended influence acquired by reason of the combination formed between them to prevent persons who naturally would purchase the plaintiff's watch cases from dealing with the plaintiff and have threatened said persons that if they bought the plaintiff's goods they would sell them no goods and give them no credit; that such conduct and threats effected a complete boycott and resulted in the

The Citizenship of the Parties should be averred in order that it may appear that the court has jurisdiction.¹

II. INDICTMENT FOR VIOLATING STATE ANTI-TRUST STATUTES — 1. Venue. — Where by statute a trust is declared to be a criminal conspiracy and punishable as a felony if its purpose is to injure any person or corporation within the state, the venue, in charging such offense, may be laid in the county where the overt acts in pursuance of the conspiracy occurred.²

2. Averments — Formation of Trusts — Effect. — In accordance with the usual rule that an indictment must charge the acts constituting the offense directly, clearly, and precisely, and not argumentatively or inferentially,³ an indictment charging the formation of a trust as a criminal conspiracy should aver that the effect of such trust was to injure either the public or some named person or corporation within the state,⁴ or it will be bad on demurrer.⁵ Merely to aver the formation of a trust, thereby "depriv-

ostracism of plaintiff from the trade, preventing the lawful and ordinary competition in business which the plaintiff had a right to enjoy; that after the passage of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," the plaintiff would have regained its customers and re-established its business had not the defendants since that date ratified, confirmed, renewed, and continued in force the said contracts, agreements, and combinations, and served notice thereof upon all the dealers in the plaintiff's goods; that by reason of said renewals and continued threats said dealers have been compelled to refuse to purchase the plaintiff's goods, to its damage in the sum of \$150,000. Judgment was demanded for three times this sum, pursuant to section 7 of said act. In delivering the opinion of the court, Coxe, J., said: "There is no allegation that the defendants are, or that any of them is or was, engaged in interstate trade, or that the articles made by them are used in such trade, or that the rights of the general public have been invaded or interstate commerce injuriously affected by any of the acts of the defendants as described in the complaint. There is no allegation that the defendants absorbed or intended to absorb the entire trade in watch cases, or that they controlled the market, or any considerable part thereof, or that they were even a majority of the watch manufacturers of the United States, or that the prices fixed by them were more than the

goods were worth or in any respect unfair. There is no statement that the goods made by the defendants were made by them exclusively, or that such goods were indispensable to plaintiff's customers; *non constat*, such goods could have been furnished by the plaintiff or dealers other than the defendants."

In *Bishop v. American Preservers' Co.*, 51 Fed. Rep. 272, it was held that a declaration was demurrable where it did not aver that the goods manufactured by the plaintiff were subjects of interstate commerce, or that the act complained of as a violation of the statute had anything to do with the alleged contract in restraint of trade.

1. *Bishop v. Am. Preservers' Co.*, 51 Fed. Rep. 272. In this case the court said: "The declaration is also fatally defective in not averring the citizenship of the parties to be such as gives this court jurisdiction."

2. *American F. Ins. Co. v. State* (Miss. 1897) 22 So. Rep. 99.

3. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99. See generally, article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 472.

4. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

5. "The fourth ground of demurrer presents a more troublesome question. It is that the indictment does not aver that the effect of the trust was to injure either the public, or any named person or corporation in this state, as required by section 1007. This averment, either in the words of the said section or equivalent terms, is essential

ing the public of the benefits of competition," is not a sufficient compliance with this requirement.¹ It is not necessary, however, to aver that any particular party was to be injured.²

Laying Time. — While an indictment for the violation of a statute making trusts and combinations punishable as a felony should, as in the case of other criminal conspiracies, lay the date of such conspiracy within the statutory period,³ if such an indictment avers the formation of a conspiracy within the county within the statutory time before the finding of the indictment, as manifested by overt acts committed, it will be sufficient,⁴ although the original conspiracy was formed more than the statutory period before the finding of the indictment, the commission of any overt act in pursuance thereof operating in law as a renewal of the original conspiracy.⁵

to the validity of the indictment. It was perhaps the object of the pleader to comply with this requirement in making the averment that the defendants placed the control of their said business of insurance, etc., in the power of trustees, etc.; thereby 'depriving the public of the benefits of competition in the matter of fire insurance rates.' In *Dealy v. U. S.*, 152 U. S. 546, it was held, construing section 5440 of the Revised Statutes of the United States; that an averment that the overt acts were 'done according to and in pursuance of said conspiracy' was equivalent to an averment that they were done 'to effect the object of the conspiracy;' and it is doubtless also true that, from the very nature of a fire insurance trust as to rates, the only injury possibly predicable of its action would be the destruction of competition as to rates; and there is so much force in these considerations that we have hesitated on this point. But in view of the fundamental rule that an indictment must charge the acts constituting the offense directly, clearly, and precisely, and not argumentatively, inferentially, or by the process of exclusion, we feel constrained to hold that this ground of demurrer is well taken, and the demurrer should, on that ground, have been sustained." *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

1. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

2. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

"The rule is that when it is the object of the conspiracy to injure any particular person or corporation spe-

cifically, the indictment must aver the name of the particular person or corporation to be injured. But when the object is to injure any and all persons who may come within the range of the operation of the conspiracy, it is only necessary to aver that the purpose or effect of the conspiracy was to injure the public. In such case the pleader cannot, and hence need not, aver that any particular party was to be injured." *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

3. *Com. v. Bartilson*, 85 Pa. St. 487.

4. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99.

5. *American F. Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 99. In this case the court, in holding such an indictment sufficient, said: "If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed more than two years before the finding of the indictment, the prosecution would, of course, be barred. Or if, treating this offense as composed of the original conspiracy plus the first overt act done in pursuance of it, and as completed when such first overt act is done, then, if such first overt act was done more than two years before the finding of this indictment, in that case also the prosecution would be barred. But the conspiracy presented by this indictment is a conspiracy formed in Lauderdale county within two years before the finding of this indictment, as manifested by overt acts committed within that time, such overt acts operating in law as a renewal, when committed, of the original conspiracy. The question is thus resolved into as-

3. **Instructions.** — On the trial of an indictment for criminal conspiracy charging a combination to prevent competition in the sale of a certain article of necessity, it is proper to charge the jury that if the defendants entered into an organization agreement for the purpose of controlling the price and managing the business of the sale of such article of necessity, so as to prevent competition in price between the members of the organization, the agreement was illegal, and that, if the jury found this to have been their intent, and that the price was raised in pursuance of the agreement, the crime of conspiracy was established.¹

III. INDICTMENT UNDER UNITED STATES STATUTE — Averment of Acts Constituting Offense. — An indictment under the Act of July 2, 1890, which merely follows the language of such statute is not sufficient, since the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished.² It should contain a statement of facts constituting the offense charged and a certain description of it.³

certaining whether the pleader has averred such conspiracy, thus renewed as a separate new offense within the two years; and this the indictment does."

1. *People v. Sheldon*, 139 N. Y. 251. In this case the court refused to charge, as requested, that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of defendants in raising the price of coal was not, of itself, such an overt act. The Court of Appeals, in holding that such request was properly refused, said: "The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Ch. Cur. Laws 142; *O'Connell v. Reg.*, 11 Cl. & F. 155. In this state this rule of the common law was changed by the Revised Statutes, and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy 'unless some act besides such agreement be done to effect the object thereof by one or more of the parties to such agreement.' 2 Rev. Stat. 692, § 10. And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof and done to effect its object, before the crime is consum-

mated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer unconnected with any conspiracy is not unlawful, but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement." *People v. Sheldon*, 139 N. Y. 251.

2. *In re Greene*, 52 Fed. Rep. 104; *U. S. v. Nelson*, 52 Fed. Rep. 646.

3. "We regard it as well settled by the authorities that an indictment following simply the language of the act would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Britton*, 107 U. S. 655; *U. S. v. Trumbull*, 46 Fed. Rep. 755. Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts which are alleged to have been

Interstate Commerce. — It is not necessary, however, to set out in detail the operations supposed to constitute interstate commerce; so far as this feature of the indictment is concerned, the language of the statute will suffice.¹ Nor need the indictment allege, in language other than that of the statute, the existence of a commerce the intended monopolizing of which is charged.²

Intent. — An indictment under this statute need not make it

actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *U. S. v. Cruikshank*, 92 U. S. 563." *In re Greene*, 52 Fed. Rep. 104.

In *U. S. v. Nelson*, 52 Fed. Rep. 646, the court said: "This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. See *U. S. v. Cruikshank*, 92 U. S. 558. The charge must contain a statement of facts constituting the offense and a certain description of it, which this indictment does

not in either of the first six counts, and they cannot be sustained."

Omission Not Aided by Averring Acts Done in Pursuance of Conspiracy. — "The allegations of what was done in pursuance of the alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail." *U. S. v. Patterson*, 55 Fed. Rep. 639.

1. *U. S. v. Patterson*, 59 Fed. Rep. 280. In this case the court said: "The claims that these counts left it for the prosecutor, and not for the court, to decide whether they state subject-matters of interstate commerce, and also that it is necessary that they should set out in detail the operations supposed to constitute interstate commerce, are not maintainable, because, so far as this feature of the indictment is concerned, it is clearly sufficient, according to numerous decisions of the Supreme Court, which need not be cited, to use the language of the statute. The suggestion of the court, in the opinion passed down February 28th, that the statute is not one of a class where it is sufficient to declare in the words of the enactment, related to the particular proposition then under consideration."

2. "As to all the propositions touching the existence of commerce in cash registers, or knowledge, or want of allegation of knowledge, on the part of the accused, it is sufficient to say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient, because neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. On this point also, in the opinion of the court, it is sufficient to use the language of the statute." *U. S. v. Patterson*, 59 Fed. Rep. 280.

appear that the purpose of the defendants was to engross, monopolize, or grasp into the hands of one of those indicted,¹ or that the defendants were interested in behalf of the one for whose benefit they combined to engross or monopolize, or what their relations were to such party.²

Monopoly Of or Combination to Monopolize Trade.—An indictment framed under this act should contain a distinct averment that by means of the acts charged the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations.³ It must

1. U. S. v. Patterson, 59 Fed. Rep. 280.

2. "Even if the statute should finally be held to be limited to combinations to engross, monopolize, or grasp in behalf of some party to the combination, yet there remains the well-known rule of law that it is unnecessary to indict all the persons involved in a conspiracy. Of course, the court would have felt less doubt in meeting this objection if it had been alleged that the corporation named was a party to the conspiracy, or if the relations of the accused to it, or some other matter of a kindred character, had been set out." U. S. v. Patterson, 59 Fed. Rep. 280.

3. U. S. v. Greenhut, 50 Fed. Rep. 469.

Indictment Bad for Want of Such Averment.—In U. S. v. Greenhut, 50 Fed. Rep. 469, the indictment, under the Act of July 2, 1890, § 2, set forth that the defendants were the officers of the Distilling and Cattle Feeding Company, a corporation chartered by the laws of the state of Illinois, and having its principal place of business in Peoria, in that state; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries within the United States; and, within certain dates specified, used, managed, controlled, and operated said distilleries, and manufactured sixty-six million gallons of distilled spirits, and sold the product within the United States, part of it in the district of Massachusetts, at prices fixed by them, the whole being seventy-five per cent of all the distilled spirits manufactured and sold within the United States during the period; that all said acts (except the purchasing and leasing of the distilleries) were done with the intent to monopolize to the company the manufacture and sale of distilled spirits in

Massachusetts, and among the several states, to increase the usual prices at which distilled spirits were sold, to prevent and counteract free competition in the sale of distilled spirits, and thereby to exact great sums of money from citizens of Massachusetts and of the several states, and from all others purchasing; that, in pursuance of such intent, the defendants, as such officers, agreed with D. T. Mills & Co. and other dealers in Massachusetts that, if such dealers would buy all their supplies of distilled spirits from the company for six months, the company would give them a rebate of two cents a gallon on their purchases; that by means of the rebate agreements and by their control of the distilleries, and of the manufacture, sale, and prices of seventy-five per cent of all the distilled spirits manufactured and sold in the United States during the period named, the company, and the defendants as its officers, had made large sales of distilled spirits to D. T. Mills & Co. and other dealers in Massachusetts at prices fixed by the defendants in excess of the usual prices at which such spirits were then sold in that state, such spirits having been manufactured in other states, and transported therefrom into Massachusetts, and had unlawfully monopolized to said company the manufacture and sale of distilled spirits, and had increased the usual prices at which distilled spirits were then sold in Massachusetts, and had prevented and counteracted the effect of free competition in the price of spirits in Massachusetts, and had exacted and procured great sums of money in said district from D. T. Mills & Co. and others. Upon the filing of a motion to quash this indictment the language of the court was as follows: "An indictment framed under this section should contain a distinct averment in the words

appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market.¹ It will not suffice simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, or intimidation.²

Allegation of Violence or Intimidation as Means. — Where, however, the purpose of engrossing or monopolizing trade has been alleged, acts of violence and intimidation may be set out in the indictment as means to accomplish such general purpose.³

Relation of Individual Defendant to Corporation. — Where an individual is indicted under the statute, an indictment alleging the acts constituting the offense to have been done by a corporation must show the relation of the defendant to such corporation and that it was other than that of a mere stockholder.⁴

of the statute, or in equivalent language, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations. This indictment contains no such averment. It does not charge that the defendants entered into any unlawful combination or conspiracy. Nor does it contain any averment that they had monopolized trade or commerce among the several states or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offenses by the statute. The indictment in this particular is clearly insufficient according to the elementary rules of criminal pleading, and charges no offense within the letter or spirit of the second section of the statute."

1. "There must be alleged in the indictment that there was a purpose to restrain trade as implied in the common-law expression 'contract in restraint of trade,' analogous to the word 'monopolize' in the second sec-

tion. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise." *U. S. v. Patterson*, 55 Fed. Rep. 641.

2. *U. S. v. Patterson*, 55 Fed. Rep. 605.

3. *U. S. v. Patterson*, 55 Fed. Rep. 605. In this case the court, after holding that certain counts of the indictment in question did aver the purpose to engross or monopolize, said: "Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter." *U. S. v. Patterson*, 55 Fed. Rep. 641.

4. *In re Greene*, 52 Fed. Rep. 104.

Indictment Bad for Failure to Show Such Relation. — "But there is another and fatal objection to all the counts of this indictment. All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling and Cattle Feeding Company, a corporation organized under the laws of Illinois. It is

IV. INJUNCTIONS AGAINST COMBINATIONS IN RESTRAINT OF TRADE—1. Suits by Individuals—In General.—A suit in equity may be maintained by an individual to enjoin a combination of defendants from unlawfully interfering with and interrupting his business, where the threatened damages are irremediable at law,¹ and where an equity proceeding will prevent a multiplicity of suits;² and such facts should appear from the bill asking a preliminary injunction.³

Jurisdiction.—United States Circuit Courts have jurisdiction of a bill in equity by an individual who will be irreparably injured by a violation of the Interstate Commerce Law to restrain such violation.⁴ Such jurisdiction arises from the subject-matter of the suit, and does not depend on the citizenship of the parties.⁵

not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. By the eighth section of the statute it is provided 'that the word "person" or "persons," wherever used in that act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.' If the acts charged constitute criminal offenses, the Distilling and Cattle Feeding Company is the 'person' who has committed the same. It would be unheard of in criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can be readily reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation." *In re Greene*, 52 Fed. Rep. 104.

1. *Blindell v. Hagan*, 54 Fed. Rep. 40; *Hagan v. Blindell*, 56 Fed. Rep. 696; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730. See Am. and Eng. Encyc. of Law, tit. *Trusts and Corporate Combinations*.

2. *Blindell v. Hagan*, 54 Fed. Rep. 40.

3. *Blindell v. Hagan*, 54 Fed. Rep. 40.

Statement of Case for Equity Jurisdic-

tion.—In *Blindell v. Hagan*, 54 Fed. Rep. 40, the amended bill to enjoin interference with the plaintiffs' business as ship owners was in substance as follows: "That the complainants are aliens, being subjects of the kingdom of Great Britain, and that the defendants are citizens of the state of Louisiana; that the complainants are owners of the steamship *Violante*, which they are using in the carrying trade between this port [New Orleans] and Liverpool; that they are prevented from shipping a crew by the unlawful and well-nigh violent combination of the defendants; that this combination is so numerous as to make it impossible for the complainants to obtain a crew without the restraining order of this [Circuit] court; that this unlawful interference of the defendants is interrupting the business of the complainants, which is that of persons engaged in the carrying trade between New Orleans and Liverpool, and is doing them an irreparable injury." In holding that an injunction *pendente lite* should issue upon this bill, the court said: "My conclusion, therefore, is that the bill of complaint in this cause states a case over which a court of equity must take jurisdiction, in that it is a case where the threatened damages are irremediable at law, as well as one where the equity suit will prevent a multiplicity of suits."

4. *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730; *Blindell v. Hagan*, 54 Fed. Rep. 40.

5. *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730. In this case the court said: "The jurisdiction of this court to hear and decide the case made by the bill cannot

2. Suits by the Government — a. TO RESTRAIN VIOLATION OF STATE LAWS. — The attorney-general of a state may bring an action in the name of the state to restrain a combination in violation of a law of such state prohibiting monopolies.¹

b. TO RESTRAIN VIOLATION OF UNITED STATES STATUTES — By Whom Brought. — An injunction suit to prevent the violation of the United States statute prohibiting unlawful restraints and monopolies (Act 1890, 26 Stat. at L. 209) must be brought by district attorneys of the United States.² That act does not authorize suits in equity or injunction suits by any other than the United States government, and the only right conferred by it upon individuals is the right to sue at law for triple damages sustained by its violation.³

be maintained on the ground of the diverse citizenship of the parties, for the complainant, and at least one of the defendants, are citizens of the same state. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the Act of Congress passed February 4, 1887 (24 Stat. at L. 379), known as the 'Interstate Commerce Act,' and an act amending it passed March 2, 1889 (25 Stat. at L. 855). These acts were passed by Congress in the exercise of the power conferred on it by the federal constitution (art. 1, § 8, par. 3) 'to regulate commerce with foreign nations, among the several states, and with the Indian tribes.' Counsel for defendant Arthur contends that the Interstate Commerce Law and its amendments are only declaratory of the common law, which gave the same rights to complainant, and that, therefore, this is not a case of federal jurisdiction. The original jurisdiction of this court extends, by act of Congress passed August 13, 1888 (25 Stat. at L. 433), to 'all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States.' The bill makes the necessary averment as to the amount in dispute. It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of

those rights is a case arising under the laws of the United States."

1. *Queen Ins. Co. v. State*, (Tex. Civ. App. 1893) 22 S. W. Rep. 1048.

"It is made the duty of the attorney-general by the constitution of this state to inquire into the charter rights of all private corporations, and to take such action in the name of the state to prevent such corporations from exercising any power or demanding or collecting any taxes, tolls, freight, or wharfage not authorized by law, and, when sufficient cause exists, to seek a judicial forfeiture of its charter." *Queen Ins. Co. v. State*, (Tex. Civ. App. 1893) 22 S. W. Rep. 1052.

2. *Pidcock v. Harrington*, 64 Fed. Rep. 821; *Blindell v. Hagan*, 54 Fed. Rep. 40; *Hagan v. Blindell*, 56 Fed. Rep. 696.

3. *Blindell v. Hagan*, 54 Fed. Rep. 40; *Pidcock v. Harrington*, 64 Fed. Rep. 821, in which case Coxe, J., said: "At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the Act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied, first, because a private person is given (section 7) the right to maintain an action at law; and second, the district attorneys of

Jurisdiction. — In such suits in the name of the United States jurisdiction depends alone upon the act giving jurisdiction to enforce its provisions, and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available.¹

V. ACTIONS TO VACATE CHARTERS—When Proper. — When a business corporation disables itself from exercising its functions and employing its franchise as was intended by the act by which it was incorporated, and becomes a party to a combination designed to create a monopoly for the purpose of raising prices, an action may be maintained to vacate and annul its charter.²

the United States, under the direction of the attorney-general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6, there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows: 'Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.' But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of

law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan*, 54 Fed. Rep. 40, *affirmed* 56 Fed. Rep. 696, 13 U. S. App. 354. The demurrer is allowed."

1. *U. S. v. Addyston Pipe, etc., Co.*, 78 Fed. Rep. 712.

2. See *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; *People v. Milk Exch.*, 145 N. Y. 267.

In *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354, the court said: "The defendant had disabled itself from exercising its functions and employing its franchises as it was intended it should be the act under which it was incorporated, and had, by the action which was taken, placed itself in complete subordination to another and different organization, to be used for an unlawful purpose, detrimental and injurious to the public. Instead of manufacturing its product and disposing of it to the public on what might be fair competitive prices, it had become a party to a combination in part, at least, designed to create a monopoly, and exact from the public prices which could not otherwise be obtained. This was a subversion of the object for which the company was created, and it authorized the attorney-general to maintain and prosecute this action to vacate and annul its charter."

Illustration. — In an action brought by the attorney-general to vacate the charter of the defendant, a domestic corporation, and to annul its corporate existence, these facts appeared: In the defendant's charter the object of its organization was stated to be the "buying and selling of milk at wholesale and retail." A large majority of the stockholders were milk dealers in

Who May Maintain. — Such actions to vacate and annul corporation charters may be maintained and prosecuted by the attorney-general of the state.¹ And where the action is so brought the influences that operated to induce the prosecution by the attorney-general are unimportant.²

Judgment. — In such an action the judgment may annul the charter and provide for the appointment of a receiver of the corporate property and the distribution thereof.³

the city of New York, and creamery or milk commission men in that vicinity. At the first meeting of its board of directors a by-law was adopted declaring that said board "shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Acting under this by-law the board fixed from time to time the price of milk to be paid by dealers. No milk was purchased by the defendant, but it did a commission business, selling milk for farmers to dealers, who would purchase it at the price fixed, guaranteeing payment and charging a commission therefor. The prices so fixed largely controlled the market in and about said city. It was held that the evidence justified a finding that the corporation was a combination inimical to trade and commerce, and so unlawful, and that a judgment granting the relief sought was proper. *People v. Milk Exch.*, 145 N. Y. 267.

1. *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354; *People v. Milk Exch.*, 145 N. Y. 267; *Queen Ins. Co. v. State*, (Tex. Civ. App. 1893) 22 S. W. Rep. 1048.

2. **Upon Petition of Rival Association.** — In *People v. Milk Exch.*, 145 N. Y. 267, it was asserted that the litigation

was instituted upon the petition of members of a rival association whose object was to enhance the price of milk. In regard to this the court said: "This may be, but the action was brought by the attorney-general, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the pleadings, and the parties have the right to have them determined upon the merits."

3. *People v. North River Sugar Refining Co.*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 311.

Stay of Proceedings Pending Appeal — When Denied. — In an action to annul the charter of a corporation wherein a judgment was obtained which annulled the charter and provided for the appointment of a receiver of the corporate property and its distribution, a stay of all proceedings pending an appeal from the judgment will be denied where the court that rendered the judgment made an order upon the application for the stay, directing the receiver to make no sale or distribution of the property of the corporation. *People v. North River Sugar Refining Co.*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 311.

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See articles *FORECLOSURE OF MORTGAGES*, vol. 9, p. 84;
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BY WILLIAM B. HALE.

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CROSS-REFERENCES.

See in general the cognate title *ORDERS*.

As to *Motions Respecting Particular Subjects or Proceedings*, see the various articles in this work upon such subjects and proceedings.

Costs of Motions, see article *COSTS*, vol. 5, p. 100, and the particular articles in this work upon the subjects of the various motions.

Judgments on Motion, see article *SUMMARY PROCEEDINGS*.

1. SCOPE OF ARTICLE. — This article aims to be exhaustive only of the general rules and principles governing procedure by way of motion. Rules peculiar to motions for particular kinds of relief are treated specifically in separate articles, under the appropriate titles as indicated by the nature of the relief sought.¹

II. DEFINITION AND NATURE. — A motion is an application to the court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court which he thinks becomes necessary to the progress of the cause, or to give relief in a summary manner in some matter which would work injustice.²

1. See for example such articles as *ARREST OF JUDGMENT*, vol. 2, p. 793; *DEFAULTS*, vol. 6, p. 1; *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 246; *DISMISSAL, DISCONTINUANCE, AND NONSUIT*, vol. 6, p. 823, etc.

Necessarily the cases cited and illustrations given in this article are drawn from specific cases, but they do not

purport to be exhaustive of the authorities upon any particular kind of motion. Such exhaustive collection of authorities must be sought in the articles dealing specifically with the motion in question.

2. Bouv. L. Dict., elaborating 3 Black. Com. 304.

Motions and Rules May Be Defined in a
Volume XIV,

Oral Application or Written Statement. — In a number of cases it is insisted that a *viva voce* application to a court or judge is essential to constitute a motion, and that the silent filing of a paper in which the matter of a motion is embodied is not enough.¹ The attention of the court must be called to it, and the court moved to grant it.² This distinction is not always observed, and frequently the written statement and not the oral application based thereon is regarded as the motion.³

Motions Distinguished from Petitions. — The principal distinction between motions and petitions lies in the fact that motions may sometimes, if not always, be made orally,⁴ while a petition is

general way as instruments or means for facilitating the progress of a cause or the transaction of the business of litigation by correcting clerical steps or amending errors not fatal; by accommodating the cause to changes of circumstances since its commencement; by meeting exigencies unforeseen or unprovided for; by removing difficulties in the development of the case which stop progress, or by advancing the cause in any way toward its final and proper disposition. Mitchell, *Motions and Rules*, p. 10.

A Motion Is an Application for an Order. — *Bicknell v. Amador County*, 30 Cal. 237; *People v. Ah Sam*, 41 Cal. 645; *Reilly v. Wilkins*, 67 Ill. App. 104; *White-Crow v. White-Wing*, 3 Kan. 276; *Foster v. Wade*, 4 Metc. (Ky.) 252; *Wallace v. Lewis*, 9 Mont. 399; *Peters v. Vawter*, 10 Mont. 201; *Shaw v. Coleman*, 54 N. Y. Super. Ct. 3; N. Y. Code Civ. Pro., § 768; Kan. Civ. Code, § 575; 1 Tidd's Pr. 478.

Under a statute providing that the judge of the court shall allow a reasonable fee to the attorney bringing a suit in partition, it has been held that the presentation of an account for allowance would not be regarded as the filing of such a motion as the statute requires to stand over one day before hearing or determination. No formal motion for the allowance is necessary. *Eddie v. Eddie*, 138 Mo. 599.

A Motion Is a "Proceeding." — *Vicksburg v. Hennessey*, 52 Miss. 180.

The application for an allowance of an appeal, although not a regular suit or action, is nevertheless a special proceeding, materially affecting the legal rights of a judgment creditor. *McCaslin v. Camp*, 26 Mich. 391.

1. Motion as an Oral Application. — "A motion is properly an application for a rule or order, made *viva voce* to a

court or judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing and filed. In practice the form of the application itself is often reduced to writing and filed. But making out and filing the application itself is not to make the motion. If nothing more were done it would not be error in the court to entirely ignore the proceeding. The attention of the court must be called to it. The court must be moved to grant the order." *People v. Ah Sam*, 41 Cal. 650. *Citing 3 Stephens' Com.* 679; *Burrill's Law Dict.*, word "Motion."

A motion is properly an application made *viva voce* to the court or judge, not a paper, though it purports to be a motion, merely filed by the clerk without notice to any one interested. *Washington Park Club v. Baldwin*, 59 Ill. App. 61.

The filing of a paper cannot be regarded as a motion in a jurisdiction where there is a bar of thousands of members and a score of courts of record. *Grosvenor v. Doyle*, 50 Ill. App. 47.

In practice, a motion is an oral argument to the court showing why a certain order should be made. *Estee's Pleadings and Forms*, vol. 3, p. 146. See generally *Spencer v. Branham*, 109 Cal. 336; *Emeric v. Alvarado*, 64 Cal. 529; *Prall v. Hunt*, 41 Ill. App. 140; *Gilbert v. Hall*, 115 Ind. 549; *Wallace v. Lewis*, 9 Mont. 399; *Peters v. Vawter*, 10 Mont. 201; *Allen v. Meyer*, 73 N. Y. 1; *Funk v. Israel*, 5 Iowa 441. See also *infra*, VIII. 2. *Oral or Written.*

2. See cases in preceding note.

3. See *infra*, VIII. 2. *Oral or Written.*

4. See cases cited *supra*, ; see also *infra*, VIII. 2. *Oral or Written.* And see generally article PETITIONS.

always in writing.¹ So also motions can usually be made only by a party to the record, while petitions may be presented by strangers.²

III. USE AND SCOPE OF MOTIONS — 1. In General. — The definitions which have been given indicate in a general way the proper use and scope of motions. Not every question which arises during the progress of a cause may be tried and disposed of by motion, but the line between what may and what may not be so determined is difficult to draw.³ In general, a motion is the proper mode of obtaining relief in a cause not ended,⁴ but it has

1. Petitions and Motions Contrasted. — A petition, in legal language, describes an application to a court in writing, in contradistinction to a motion, which may be made *viva voce*. *Per* Chief Justice Shaw in *Bergen v. Jones*, 4 Met. (Mass.) 371. This definition was adopted in *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 544.

Mr. Daniell, in his treatise on Chancery Pleading and Practice, says: "Interlocutory applications, when made *viva voce* to the court, are called motions; when they are made in writing, they are called petitions. There does not appear to be any very distinct line of demarkation between the cases in which they should be made by motion and those in which they should be made by petition, but, as a general rule, where any long or intricate statement of facts is required, the application should be made by petition, while in other cases a motion will be sufficient." 2 Dan. Ch. Pl. & Pr. 1587. See also, to same effect, *State Bank v. Plainfield First Nat. Bank*, 34 N. J. Eq. 458. Further as to the distinctions between motions and petitions, see *Shipbrooke v. Hinchingsbrook*, 13 Ves. Jr. 393; *Jones v. Roberts*, 12 Sim. 189.

2. See *infra*, V. *Parties to a Motion*. See also *Barker v. Todd*, 15 Fed. Rep. 265.

3. Questions Triable by Motion Limited. — "It is true that the matters which may be tried on motion and by affidavit are limited, but it is difficult to define the mark limiting them. In regard to a certain species of subjects, the rule is that they must appear of record, but this is admitted not to apply to others, such as venue and some other instances. Neither is this remedy excluded by the circumstance that an issue arises and calls for testimony *in pais*. We find a motion sustained to

quash an execution, upon the alleged ground that the judgment had been satisfied. *Russell v. Hugunin*, 2 Ill. 562. A motion to set aside a judgment was entertained, made by one of the defendants, upon the ground that the judgment was entered by virtue of a power of attorney, executed by one only of the two parties, and without his authority. *Sloo v. State Bank*, 2 Ill. 438. So where a judgment was obtained against a party represented by one who had no authority to enter his appearance, it was held that the court had the power to vacate the judgment, on motion, without compelling the party to resort to chancery for relief, or to a suit against the attorney. *Lyon v. Boilvin*, 7 Ill. 629. But this case is referred to, more for the views of the court than because of the pertinency of the facts. In the same connection, however, see *Truett v. Wainwright*, 9 Ill. 418; *Critchfield v. Porter*, 3 Ohio 518. And again in *Warner v. Helm*, 6 Ill. 234, it was considered that a plaintiff in execution may in some cases, on motion, have a levy and sale set aside, and be permitted to proceed on his judgment, when the title to property purchased by him under such sale has failed, and it is recovered for him; or where the defendant in execution had no title." *Pomroy v. Parmlee*, 9 Iowa 148. In this case it was held that a motion to discharge attached property might be submitted on affidavits showing that the attachments were made outside of the limits of the county in which the officer was authorized to act.

4. *Wright v. Herlong*, 16 S. Car. 620; *Morris v. White*, 96 N. Car. 91; *Murrill v. Humphrey*, 88 N. Car. 138.

No New Action Will Be Entertained to determine a matter once heard and decided by a competent court. Such matter can be heard only by a motion

been held that the questions raised must be such as are collateral or preliminary to the issue.¹

The Remedy by Motion Is to Be Encouraged where it is as well calculated to do complete justice as the other remedies, but not any further.²

The Remedial Scope of Motions Has Been Enlarged in modern practice, so that now defects may be taken advantage of, or removed and cured by them, where more formal relief was, under the old practice, necessary.³ Thus, a final judgment irregularly obtained, or void or voidable obstacles to the progress of a suit, such as a discharge, release, or stipulation, or a failure of an officer of the court to comply with a mandate of the court, may be relieved against by motion.⁴ So also relief against a judgment on account

in the cause in which it has been determined, if that cause be pending, or if there has been final judgment therein, then by an action to impeach the decree. *Albertson v. Williams*, 97 N. Car. 264.

The assignee of a purchaser at a judicial sale cannot maintain an action to have a deed executed, but must obtain relief by a motion in the cause in which the land was sold. Such cause, although not carried on the docket, is not terminated until order is made directing title to be made to the purchaser or his assignee. *Long v. Jarrett*, 94 N. Car. 443. See also *infra*, III. 4. *Motion or Action*.

1. *Collateral and Preliminary Questions*.—*Callender v. Painesville*, etc., R. Co., 11 Ohio St. 520, wherein the court said: "It is only certain questions, properly triable by the court, that can be thus summarily tried upon motion. The question to be so tried must be one collateral, or preliminary, to the issue made in the case. The question sought to be raised by the motion in this case was really one of jurisdiction. The substance of the motion is, that the members of the company being nonresidents, and the return of the sheriff showing no service of a summons within the county, the defendant was not constructively in court. The motion contains a statement of facts to show that the case fell under the general rule that the action should be brought in the county where the defendants reside, and negating the fact that the defendants are an incorporated railroad company." The motion in this case was held to fall within the rule.

2. *Price v. Shelby Cir. Ct.*, Hard. (Ky.) 261.

3. See *infra*, III. 4. *Motion or Action*; 5. *Motion or Appeal*; 7. *Motion as a Substitute for Plea or Demurrer*.

4. *Indiana*.—*Beatty v. O'Connor*, 106 Ind. 81.

New York.—*Smith v. American L. Ins., etc., Co.*, Clarke Ch. (N. Y.) 307; *Howell v. Mills*, 53 N. Y. 322; *Gould v. Mortimer*, 16 Abb. Pr. (N. Y. Supreme Ct.) 448, 26 How. Pr. (N. Y.) 167; *Vandercook v. Cohoes Sav. Inst.*, 5 Hun (N. Y.) 641; *McCotter v. Jay*, 30 N. Y. 80; *Ferris v. Crawford*, 2 Deh. (N. Y.) 595; *Seaver v. Moore*, 1 Hun (N. Y.) 305; *Weseman v. Wingrove*, 85 N. Y. 353; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Romain v. Garth*, 5 Thomp. & C. (N. Y.) 361; *McLean v. Tompkins*, 18 Abb. Pr. (N. Y. Supreme Ct.) 24.

Relief Against Judgments.—An application in the form of a complaint, filed to correct an erroneous order or judgment, is irregular and cannot be entertained. *Dunham v. Tappan*, 31 Ind. 173.

The forfeiture of a recognizance may be set aside on written motion and no formal complaint is necessary. *State v. Shideler*, 51 Ind. 64.

It is clear that the fairness of a judgment obtained against a lunatic may be attacked by an equitable action instituted by his committee. And as under our present system general jurisdiction in law and equity has been conferred on this court, there is no well-grounded objection to its setting aside judgments against lunatics on motions made by their committees. *Demelt v. Leonard*, 19 How. Pr. (N. Y. Supreme Ct.) 140. See also *infra*, III.

4. *Motion or Action*.

Enjoining Execution.—A bill in equity for an injunction against an

of matters arising after its rendition which was formerly obtained by a writ of audita querela may now generally be obtained by motion.¹

2. Relief Obtainable by Motion. — The proper office of a motion is best indicated by an enumeration of various cases in which it has been held to be an available remedy. Such cases are almost infinite in number and variety. Thus, a motion will lie to prevent an abuse of the process or orders of the court;² to vacate an improvident order;³ to stay proceedings,⁴ or to vacate an order staying proceedings;⁵ to discharge an attachment,⁶ or to

execution on the ground that the judgment and execution do not follow the declaration and verdict will not lie, but the remedy is at law by affidavit of illegality or by motion in open court to amend. *Lenoard v. Collier*, 53 Ga. 387.

Relief Against Stipulation. — A motion is the proper remedy to obtain relief against a stipulation. *Becker v. Lamont*, 13 How. Pr. (N. Y. Supreme Ct.) 23; *Wells v. American Express Co.*, 49 Wis. 224; *Keeler v. Keeler*, 24 Wis. 522.

To Remedy a Curable Defect in judicial proceedings as against a motion to dismiss or a plea in abatement, a counter-motion to amend should be granted. *State Bank v. Buckmaster*, 1 Ill. 176.

1. Motion as a Substitute for Audita Querela. — *Kentucky.* — *Chambers v. Neal*, 13 B. Mon. (Ky.) 256.

Maryland. — *Huston v. Ditto*, 20 Md. 305.

Mississippi. — *Hicks v. Murphy*, Walk. (Miss.) 66.

New York. — *Baker v. Judges*, 4 Johns. (N. Y.) 191; *Davis v. Sturtevant*, 4 Duer (N. Y.) 148; *Meyer v. Lent*, 16 Barb. (N. Y.) 539.

South Carolina. — *Longworth v. Screven*, 2 Hill L. (S. Car.) 298.

Virginia. — *Smock v. Dade*, 5 Rand. (Va.) 639.

Wisconsin. — *McDonald v. Falvey*, 18 Wis. 571.

United States. — *Humphreys v. Leggett*, 9 How. (U. S.) 297.

Motions now take the place of writs of audita querela and of writs of error coram nobis. *Ex p. James*, 59 Mo. 280. See article CORAM NOBIS AND CURAM VOBIS, vol. 5, p. 26.

Motions to set aside a judgment, to stay or enjoin proceedings to order the entry of satisfaction, etc., now take the place of writs of audita querela. *Spafford v. Janesville*, 15 Wis. 474; *Cooley v. Gregory*, 16 Wis. 303; *McDonald v. Falvey*, 18 Wis. 571.

Alternative Remedies. — Audita querela being a common-law remedy is not taken away or abolished by the establishment of a remedy by motion. See article AUDITA QUERELA, vol. 3, p. 125.

The proper mode to correct irregularities of the clerk and other officers of the court, is by motion or writ of audita querela. *Hicks v. Murphy*, Walk. (Miss.) 66.

2. Abuse of Legal Process or Orders. — The general rule is that the abuse or misuse of the process of the court may be corrected on motion. *Pomroy v. Parmlee*, 9 Iowa 140. And every court of record has inherent power, unless restrained by statute, to vacate on motion its process, order, or judgment, to prevent a perversion thereof, or to frustrate oppression. *Levy v. Loeb*, 5 Abb. N. Cas. (N. Y. Super. Ct.) 157, affirmed in 75 N. Y. 609 without opinion.

Thus where a levy of an attachment is obtained by fraud, violence, or an abuse of official power, the property may on motion properly sustained be discharged. *Pomroy v. Parmlee*, 9 Iowa 140.

3. Vacating Improvident Orders. — *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

When a motion that plaintiff give security for costs is improvidently granted, the plaintiff's remedy is to move to set it aside. If he does not do so the order remains in force, and when the case is called for trial the plaintiff should on motion be nonsuited, unless a continuance be granted. *Anderson v. Smith*, 2 Mackey (D. C.) 1.

4. See article SUPERSEDEAS AND STAY OF PROCEEDINGS.

5. Case v. Turner, 2 Wend. (N. Y.) 627, holding that an application may be made by motion to vacate an order to stay proceedings, although the motion requires an examination into the merits of the case.

6. Hines v. Kimball, 47 Ga. 587;

be compelled by motion,¹ and a motion lies to compel a plaintiff to separately state and number different causes of action set out in the same complaint.² Generally, whenever a defect appears in

Plaintiff cannot, on motion, compel the answer of interrogatories. The matter should be brought up by exceptions to the answer. *Fuller v. Knapp*, 24 Fed. Rep. 100.

Defects in the form of pleading should be corrected by motion before coming to trial. *Stickney v. Blair*, 50 Barb. (N. Y.) 341.

Thus indefiniteness in pleading should be attacked by motion and not by objection to the evidence. *Dorchester First Nat. Bank v. Smith*, 36 Neb. 199; *Kerr v. Hays*, 35 N. Y. 331.

Improper joinder of causes of action may be reached by motion to strike out. *Lyman v. Corwin*, 27 Ark. 580; *Farmers' Bank v. Bayliss*, 41 Mo. 274.

Misjoinder of causes of action, if not taken advantage of by motion, will, under section 113 of the Kentucky Code, be deemed to have been waived. *Caldwell v. Caldwell*, 2 Bush (Ky.) 446.

Pleadings May Be Stricken Out on Motion because not properly verified. *Warner v. Warner*, 11 Kan. 121; *Hershiser v. Delone*, 24 Neb. 380; *Tibballs v. Selfridge*, 12 How. Pr. (N. Y. Supreme Ct.) 64; *Hackes v. Ketzenstein*, 26 Wis. 363. And see article VERIFICATION.

If a bill in equity is illegible, the remedy is by motion to strike it from the files. *Downer v. Staines*, 4 Wis. 372.

An Improper Pleas, Answer, or Demurrer may be stricken from the files on motion.

Colorado. — *Crane v. Andrews*, 10 Colo. 265.

Florida. — *Keen v. Jordan*, 13 Fla. 327.

Illinois. — *National Syrup Co. v. Carlson*, 155 Ill. 210; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, *reversing* *Peers v. St. Louis Consol. Coal Co.*, 59 Ill. App. 595.

Indiana. — *Lomax v. Bailey*, 7 Blackf. (Ind.) 599; *Cool v. Cool*, 54 Ind. 225; *Evans v. Shoemaker*, 2 Blackf. (Ind.) 237; *Wheat v. Ragsdale*, 27 Ind. 191.

Michigan. — *Comstock v. McEvoy*, 52 Mich. 324.

Missouri. — *Phillips v. Evans*, 38 Mo. 305; *Houston v. Lane*, 39 Mo. 495. See also *Gaynor v. Hibernia Sav. Bank*, 166 Ill. 577.

Variance between the declaration and

writ may be reached by motion to set aside the declaration. *Freeman v. Young*, 3 Robt. (N. Y.) 666; *Dunn v. Bloomingdale*, 14 How. Pr. (N. Y. Supreme Ct.) 474, 6 Abb. Pr. (N. Y.) 340, note; *Haviland v. Tuttle*, 1 Sandf. (N. Y.) 668; *Tuttle v. Smith*, 6 Abb. Pr. (N. Y. Supreme Ct.) 329, 14 How. Pr. (N. Y.) 395; *Ridder v. Whitlock*, 12 How. Pr. (N. Y. Supreme Ct.) 208; *Allen v. Allen*, 14 How. Pr. (N. Y. Supreme Ct.) 248; *Bender v. Comstock*, 4 Robt. (N. Y.) 644. And see article VARIANCE.

Striking Matter from Pleadings. — Improper matter, such as redundant, immaterial, and superfluous allegations, may be stricken from a pleading on motion.

Colorado. — *Brooks v. Bates*, 7 Colo. 576.

Indiana. — *Garn v. Working*, 5 Ind. App. 14.

Missouri. — *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168; *Singleton v. Pacific R. Co.*, 41 Mo. 465.

Nebraska. — *Obernalte v. Johnson*, 36 Neb. 772.

New Jersey. — *Hill v. Craig*, 14 N. J. L. 577.

New York. — *Ripley v. Burgess*, 2 Hill (N. Y.) 360.

Motion for Judgment. — A motion lies to procure judgment on the pleadings, *Brown v. Kroh*, 31 Ohio St. 492; as where the answer presents no defense, *Manning v. Tyler*, 21 N. Y. 569; *Douglas v. Rinehart*, 5 Kan. 393; or is frivolous, *Manning v. Tyler*, 21 N. Y. 567.

Judgment *non obstante veredicto* must be moved for. See article JUDGMENTS, vol. 11, p. 920.

1. *Dougherty v. Wabash, etc.*, R. Co., 19 Mo. App. 419; *Offield v. Wabash, etc.*, R. Co., 22 Mo. App. 607; *Stevenson v. Judy*, 49 Mo. 227; *Mooney v. Kennett*, 19 Mo. 551; *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168; *Autenrieth v. St. Louis, etc.*, R. Co., 36 Mo. App. 254; *Ehrlich v. Aetna L. Ins. Co.*, 88 Mo. 249, *affirming* 15 Mo. App. 579; *Fox v. Graves*, 46 Neb. 812; *Pollock v. Whipple*, 45 Neb. 844; *Dinges v. Riggs*, 43 Neb. 710. See also article ELECTION OF REMEDIES, vol. 7, p. 360.

2. *Mansfield v. Shipp*, 128 Ind. 55; *Cincinnati, etc.*, R. Co. v. *Chester*, 57

the pleadings, for which no specific remedy is provided, but which might be the subject of an order, it may and must be met by motion.¹

3. Relief Not Obtainable by Motion — Important Questions of Fact and Law. — Ordinarily, where the relief sought by a motion could only be granted after a determination of grave and doubtful questions of fact and law, it will be denied.² And the court may require the question to be determined by an ordinary action.³

Whole Merits of Cause. — So also the court will not determine on motion a question which involves the whole merits of the cause to be tried.⁴

Ind. 297; *Hendry v. Hendry*, 32 Ind. 349; *Pierce v. Bicknell*, 11 Kan. 262; *Ridenour v. Mayo*, 29 Ohio St. 138.

1. Bliss's Code, Pleadings (3d ed.), § 4.

2. **Difficult Questions Not Determined on Motion.** — *Chapman v. Blakeman*, 31 Kan. 684; *New York El. R. Co. v. Manhattan R. Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 14; *McLean v. Tompkins*, 18 Abb. Pr. (N. Y. Supreme Ct.) 24; *Phillips v. Wicks*, 38 N. Y. Super. Ct. 74; *Rhodes v. Dutcher*, 6 Hun (N. Y.) 453; *Oswego First Nat. Bank v. Dun*, 29 Hun (N. Y.) 529; *People v. Erie R. Co.*, 54 How. Pr. (N. Y. Supreme Ct.) 59; *Hill v. Hermans*, 59 N. Y. 306; *Hackley v. Draper*, 60 N. Y. 88.

Grave questions which should be determined in an action to which all interested can be made parties will not be determined on a motion for the payment of rents to a receiver. *Mutual L. Ins. Co. v. Belknap*, 19 Abb. N. Cas. (N. Y. Supreme Ct.) 345.

The question as to whether a vessel was government property under a charter should not be disposed of by motion. *Cartwright v. The Schooner Othello*, 1 Ben. (U. S.) 43.

The United States Circuit Court will grant leave to file a supplemental bill, although, on the facts set forth therein, there may be grave doubts as to the right to the relief sought therein. The issue will not be tried on the motion. *Oregon, etc., Co. v. Northern Pac. R. Co.*, 32 Fed. Rep. 428.

Questions of fraud or irregularity in a confession of judgment cannot be tried on motion. *Hall v. Moreman*, 3 McCord L. (S. Car.) 477.

Legal Claims Cannot Be Finally Determined on Motion and Affidavit. *Lyon v. Smith*, 66 Mich. 676, citing *Parker v. Calhoun Circuit Judge*, 24 Mich. 408, and *Brown v. Thompson*, 29 Mich. 75, and holding that where a sheriff has

made a set-off of executions under the statute and returned one unsatisfied, it is not competent for the Circuit Court on motion to set aside the return and grant a second execution on the judgment.

Constitutional Questions should not be disposed of summarily on a motion to strike out part of the pleading as being irrelevant. *Brien v. Clay*, 1 E. D. Smith (N. Y.) 649.

Jurisdictional Questions. — A court of admiralty will generally refuse to decide a jurisdictional question upon a mere motion. *Sands v. A Cargo*, 3 N. J. L. J. 361; *Lands v. Cargo of 227 Tons of Coal*, 4 Fed. Rep. 478; *Cushing v. Laird*, 4 Ben. (U. S.) 70; *Cartwright v. The Schooner Othello*, 1 Ben. (U. S.) 43; *Dennistoun v. Draper*, 5 Blatchf. (U. S.) 336.

3. **Motion or Action.** — *New York El. R. Co. v. Manhattan R. Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 14. See also *infra*, III. 4. **Motion or Action.**

On a mere non-enumerated motion, the court has power to dispose of any question which arises, even to the extent of setting aside releases, overturning deeds and judgments, without the aid of a jury. But in cases of moment and difficulty, the court may, in its discretion, require that the matters in controversy be determined by action. *McLean v. Tompkins*, 18 Abb. Pr. (N. Y. Supreme Ct.) 24.

Reference on Motion. — Difficult questions of fact arising on motion may be referred to a referee to determine. *Demelt v. Leonard*, 19 How. Pr. (N. Y. Supreme Ct.) 140; *Riley v. Brown*, 44 How. Pr. (N. Y. Super. Ct.) 429; *Hubbell v. Schreyer*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 290, note.

4. **Merits Not Determined on Motion.** — *Howard v. Waldo*, 1 Root (Conn.) 539; *Parker v. Calhoun Circuit Judge*, 24 Mich. 408; *Bloss v. Tacke*, 59 Mo. 174;

To Obtain Opinion of Court. -- A motion made simply to obtain the opinion of the court, and which does not ask the court to make any order or take any action, will not be entertained.¹

To Strike Out Motion or Demurrer. -- Ordinarily motions made in a cause should be heard and determined, and a motion to strike out a motion will not be allowed.² The same rule prevails with respect to demurrers.³

McGuin v. Cace, 9 Abb. Pr. (N. Y. C. Pl.) 160; Pignolet v. Geer, 1 Robt. (N. Y.) 626; Morse v. Stockman, 65 Wis. 36.

Illustrations. -- The court will not determine on motion the right of one who appears to prosecute the suit as the agent of a corporation, and presents a written authority; for the objection to his right goes to the merit of the whole cause. Howard v. Waldo, 1 Root (Conn.) 539.

When an alleged compromise and payment are contested a question is raised upon the rights of the parties which cannot properly be tried upon motion and affidavit. Parker v. Calhoun Circuit Judge, 24 Mich. 408.

Adverse claims of title to land cannot be determined upon affidavits on an application to be made a party in an action for partition. Morse v. Stockman, 65 Wis. 36.

Where an injunction is made perpetual by a final judgment in the cause, the court cannot at a subsequent term, on a motion to dissolve filed by the defendant, reopen the matter and re-examine the merits of the controversy. The matter has become *res judicata*. Bloss v. Tacke, 59 Mo. 174.

Issues Made by the Pleadings should not be determined upon a motion to dismiss. Conger v. Dean, 3 Iowa 463.

Motions Relating Merely to the Extent of the Relief subsequently to be granted at the trial will not be entertained. Redmond v. Dana, 3 Bosw. (N. Y.) 615.

Before an action is ready for judgment it is not proper to bind the court by an order granted on special motion requiring it to enter particular provisions in the judgment. East River Sav. Inst. v. Bucki, 77 Hun (N. Y.) 329.

1. McMichael v. Kilmer, 20 Hun (N. Y.) 176; appeal dismissed without opinion in People v. Smith, 85 N. Y. 628. In this case the opinion of the court was sought as to whether or not an arrest under an execution for costs will be valid; the moving papers stating that the party "desires to have the question passed upon by the court before taking the responsibility of arrest-

ing the said McMichael and committing him to the county jail on said execution, and being liable for false imprisonment in case it shall be determined that an execution against the person is not properly issuable in said action, to collect said costs." The court declined to express an opinion as counsel.

2. **Motion to Strike Out Motion.** -- Lang v. Superior Ct., 71 Cal. 491; Wier v. Bradford, 1 Colo. 14; Johnson v. Moore, 112 Ind. 91; Blemel v. Shattuck, 133 Ind. 498; White v. Morgan, 119 Ind. 338; Newlin v. Armstrong, 8 W. N. C. (Pa.) 255; Mann v. Young, 1 Wash. Ter. 454.

A rule to strike off a rule to show cause will not be entertained, as the objections may be heard on the argument of the principal rule. Newlin v. Armstrong, 8 W. N. C. (Pa.) 255.

Effect of Order Striking Out Motion. -- Where a motion to strike out a motion is in fact entertained and sustained, the effect is equivalent to overruling the first motion. White v. Morgan, 119 Ind. 338; Blemel v. Shattuck, 133 Ind. 498; Lang v. Superior Ct., 71 Cal. 491.

3. **Striking Out Demurrer.** -- Wier v. Bradford, 1 Colo. 16, wherein the court said: "We have no doubt but that the court below erred in striking from the files of this cause the paper called a demurrer and the motion to dismiss plaintiff's suit, under the circumstances which are manifest to us. There is no rule of practice which can tolerate such a proceeding on the part of a court. There may arise cases where such a practice is justifiable and proper, but this is not such a case. The questions which the paper called a demurrer raised had never been decided by the court or acted on in this case. No matter how informally these questions may have been presented to the court, it nevertheless was the duty of the court to sustain or overrule the demurrer. So with the motion to dismiss plaintiff's action. After leave had been granted by the court to defendant to file his motion, it was then too late to object that the motion came too late, and

Other Matters. — Various other illustrations of relief not obtainable by motion will be found collated in the notes below.¹

it was the duty of the court to pass upon the merits of the motion, and not to strike it from the files. If this practice could be tolerated, it might lead to great abuses, and might become very convenient for any incompetent judge to hide his ignorance of the principles upon which he was called upon to act."

Compare Comstock v. McEvoy, 52 Mich. 324, wherein it was held that a motion to strike from the files is the proper proceeding for getting rid of a defective demurrer, and that it is not good practice to move that it be not heard.

1. Unauthorized, Unnecessary, and Unknown Motions. — In *Butler v. Barnes*, 61 Conn. 399, it was held that a motion for a new trial embracing claims made by the moving party on the trial, and a claim that the judgment was against the evidence, and asking the court to report the evidence to the Supreme Court and reserve the questions arising thereon for its consideration, was unauthorized by any statute or rule of practice, and was therefore properly overruled.

In *Odell v. Sargent*, 3 Kan. 80, it was held that a motion for leave to make a motion for a new trial was unknown to the law, and therefore a nullity and unavailing to keep the cause in court.

In *Catterlin v. Armstrong*, 101 Ind. 258, it was held that a motion by defendant to compel the plaintiff to enlarge his prayer for relief was unwarranted.

In *Frohner v. Rodgers*, 2 Mont. 179, it was held that the practice of filing a motion for judgment after a verdict had been recorded by the clerk is not required by the Civil Practice Act, and was therefore unauthorized.

Questions to Be Raised at Trial and Not by Motion. — A bill of particulars which does not accord with the facts, or which omits matters essential to plaintiff's case, should be taken advantage of on the trial, and not by motion to strike out the items objected to. *Matthews v. Hubbard*, 47 N. Y. 428.

The court will not on motion compel a defendant to surrender a release obtained from the nominal plaintiff after notice of the assignment of his claims to the beneficiary plaintiff. The ques-

tion is one for trial upon issues made by the pleadings. *Timan v. Leland*, 6 Hill (N. Y.) 237, wherein the court said: "In England, the most common mode of giving relief has been by an order of the court precluding the defendant from setting up a payment to or a release given by the nominal plaintiff; and sometimes the release has been ordered to be delivered up to be canceled. And pleas setting up such defenses have been struck out on motion. The cases are collected in Chit. on Cont. 744, 779, 780 (ed. of 1842). But with us the course has been to leave such matters to be tried in the ordinary forms of law, instead of granting relief on motion. If the defendant pleads the release or other matter of defense, the plaintiff replies, setting up the assignment and notice, or giving such other answer to the plea as the nature of the case may require. If the defense is given in evidence on the trial without having been pleaded, the plaintiff gives his answering evidence, and the whole matter is passed upon by the jury. The following references will be sufficient to illustrate what has been said: *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51; *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411; *Littlefield v. Storey*, 3 Johns. (N. Y.) 425; *Van Vechten v. Graves*, 4 Johns. (N. Y.) 403; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343; *Meghan v. Mills*, 9 Johns. (N. Y.) 64; *Dawson v. Coles*, 16 Johns. (N. Y.) 51; *Briggs v. Dorr*, 19 Johns. (N. Y.) 95; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34. I think this much the better course than to decide such questions upon affidavits, where the testimony is often conflicting. If, from the nature of the case, the matter cannot be tried in the usual manner, then relief will be granted on motion. *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121, 258, Col. & C. Cas. (N. Y.) 137, 1 Johns. (N. Y.) 532, note a. Here there is nothing in the way of trying the validity of the release at the circuit."

The Validity of a Discharge in Bankruptcy will not be tried on motion and affidavits. *Bangs v. Strong*, 1 Den. (N. Y.) 619; *Cramer v. —*, 3 Sandf. (N. Y.) 700.

Compelling Acceptance of Bail. — The court has no power to order the sheriff

4. Motion or Action — General Rule. — A new action between the parties to a pending proceeding will not be permitted to determine rights which might be settled in the original proceeding,¹ as it is against public policy to permit an unnecessary multiplicity of suits. But a motion cannot be used as a means of enforcing a distinct right of action without bringing suit.² This rule is clear

to accept bail for the jail liberties. Although the sheriff is responsible if he unjustly refuses to do so, the prisoner cannot be released on motion in the cause. *Sartos v. Merceques*, 9 How. Pr. (N. Y. C. Pl.) 188.

Motion to Eliminate Parts of Record. — A motion to eliminate parts of the record, alleged to have been interpolated without authority after the appeal, will be overruled, because the transcript, when properly certified, imports absolute verity, and because the Supreme Court will not undertake to reconcile the affidavits for and against the motion or pass upon their preponderance. *Du Souchet v. Dutcher*, 113 Ind. 249; *Justice v. Justice*, 115 Ind. 201.

1. *Murrill v. Murrill*, 84 N. Car. 182; *Wilson v. Sykes*, 84 N. Car. 215; *Long v. Jarratt*, 94 N. Car. 443; *Fox v. Kline*, 85 N. Car. 173.

Such an action should be dismissed. *Murrill v. Murrill*, 84 N. Car. 182.

The parties cannot by consent give the court jurisdiction of such new action, and when the facts appear the court should *ex mero motu* dismiss it. *Long v. Jarratt*, 94 N. Car. 443.

Remedy of Purchaser at Judicial Sale. — A motion in the cause, and not a civil action, is the proper means of compelling a sheriff to make title to a purchaser at an execution sale. *Fox v. Kline*, 85 N. Car. 173.

A purchaser at a judicial sale bears a certain relation to the action in which the sale is made, and he must enforce any rights he gets by such purchase by a motion in the pending action, and his assignees and the heirs-at-law of such assignees must do the same. If a new action is brought to obtain such relief, it should be dismissed even on appeal and although the objection was not taken in the court below. The new action will not be treated as a motion in the original cause. *Long v. Jarratt*, 94 N. Car. 443. See generally JUDICIAL SALES, vol. 12, p. 2.

Remedy of Claimant to Proceeds of Execution. — One of a number of contesting

claimants of a fund raised by execution cannot maintain an action to support his claim, but must proceed by motion in the cause in which the execution issued. *Fox v. Kline*, 85 N. Car. 173.

Plea in Abatement. — If a new action is brought unnecessarily, to determine a matter that might be determined by motion in a pending proceeding, the pendency of such proceeding must be pleaded in abatement, or it will be deemed waived. *Wilson v. Sykes*, 84 N. Car. 215, citing *Smith v. Moore*, 79 N. Car. 82, and *Walton v. Walton*, 80 N. Car. 26. But compare *Long v. Jarratt*, 94 N. Car. 443, abstracted *supra*, in this note.

2. *Euston v. Pendleton St. R. Co.*, 2 Cinc. Super. Ct. Rep. 64.

Property in the Hands of an Assignee for the benefit of creditors was seized by attachment. On motion and affidavit the district judge summarily ordered the sheriff to forthwith surrender possession to the assignee, on the theory that the property was in custody of the court. It was held that such order was not made in any action or special proceeding pending in court, and was absolutely void and should be set aside on certiorari. *State v. Rose*, 4 N. Dak. 319.

Setting Aside Execution Sale. — A sale on execution cannot be set aside as against the purchaser on mere motion. *Gridley v. Duncan*, 8 Smed. & M. (Miss.) 456, following *Flournoy v. Smith*, 3 How. (Miss.) 62, wherein the court said: "The constitutional law of this country provides that no man shall be deprived of his life, liberty, or property except by due course of law. Is it according to any of the forms of proceeding known to the common or statute law of this state, for the presiding judge in a court of common law to divest another of his title to the freehold in land, upon a naked motion? A law which should confer such power would be an infringement of the right of trial by jury, so cautiously guaranteed by our fundamental law to every

enough, but it is not always easy to determine what constitutes a distinct right of action within its meaning.¹

Where a Motion Raises Doubtful and Difficult Questions, and the facts are controverted, and the evidence conflicting, the party will ordinarily be left to his remedy by action, provided relief can be obtained in that form.²

Relief Against Judgments and Orders.—After the termination of a cause, relief from the consequences of a final judgment or decree must be sought in a separate action.³ But an interlocutory judg-

citizen." See also *Copley v. Robertson*, 6 La. Ann. 181, and compare therewith *Junek v. Hezeau*, 11 La. Ann. 731.

1. When Action Instead of Motion Is the Proper Remedy.—An agreement in relation to the subject of a pending action must be enforced by action and cannot be enforced by motion. *Phillips v. Wicks*, 38 N. Y. Super. Ct. 74.

Where property is seized under a writ which is void upon its face because issued under a statute which had been repealed, an application for an order vacating the writ is properly refused; the remedy is by replevin or an action for damages. *Castle v. Thomas*, 16 Minn. 490.

Where an action in the nature of a creditor's bill proceeded to final decree, and a note which had been executed to a commissioner appointed in the cause was by the decree turned over to one of the parties to the suit, the remedy of such party upon the note was by an independent action and not by motion in the cause. *Causey v. Snow*, 120 N. Car. 279.

Restitution of Money Paid under Execution.—To authorize the court to grant, upon rule or motion, a restitution of money paid under execution, there must be record evidence that the person against whom the order of restitution is asked has received the money, and also that he was a party to the suit or judgment. If the party who received the money on a judgment afterwards reversed is not a party to the judgment, the remedy is by sci. fa. or other suit in which matters *in pais* may be tried and ascertained by a jury. *Outten v. Palmateer*, 7 J. J. Marsh. (Ky.) 241.

Miscellaneous Cases.—In the following cases it was held that a new action instead of a motion in the cause was the proper remedy to obtain the relief sought. *Wilson v. Sykes*, 84 N. Car. 215; *Walton v. Walton*, 80 N. Car. 26; *Bartlett v. Humphreys*, Hard. (Ky.)

522; *Adams v. Elliott*, 1 How. Pr. (N. Y. Supreme Ct.) 220; *Goddard v. Stiles*, 90 N. Y. 199; *Rhodes v. Dutcher*, 6 Hun (N. Y.) 453; *Day v. Graham*, 6 Ill. 435.

2. Camp v. McCormick, 1 Den. (N. Y.) 641; *Hill v. Hermans*, 59 N. Y. 396; *Goddard v. Stiles*, 90 N. Y. 206; *Chapman v. Blakeman*, 31 Kan. 686. See also *supra*, III. 3. **Relief Not Obtainable by Motion.**

The district courts have power to grant relief by summary application, upon a motion to set aside an entry of satisfaction of a judgment where such satisfaction has been fraudulently obtained; but if the evidence is conflicting upon the material questions of fact arising upon the motion, the party seeking relief should be left to an action, rather than have the court determine the questions upon *ex parte* affidavits. *Chapman v. Blakeman*, 31 Kan. 684.

A court of law will distribute a fund by rule only where the rights of the parties are so clearly ascertained that no resort to equity is necessary. *Habersham v. Bond*, Ga. Dec., pt. ii. 46.

3. Final Judgments.—*Vaughan v. Gooch*, 92 N. Car. 524; *Williamson v. Hartman*, 92 N. Car. 236; *England v. Garner*, 84 N. Car. 212; *Bayerque v. Jackson Water Co.*, McAll. (U. S.) 85.

In *England v. Garner*, 84 N. Car. 213, Smith, C. J., reviewing the North Carolina decisions, said: "The cases cited by the counsel for the appellants show that relief from a judgment at law, rendered against the course of the court, may be had by motion in the cause. To this class of cases belong *Pearson v. Nesbit*, 1 Dev. L. (N. Car.) 315, where the judgment was vacated seven years after its rendition, because the same person was plaintiff, an executor, and a defendant; *Keaton v. Banks*, 10 Fred. L. (N. Car.) 381, where an unauthorized acceptance of service

ment or order may be relieved against on motion.¹

The Proper Method of Attacking a Final Judgment for fraud is by a new action, but when it is sought to set it aside for irregularity the proper mode of proceeding is by motion in the cause.²

of process was made for an infant defendant, and the judgment on which an execution had issued and property sold was set aside eight years thereafter. It is equally well settled that errors or wrongs committed during the progress of a suit in equity, and before its determination, must be corrected by a petition filed in the cause, as is held in *Singeltary v. Whitaker*, Phil. Eq. (N. Car.) 77, and *Rogers v. Holt*, Phil. Eq. (N. Car.) 108. If, however, the suit is ended by a final decree, carried into effect, the redress must be sought by a new action, as is decided in *Covington v. Ingram*, 64 N. Car. 123; *Thaxton v. Williamson*, 72 N. Car. 125; and *Peterson v. Vann*, 83 N. Car. 118; and is recognized and acted on in *Doyle v. Brown*, 72 N. Car. 393, and *Latta v. Vickers*, 82 N. Car. 501. The case of *Doyle v. Brown*, 72 N. Car. 393, in its essential features, is very similar to the present. There the petitioners alleged that they resided in the state of Arkansas when the bill for sale of the lands was filed and decree made; that they had no notice of the proceedings, nor have in any way assented to them since they came to their knowledge in 1867. In delivering the opinion, Reade, J., uses this language: 'It is an action in the nature of a bill in equity to vacate the said decree, but not alone for that. It sets forth the proceedings and the decree in the former action, and that the plaintiff was not in fact a party thereto, and had no knowledge of it, being at the time, as she now is, a nonresident. And it demands to have the proceedings and decree vacated and declared void.' So again in *Peterson v. Vann*, 83 N. Car. 118, where the motion was to invalidate certain proceedings instituted by the plaintiff, as administrator, for license to sell land for assets, *Dillard, J.*, adverting to the fact that a final decree had been entered, the purchase money paid, and title made to the purchaser, proceeds to say: 'When the motion in the cause was made, there was no cause pending in which to make the motion, and the only remedy of defendants was, as settled by a series of decisions in this court, by an action in the superior

court, commenced by summons, as a substitute for a bill of review, or for a bill to impeach the decree for fraud.' "

1. *Interlocutory Orders*. — *Vaughan v. Gooch*, 92 N. Car. 524.

A final judgment obtained by fraud cannot be set aside by motion; a new action must be brought to impeach it. But any interlocutory order may be impeached for fraud by a petition filed in the cause. *Williamson v. Hartman*, 92 N. Car. 236.

2. *Fraud or Irregularity in Judgment*. — *Williamson v. Hartman*, 92 N. Car. 236; *Fowler v. Poor*, 93 N. Car. 466; *Burgess v. Kirby*, 94 N. Car. 575; *Morris v. White*, 96 N. Car. 91; *Syme v. Trice*, 96 N. Car. 243.

In *Hackley v. Draper*, 60 N. Y. 88, it was held that where a receiver appointed in an action against a corporation fraudulently obtains an order for a sale of a debt due the corporation, an equitable action at the suit of the creditor will lie to vacate the order and set aside a sale made in pursuance thereof. The creditor is not limited to a motion in the action wherein the receiver was appointed. In this case *Libby v. Rosekrans*, 55 Barb. (N. Y.) 219, was criticised and its inconsistent statements pronounced dicta.

Under the code as well as before it, the remedy for a judgment entered by collusion of counsel is not by motion, but by an action to set the judgment aside for fraud, because, though the court may have power, the question should not be tried on affidavits. *Mattern v. Sage*, 15 Daly (N. Y.) 38 [*citing* *Jex v. Jacob*, 9 Daly (N. Y.) 297; *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 410].

The fact that the same matter is pending between the parties in chancery is a sufficient reason for refusing to entertain a motion to set aside the judgment for fraud, particularly where a feigned issue will be necessary. *McLaren v. McLaren*, 6 Wend. (N. Y.) 537.

When judgment should be set aside by action instead of motion, see *Knickerbacker v. Smith*, 16 Abb. Pr. (N. Y. Supreme Ct.) 241.

Instead of putting the committee of a lunatic to an action in his behalf to

Exclusiveness of Remedy by Motion. — A statute giving a remedy by motion does not exclude the common-law remedy by action, as such summary remedy is in derogation of the common law and is to be strictly construed.¹

5. Motion or Appeal. — The law provides but two modes for correcting errors in legal proceedings — one by motion, where the error is one of form, arising out of a failure to conform to the settled rule of practice of the court; the other by appeal, where the errors consist in the omission of the court itself properly to observe and apply the law affecting the rights involved in controversy and in making its adjudication upon them.² Often the remedies by motion and appeal are alternative, and a party may obtain relief in either way.³ Thus, on the granting of a motion

set aside a judgment which is overruled by an inquisition of lunacy, the court may on motion set aside such judgment. *Demilt v. Leonard*, 11 Abb. Pr. (N. Y. Supreme Ct.) 252, 19 How. Pr. (N. Y.) 140.

1. *Hamilton v. Com.*, 3 T. B. Mon. (Ky.) 213; *Tull v. Geohagen*, 3 J. J. Marsh. (Ky.) 377; *Carter v. Simpson*, 8 B. Mon. (Ky.) 156. See generally article SUMMARY PROCEEDINGS.

2. *Per Daniels, J.*, in *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

When Motion and When Appeal Is Proper Remedy. — An appellate court sits to correct the errors of the court below, and not, ordinarily, those of ministerial officers, or of the parties, never properly brought to the attention of those courts. *De Lavallette v. Wendt*, 75 N. Y. 579. See also *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.

Where an Order Is Made on Defective Proofs the remedy is an appeal, not a motion to vacate. *Flaherty v. Flaherty*, 5 N. Y. Month. L. Bul. 74. See also *Wilson v. Barney*, 5 Hun (N. Y.) 257.

After a Court Has Acquired Jurisdiction, its judgment, if erroneous, should not be set aside on motion, but the remedy is by appeal. *Schaettler v. Gardiner*, 47 N. Y. 404. But see *Kamp v. Kamp*, 59 N. Y. 223, wherein this case is distinguished.

Modification of Decree. — A decree, although appealed from, will not be modified on motion, if it could be corrected on the subsequent introduction of the master's report, or by the Supreme Court on the final hearing there. *Henry v. Travelers' Ins. Co.*, 34 Fed. Rep. 258.

Omission of Judge to Find Fact. — Appeal, and not a special motion to set aside a judgment for irregularity, is the remedy for the omission of a judge, after trial without a jury, to find a fact supported by the evidence, and deemed material. *People v. Albany, etc., R. Co.*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 122, affirmed in 57 Barb. (N. Y.) 204, and 57 N. Y. 161.

Allowance of Costs. — The question whether defendant should not have been allowed costs as a condition of granting to plaintiff an order of consolidation will not be reconsidered on a motion by defendant to resettle such order, as the court had the power to disallow such costs, and defendant is concluded by failing to appeal. *Train v. Davidson*, 11 N. Y. App. Div. 627.

3. Motion and Appeal as Alternative Remedies. — *The Error of a Referee* in allowing the name of a party to be struck out may be corrected on motion as well as by appeal. *Billings v. Baker*, 6 Abb. Pr. (N. Y. Supreme Ct.) 213.

Where a Nonsuit Has Been Granted, the losing party has two remedies: he either may take his case at once to the Supreme Court by writ of error, or he may during the trial term move to reinstate the case, and from a refusal of that motion, properly made, may take the case to the Supreme Court. *Aiken v. Peck*, 72 Ga. 434.

Unauthorized Order on Default. — Where the special term upon default makes an unauthorized order, the party prejudiced may either move at special term to set it aside, or appeal to the general term. *Wilkinson v. Tiffany*, 4 Abb. Pr. (N. Y. Supreme Ct.) 98.

A Judgment by Default, rendered be-

to dissolve an injunction, the plaintiff may appeal from the decision of the court, or he may by leave of court renew his motion for an injunction.¹ So also, where a judgment has been obtained, the losing party may appeal, or he may under certain circumstances make a motion to set aside the judgment.² A decision incorrect on account of accident, mistake, or only partial disclosure of facts,³ and errors in form or contents of the record of the proceeding,⁴ should be corrected by motion. A motion will be refused if the effect of the order moved for would be the performing of work properly within the function of an appeal.⁵

fore the time allowed the defendant to answer has expired, is erroneous merely, and can be attacked only upon motion or by appeal, and by the party aggrieved. *Matter of Newman*, 75 Cal. 213.

Order by Judge at Chambers.—In *West Side Bank v. Pugsley*, 12 Abb. Pr. N. S. (N. Y. Ct. App.) 28, it was held that under the Code of Procedure an order made by a judge out of court might be set aside upon motion, and that the remedy by appeal was not exclusive. Compare *Genesee Bank v. Spencer*, 15 How. Pr. (N. Y. Supreme Ct.) 14, where it is held that the proper way to get rid of an order improperly made by a judge at chambers is not by appeal, but by moving the court to set it aside. To same effect, see *Lindsay v. Sherman*, 5 How. Pr. (N. Y. Supreme Ct.) 308; *Boyd v. Bigelow*, 14 How. Pr. (N. Y. Supreme Ct.) 511; *Kelly v. Thayer*, 34 How. Pr. (N. Y. Supreme Ct.) 168; *Union Bank v. Sargeant*, 53 Barb. (N. Y.) 424.

1. *Schaughnessy v. Reilly*, 41 How. Pr. (N. Y. Super. Ct.) 382. See also *infra*, XV. *Renewal of Motions*.

2. *Clumpha v. Whiting*, 10 Abb. Pr. (N. Y. Supreme Ct.) 448; *New York v. Lyons*, 1 Daly (N. Y.) 296; *Harrison v. Neher*, 9 Hun (N. Y.) 127; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637. See also article OPENING, AMENDING, AND VACATING JUDGMENTS.

3. *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Derham v. Lee*, 47 N. Y. Super. Ct. 174; *Pitt v. Davison*, 37 Barb. (N. Y.) 97; *Matter of New York Cent., etc., R. Co.*, 64 N. Y. 60, dismissing appeal from 5 Hun (N. Y.) 105.

4. *Alabama*.—*McDowell v. Mitcham*, 37 Ala. 417.

California.—*Gordon v. Clark*, 22 Cal. 533.

Georgia.—*Leonard v. Collier*, 53 Ga. 387.

Louisiana.—*Smith v. McWaters*, 7 La. Ann. 146.

New York.—*Ingersoll v. Bostwick*, 22 N. Y. 425; *Buck v. Remsen*, 34 N. Y. 385; *Binsse v. Wood*, 37 N. Y. 532; *Patten v. Stitt*, 50 N. Y. 591; *Moran v. Chase*, 52 N. Y. 346; *People v. Goff*, 52 N. Y. 434; *Campbell v. Seaman*, 63 N. Y. 568; *Union Nat. Bank v. Kupper*, 63 N. Y. 617; *Cagger v. Lansing*, 64 N. Y. 417; *Cole v. Tyler*, 65 N. Y. 73; *Reeder v. Sayre*, 70 N. Y. 180; *Kraushaar v. Meyer*, 72 N. Y. 602; *Beers v. Shannon*, 73 N. Y. 292; *De Lavallette v. Wendt*, 75 N. Y. 582; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Walbridge v. James*, 4 Hun (N. Y.) 793, 66 N. Y. 639; *Young v. Atwood*, 5 Hun (N. Y.) 234; *Howland v. Howland*, 20 Hun (N. Y.) 472; *Cochran v. Gottwald*, 41 N. Y. Super. Ct. 317; *Marble v. Lewis*, 53 Barb. (N. Y.) 432; *New York v. Lyons*, 24 How. Pr. (N. Y. C. Pl.) 280; *Sluyter v. Williams*, 37 How. Pr. (N. Y. Super. Ct.) 109; *Sharp v. Wright*, 35 Barb. (N. Y.) 236.

Wisconsin.—*Hungerford v. Cushing*, 2 Wis. 416.

Where a clause is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment, and not by appeal. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *People v. Goff*, 52 N. Y. 434; *Kraushaar v. Meyer*, 72 N. Y. 602; *De Lavallette v. Wendt*, 75 N. Y. 579.

5. *Motion Not a Substitute for Appeal*.—In *Hartshorn v. Milwaukee, etc., R. Co.*, 23 Wis. 695, it was held that an application to withdraw a portion of the mortgaged premises from the operation of a decree of foreclosure and sale was an attempt to review and correct the judgment upon motion or to make such a motion perform the office of an appeal, and it was accordingly refused. *Citing Edwards v. Janesville*, 14 Wis. 26; *Spafford v. Janesville*, 15 Wis. 474;

6. Motion as a Prerequisite to Review on Appeal. — Questions of regularity and practice should ordinarily be called to the attention of the trial court by motion, or they will not be reviewed on appeal.¹ Thus it is a familiar rule that objections not raised by a motion for a new trial will not be considered on appeal.²

7. Motion as a Substitute for Plea or Demurrer — *a.* **RAISING DEFENSES.** — Matter of defense to an action should be set up by plea or answer, and cannot ordinarily be raised by motion.³

Etna L. Ins. Co. v. McCormick, 20 Wis. 265.

A motion to correct errors in the decision of a demurrer or the like cannot take the place of an appeal or writ of error. *Spafford v. Janesville*, 15 Wis. 474.

What cannot be done by appeal ought not to be done by a motion. *Bullard v. Sherwood*, 85 N. Y. 253.

1. *Derham v. Lee*, 47 N. Y. Super. Ct. 174; *Western Massachusetts Ins. Co. v. Duffy*, 2 Kan. 347.

A motion to set aside a void judgment is necessary before an appeal can be taken. *Bullitt v. Com.*, 14 Bush. (Ky.) 74; *Easterling v. Chiles*, 93 Ky. 315.

When a demurrer to a bill is filed without being accompanied by certificate of counsel as required by chancery rule, advantage of the omission should be taken by motion to strike off the demurrer; but if the parties proceed to a hearing without regarding the omission, and the questions raised by demurrer are passed upon by the court, it is too late, upon appeal, to raise the objection. *Keen v. Jordan*, 13 Fla. 327.

A motion for an instruction to direct a verdict for defendant is not necessary to raise on appeal the question whether the court should have directed such verdict. *Spiro v. Felson*, 73 Fed. Rep. 91.

2. See article NEW TRIAL, *post*. See also *Fox v. Young*, 22 Mo. App. 388; *Carver v. Thornhill*, 53 Mo. 283; *Hullett v. Nugent*, 71 Mo. 134; *Baker v. Crandall*, 78 Mo. 592; *McAllister v. Connecticut Mut. L. Ins. Co.*, 78 Ky. 531; *Calvin v. State*, 12 Ohio St. 60.

The action of a trial court as to instruction may be reviewed on appeal without motion for a new trial. *Illinois Cent. R. Co. v. O'Keefe*, 154 Ill. 508.

3. **Champerly.** — The objection that a suit is being prosecuted under an agreement between the plaintiffs and other parties which is void for cham-

perly, should be raised formally, and not by a motion to strike the bill from the files and to set aside the service of the subpoena. *Sperry v. Erie R. Co.*, 6 Blatchf. (U. S.) 425. And see article CHAMPERTY AND MAINTENANCE, vol. 4, p. 368.

A Former Adjudication of the causes of action is not proper ground of a motion to dismiss, but is a matter of defense to be pleaded. *Coffee v. Groover*, 20 Fla. 64. See article FORMER ADJUDICATION, vol. 9, p. 611.

A Discharge in Bankruptcy must be pleaded, and effect will not be given to it on motion; but a default may be set aside upon motion to allow defendant to plead it. *Lee v. Phillips*, 6 Hill (N. Y.) 246. See also *Mechanics' Banking Assoc. v. Lawrence*, 1 Sandf. (N. Y.) 659. See article INSOLVENCY, vol. 11, p. 35 *et seq.*

Misnomer of Plaintiff. — A capias cannot be set aside on a motion based on defendant's affidavit that the name by which the suit was begun was not the plaintiff's true name; the objection if raised at all must be raised by plea. *Watson v. Watson*, 47 Mich. 427. But see *Hall v. Bennett*, 2 Greene (Iowa) 466, wherein it was held that in an action commenced before a justice of the peace a misnomer may be taken advantage of by motion as well as by plea. See article NAMES, *post*.

Stipulation. — Where a stipulation to settle the case is disputed, the parties to the stipulation are entitled to have the fact as to the settlement tried on a regular issue before a jury; and if the validity of the stipulation is contested, it should be brought into the case by plea and not by motion. *Leavitt v. Judge*, 52 Mich. 595. Compare *Blackburn v. Reilly*, 47 N. J. L. 290, wherein it was held that circumstances which, according to the agreement of the parties, are to require the plaintiff to discontinue a pending suit without costs, cannot be pleaded by the defendant in bar of the action. The stipu-

Want of Jurisdiction must ordinarily be raised by demurrer or plea, and not by motion.¹ Where, however, the want of jurisdiction appears on the face of the record, it has been held that the objection may be raised by motion to dismiss, but where it does not so appear the objection must be pleaded.²

Where the Suit Is Brought in the Wrong Court, but such court has jurisdiction, the remedy is by motion only and not by plea.³

Infancy of the Plaintiff, it seems, may be raised either by motion or by plea.⁴

Want of Authority to Bring an Action must be raised by motion and not by plea or answer.⁵

b. OBJECTING TO PLEADINGS. — In Modern Practice the special

lated relief must be obtained by motion. See article STIPULATIONS.

1. *Maxwell v. Speed*, 60 Mich. 36; *Jewell v. Lamoreaux*, 30 Mich. 155. See article JURISDICTION, vol. 12, p. 114.

In *Johnson v. Adams Tobacco Co.*, 14 Hun (N. Y.) 89, it was held that a question as to the jurisdiction of the court cannot be tried on motion, but if the want of jurisdiction appears on the face of the complaint it should be taken advantage of by demurrer, and if it does not so appear it should be set up in the answer. But compare *Haywood v. Johnson*, 41 Mich. 598, wherein it was held that the jurisdiction of transitory actions may be questioned and decided on motion based upon affidavits, even where the facts are not of record nor within judicial notice; that a plea is not essential, and the party asserting the jurisdiction can waive a formal issue on the motion. It was conceded, however, that the technical mode of raising the objection in such a case was by plea. See also *Stringer v. Dean*, 61 Mich. 196.

2. *Holloway v. Freeman*, 22 Ill. 197; *Funk v. Israel*, 5 Iowa 438; *Badger v. Towle*, 48 Me. 20; *Padgett v. Ducktown, etc., Iron Co.*, 97 Tenn. 690.

Meaning of "Record." — In *Bent v. Bent*, 43 Vt. 42, the court said: "Generally, causes for dismissing the action and causes of abatement, which are apparent of record, may be taken advantage of by motion; that is, not record in the strict technical sense, but apparent from the papers on file which constitute the proceedings in the cause."

Erasing from Docket. — In *Bishop v. Vose*, 27 Conn. 1, it was held that a motion to strike a case from the docket for want of jurisdiction must be predi-

cated only on matters appearing on the face of the writ or of the officer's return of service.

When Motion Is Sole Remedy. — In *Campbell v. Chaffee*, 6 Fla. 724, it was held that defects and irregularities apparent on a writ of summons must be the subject of motion, and cannot be taken advantage of by a plea in abatement, unless the mistake be also carried into the declaration.

3. *Matthews v. Cook*, 13 Wend. (N. Y.) 33, wherein it was held that the objection that bail sued in a court other than that where the original suit was pending, does not go to the jurisdiction, and should be taken not by plea but by motion. See also *Otis v. Wakeman*, 1 Hill (N. Y.) 604, where the same rule was applied in a case where the original suit was in another state.

4. See generally article NEXT FRIEND, *post*.

Where an infant plaintiff fails to appear by a guardian *ad litem* the defendant is not limited to an answer in the nature of a plea in abatement, but may move to have the proceeding set aside for irregularity. *Wolford v. Oakley*, 1 Sheld. (N. Y.) 261; *Freyberg v. Pelerin*, 24 How. Pr. (N. Y. Supreme Ct.) 202.

5. *Excise Com. v. Purdy*, 13 Abb. Pr. (N. Y. Supreme Ct.) 434, holding that the objection that an action is commenced without authority of the officers in whose names it is brought should be taken on motion and not by plea.

Where Leave of Court Is Necessary, the objection that the action is prosecuted without leave should be raised by motion and not by answer. *Higgins v. Allen*, 6 How. Pr. (N. Y. Supreme Ct.) 30; *New York v. Brett*, 2 Hilt. (N. Y.) 560; *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225.

demurrers of the common law are largely replaced by motions.¹ As a general rule, where a pleading is substantially defective, as where the facts alleged do not constitute a cause of action or a defense, the objection must be raised by demurrer;² but where sufficient facts are stated, but the manner of stating them is defective for noncompliance with the rules of pleading, the remedy is by motion.³

Matters of Substance.—Accordingly the sufficiency of a pleading in matters of substance must be tried on demurrer and not on motion.⁴

1. *Locke v. Merchants' Nat. Bank*, 66 Ind. 353; *Wiles v. Lambert*, 66 Ind. 494; *Manning v. Tyler*, 21 N. Y. 573; *Stoutenburg v. Lybrand*, 13 Ohio St. 233; *Waggoner v. White*, 11 Heisk. (Tenn.) 741; *Trabue v. Higden*, 4 Coldw. (Tenn.) 620. But see *Augusta R. Co. v. Glover*, 92 Ga. 132, wherein it was held that an objection to irrelevant matter in a pleading should be taken by special demurrer and not by motion.

In *Stoutenburg v. Lybrand*, 13 Ohio St. 233, the court said: "The answer does contain what was no doubt intended as a statement of such facts; but objection is taken to the mode of statement; because, as to some of them, the averments are not direct as to the existence of the facts, but only as to the defendant's information and belief of their truth; and as to another, that it is not a statement of fact, but of a conclusion of law. The strictness of the common-law rules of pleading would unquestionably condemn such an answer, upon demurrer. But the code has abolished the former rules of pleading, and prescribed in their stead others, essentially different. Under the code demurrers go to the substance and not to the form of pleadings. If a pleading, liberally construed, sets out a sufficient cause of action or defense, though it may be defectively stated, a demurrer to it will not lie. Objection to defects extending only to the mode of statement must be taken by motion."

A Motion to Make More Definite and Certain takes the place, under the code, of special demurrers at common law, but its scope is somewhat broader. *Wiles v. Lambert*, 66 Ind. 494. See article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

2. See articles DEMURRERS IN CHANCERY, vol. 6, p. 393; DEMURRERS AT

COMMON LAW AND UNDER THE CODES, vol. 6, p. 296.

3. *Bozeman v. Browning*, 31 Ark. 379; *Fagg v. Martin*, 53 Ark. 449; *Dillahunt v. Little Rock, etc., R. Co.*, 59 Ark. 629; *Johnson v. Douglass*, 60 Ark. 39; *Ball v. Fulton County*, 31 Ark. 379; *Williams v. Port*, 14 Ind. 569; *Kinney v. Miller*, 25 Mo. 576; *Chicago, etc., R. Co. v. Shepherd*, 39 Neb. 523; *Chicago, etc., R. Co. v. Bachman*, 39 Neb. 528; *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

Improper Blending of Defense and Counterclaim.—Where an answer improperly blends matters set forth therein as a defense and as a counterclaim, the proper mode of taking advantage of the defect is not by demurrer to the whole answer, but by motion to strike out. *Kinney v. Miller*, 25 Mo. 576.

Argumentativeness is not a ground for demurrer. But a motion to strike out a paragraph of an answer containing an argumentative denial may be sustained. *Williams v. Port*, 14 Ind. 569.

4. *Brown v. College Corner, etc., Gravel Road Co.*, 56 Ind. 110; *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258; *Skeen v. Muir*, 34 Ind. 310; *Williams v. Port*, 9 Ind. 551; *McGregor v. McGregor*, 35 How. Pr. (N. Y. Supreme Ct.) 385; *Smith v. American Turquoise Co.*, 77 Hun (N. Y.) 192; *Finch v. Finch*, 10 Ohio St. 501; *Tyler v. Hyde*, 2 Blatchf. (U. S.) 399. See article DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, p. 296.

In *Finch v. Finch*, 10 Ohio St. 505, the petitioner moved to strike the answer from the files, on the ground that the agreements set forth therein are within the statute of frauds and therefore constitute no defense to the petition. "On this motion the case was reserved for decision here. The practice thus adopted was irregular and

Formal Defects. — A motion to dismiss or to strike out will reach only formal defects, and will not be allowed to take the place of a demurrer.¹ On the other hand, mere formal defects in pleadings

ought not to be drawn into precedent. The motion being based not on any alleged irregularity connected with the filing of the answer, nor on any matter pertaining to its form merely, but on its alleged insufficiency in matter of substance, the objection ought to have been taken by demurrer; but as the course adopted was taken by the consent of all parties, and by leave of the court, obviously for the purpose of bringing the case directly before this court for decision, we will proceed to dispose of the questions made, upon their merits."

Misjoinder of Causes of Action is usually made a ground of demurrer by statute in code states, and where this is true a party should be restricted to that remedy. *Redmond v. Dana*, 3 Bosw. (N. Y.) 615.

Under the Arkansas statute a misjoinder of actions is not reached by demurrer, but must be reached by motion to strike out the causes improperly joined. *Riley v. Norman*, 39 Ark. 158. But see *Veatch v. Greenwood*, 23 Ark. 637.

A demurrer for misjoinder of causes will be treated as a motion to strike out. *Fordyce v. Nix*, 58 Ark. 136.

1. *Florida*. — *Russ v. Mitchell*, 11 Fla. 80.

Indiana. — *Elkhart v. Simonton*, 71 Ind. 7; *Port v. Williams*, 6 Ind. 219; *Williams v. Port*, 9 Ind. 551; *Skeen v. Muir*, 34 Ind. 310; *Clark v. Jeffersonville*, etc., R. Co., 44 Ind. 248; *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258; *Teague v. Fowler*, 56 Ind. 569.

Mississippi. — *Tully v. Herrin*, 44 Miss. 626.

Nebraska. — *Hershiser v. Delone*, 24 Neb. 380.

Ohio. — *Finch v. Finch*, 10 Ohio St. 501; *Cleveland Second National Bank v. Marbach*, 2 Cleve. L. Rep. (Ohio) 313, 4 Ohio Dec. (Reprint) 524.

Illustration. — "Where there is an improper joinder of causes of action, the statute makes it a ground of demurrer. This provision of the statute does not apply to the manner of the joinder—i. e., to the improper commingling in one count of matters that might be properly united in a petition by different counts—but to the sub-

stantial error of uniting, whether in one or different counts, matters that cannot be united at all. The former error violates a rule of pleading, and should be met by motion, while the latter may be reached by demurrer." *Mulholland v. Rapp*, 50 Mo. 43.

"The Office of a Motion is to bring to the notice of the court some matter or subject in the progress of a cause which cannot be raised by plea or demurrer. It ought not to be permitted to usurp the place of regular formal pleadings, where they are appropriate. If the declaration does not contain a cause of action, or if it sets out a good 'title' defectively, the appointed mode of submitting the question to the court is by a demurrer, and not by a motion to dismiss. In regard to pleas, it has been more than once declared by this court, that if they have any merits, though defective and insufficient, they cannot be displaced on motion, but must be contested by demurrer." *Tully v. Herrin*, 44 Miss. 639.

In *State v. Harper*, 6 Ohio St. 607, it was held that a statute authorizing irrelevant matter, inserted in any pleadings, to be stricken out on motion of the party prejudiced thereby, made it competent for the plaintiff to move the court to strike out the defendant's answer, if the matters which it contained were irrelevant, and formed no ground of defense to the action. The motion, in such case, took the place and served the office of a demurrer. But it was further held that a later statute, authorizing the plaintiff to demur to the answer for insufficiency, necessarily superseded the practice of moving to strike the answer from the files.

The Sufficiency of an Answer may be raised by a motion for judgment *non obstante veredicto*. *Hemenway v. Francis*, 20 Oregon 455. See also article JUDGMENTS, vol. II, p. 796.

In *Columbus v. Reinhard*, 1 Ohio Cir. Ct. Rep. 289, it was held that a motion for judgment because of the insufficiency of the answer is not good practice, but that a demurrer so that an amendment can be allowed is the proper pleading.

Motion or Demurrer Alternative Remedies. — In *Howell v. Stewart*, 54 Mo. 400, it was held that where an answer

must be attacked by motion and cannot be reached by demurrer.¹

Uncertainty and Indefiniteness. — Thus the remedy for uncertainty and indefiniteness in pleading is by motion to make more definite and certain, and not by demurrer.²

Surplusage. — So also the remedy for superfluous matter in a pleading is by motion to strike it out.³

IV. KINDS OF MOTIONS — 1. Motions of Course. — Motions are either of course or not of course. A motion of course is an application for an order which by some standing rule or practice of the

does not state facts sufficient to constitute a defense to the cause of action, the defect may be reached either by demurrer or by motion to strike out.

Motion Treated as a Demurrer. — A motion to dismiss, if no objection is interposed, may be treated as a demurrer for want of equity. *Tamaroa v. Southern Illinois Normal University*, 54 Ill. 334. Compare *Brill v. Stiles*, 35 Ill. 305; *Vieley v. Thompson*, 44 Ill. 9; *Hickey v. Stone*, 60 Ill. 458; *Swinney v. Beard*, 71 Ill. 27.

A motion to strike out all the substantial and material points of a petition is in effect a demurrer, and the action of the court in sustaining such a motion is equivalent to a judgment on the demurrer. *Austin v. Loring*, 63 Mo. 19. See also *Paxson v. Talmage*, 87 Mo. 13, 14 Mo. App. 586, where a motion to strike out parts of an answer was treated as a demurrer, and as such allowed to run through the record and question the sufficiency of the petition.

In *Ellis v. Reddin*, 12 Kan. 306, it was held error for the court to treat a motion to make more definite and certain as a demurrer and to sustain it as such.

1. It Is Not Reversible Error to sustain a demurrer to an unsworn plea in abatement, though the proper practice is to strike out or reject such a plea on motion. *Indianapolis, etc., R. Co. v. Summers*, 28 Ind. 521; *Beeson v. Howard*, 44 Ind. 413.

Demurrer Treated as a Motion. — A general demurrer to an answer containing a good defense, but without proper definiteness of detail, should be treated as a motion to make more definite and certain. *Reynolds v. Roth*, 61 Ark. 317.

2. Arkansas. — *McIlroy v. Adams*, 32 Ark. 315; *McCreary v. Taylor*, 38 Ark. 393; *Bushey v. Reynolds*, 58 Ark. 657; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *McFadden v. Stark*, 58 Ark. 7; *Fordyce v. Merrill*, 49 Ark. 277;

Bush v. Cella, 52 Ark. 378; *Johnson v. Douglass*, 60 Ark. 39.

Indiana. — *Wiles v. Lambert*, 66 Ind. 494; *Pennsylvania Co. v. Sedwick*, 59 Ind. 336; *Schee v. McQuilken*, 59 Ind. 269; *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297; *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *Shaw v. Merchants' Nat. Bank*, 60 Ind. 83; *Doman v. Bedunnah*, 57 Ind. 219; *Snowden v. Wilas*, 19 Ind. 10.

Kansas. — *Western Massachusetts Ins. Co. v. Duffy*, 2 Kan. 347.

Missouri. — *Baker v. Raley*, 18 Mo. App. 563.

New York. — *Maretzek v. Cauldwell*, 2 Robt. (N. Y.) 715.

Ohio. — *Schrock v. Cleveland*, 29 Ohio St. 499; *Lewis v. Coulter*, 10 Ohio St. 451; *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

Demurrer Lies for Uncertainty. — But if a pleading be so uncertain as not to state a substantially good cause of action or defense it will be subject to a demurrer. *Snowden v. Wilas*, 19 Ind. 10. Thus, for example, in *Corns v. Clouser*, 137 Ind. 201, the complaint alleged a parole agreement for a right of way generally. Defendant moved to require the complaint to be made more definite and certain. This motion was properly overruled, as it was manifest that the pleading in this respect could be no more specific than the agreement. If the agreement was insufficient its weakness could only be tested upon demurrer.

3. Ward v. Ward, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 145; *Boden v. Dill*, 58 Ind. 273. See generally article SURPLUSAGE.

Duplicity or Redundancy in a pleading must be objected to by motion. *Judah v. Vincennes University*, 16 Ind. 56.

At common law duplicity was met by a special demurrer, but under the code the remedy is by motion. *Waggoner*

court may be granted without hearing both sides as a mere matter of routine.¹ Thus it is a matter of course to order a cause to be brought forward on the docket where either party desires to be heard on any motion in respect to it.² So, also, a motion for leave to file consistent double pleas is a motion of course.³ On the other hand, an application for the continuance of a motion to dissolve an injunction,⁴ or for an order of reference,⁵ will not be granted as an order of course.

2. Motions Not of Course. — A motion not of course, or a special motion as it is usually termed, is one which is not granted as a matter of course, but which the court in the exercise of its discretion or judgment may, on the facts established in support of the application, either grant or refuse.⁶ Thus a special motion and order is necessary to revive an injunction which has been dissolved.⁷

3. Ex Parte Motions. — *Ex parte* motions are applications made to the court in behalf of one or the other of the parties to the action, in the absence and usually without the knowledge of the other party or parties.⁸ Motions of course are necessarily *ex*

v. White, 11 Heisk. (Tenn.) 741; *Trabue v. Higden*, 4 Coldw. (Tenn.) 620.

1. *Anderson's L. Dict.*; *Pratt v. Rice*, 7 Nev. 123.

A motion is termed of course when the thing sought is grantable without question or hearing. *Abbott's Law Dict.*

A motion of course is not usually made in open court, but is granted by the master, chief clerk, or other officer of the court when the paper containing the direction to move is laid before them with a signature attached. *Brown's L. Dict.*, title Motion. See *infra*, IX. *Notice of Motion*.

A motion for leave to file a suggestion to try whether a confession of judgment is fraudulent or not is not grantable of course on the affidavit of the creditor that he believes the judgment to be fraudulent, but only on satisfying the court that there is no reasonable ground of suspicion. *Robinson v. Stewart*, 1 Rich. L. (S. Car.) 3.

2. *Russell v. Dyer*, 39 N. H. 528, cited in *Rice v. Holden*, 55 N. H. 398, wherein it was held that an action omitted from the printed docket by mistake would be ordered to be entered, but that the order decides nothing except that the court is ready to hear the party.

3. *Richardson v. Whitfield*, 2 McCord L. (S. Car.) 148.

Such a motion may be granted at any time provided it will not operate as

a surprise on the plaintiff. *Stewart v. McCully*, 5 Rich. L. (S. Car.) 80; *Van Holten v. Lewis*, 1 McCord L. (S. Car.) 12.

4. *Taylor v. Dickinson*, 15 Iowa 483.

5. *Corning v. Baxter*, 6 Paige (N. Y.) 178.

6. *Pratt v. Rice*, 7 Nev. 123, holding that a motion to enter a judgment *nunc pro tunc* is not a motion of course.

Special Motions are motions which invoke the discretion or judgment of the court, and must be heard and considered. *Abbott's Law Dict.* A motion is special when granted after hearing had. *Anderson's Law Dict.*

Special, in this phrase, does not seem to have much distinctive force; it emphasizes the idea of a motion actually made and argued, and judicially decided, as distinguished from a formal application for some order or rule that may be granted of course. *Abbott's L. Dict.*

The Distinction between a special motion and one grantable of course is that a motion which requires an allowance from the judge or a notice to the opposite party is a special one; all others are grantable of course. *U. S. v. Parrott, McAll.* (U. S.) 447.

7. *Blount v. Tomlin*, 26 Ill. 531, holding that a writ of error operating as a supersedeas is insufficient.

8. *Anderson's L. Dict.*

Ex parte motions are motions which must be heard and considered, but

parte.¹ Special motions may be made either *ex parte* or upon notice according to circumstances.²

4. Contested or Litigated Motions. — Motions made on notice to the adversary party, where he is afforded an opportunity to resist the application, are called contested or litigated motions.³

5. Enumerated and Nonenumerated Motions. — In *New York*, for the purpose of regulating the practice and procedure thereon, motions are divided by rule of court into two classes, known respectively as enumerated and nonenumerated motions.⁴ The difference in practice between the two classes of motions, so far as announced in judicial decisions, will be noticed under the appropriate subdivisions of this article.

may be heard on application of one party only. Abbott's Law Dict.

As to when motions may be made and granted *ex parte* and without notice to the adversary party, see *infra*, IX. *Notice of Motion*.

The Object of Motions of This Nature is generally to prevent the performance of some act which, if performed, might be productive of irreparable injury; and it is therefore desirable that the party affected by it should not have any previous intimation of the intention to apply to the court restraining him. Where there is no danger that the object of the motion would not be defeated if notice were given, such motions will not be permitted, and special applications concerning the proceedings in the cause, not regulated either by the general orders or by any clearly defined rule of practice, must almost always be made upon notice. Pratt v. Rice, 7 Nev. 123. See also *Ex p.* Mitchell, 12 S. Car. 86; Hungerford v. Cushing, 2 Wis. 411; Clark v. Pigeon Roost Min. Co., 29 Ga. 29.

1. See *supra*, IV. 1. *Motions of Course*.

2. See *infra*, IV. 4. *Contested or Litigated Motions*. See also *infra*, IX. *Notice of Motion*.

3. Anderson's Law Dict.

Litigated motions are motions which can be heard only on notice. Therefore a motion which can be heard either with or without notice, in the discretion of the court, is not a litigated motion. Sturz v. Fischer, 2 N. Y. Ann. Cas. 366, 15 Misc. Rep. (N. Y. Supreme Ct.) 410, 25 Civ. Pro. Rep. (N. Y.) 202, holding that an application to vacate an attachment, although made on notice, is not a litigated motion, as under the N. Y. Code of Civil Procedure, section 683, such an application may be made without notice.

4. Rule Defining Enumerated and Non-enumerated Motions. — "Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the code, agreed cases submitted under section 1279 of the code, and appeals from final orders and decrees of Surrogates' Courts, and matters provided for by sections 2085-2099 and 2138 of the code. Nonenumerated motions include all other questions submitted to the court, and shall be heard at special Term except when otherwise directed by law." Rule 38, Hun's Rules of Court, p. 205.

What Are Enumerated Motions. — The following have been held to be enumerated motions:

Appeals from final orders and decrees of surrogates. Brockway v. Jewett, 16 Barb. (N. Y.) 590.

An appeal from an order of the County Court granting a new trial on the judge's minutes. Harper v. Allyn, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 186.

A motion for a new trial on account of newly discovered evidence. Chandler v. Trayard, 2 Cai. (N. Y.) 94.

A motion for a new trial on a case or bill of exceptions. Ellsworth v. Gooding, 8 How. Pr. (N. Y. Supreme Ct.) 1; Van Schaick v. Winne, 8 How. Pr. (N. Y. Supreme Ct.) 5.

Appeals from orders sustaining or overruling demurrers. Reynolds v. Freeman, 4 Sandf. (N. Y.) 702.

A motion to confirm a referee's report on reference, under an interlocutory decree. Empire Bldg., etc.,

V PARTIES TO A MOTION — 1. Who May Move — Parties. — A motion may be made by any party to the record,¹ as a matter of right,² provided he is in good standing before the court.³ And

Assoc. v. Stevens, 8 Hun (N. Y.) 515; *Rogers v. Pearsall*, 21 N. Y. App. Div. 389.

A motion to set aside the report of a referee on the merits. *Remsen v. Isaacs*, 1 Cai. (N. Y.) 22; *Clinton v. Elmendorf*, 3 Johns. (N. Y.) 143; *Foden v. Sharp*, 4 Johns. (N. Y.) 183.

A motion in arrest of judgment. *Brush v. Mullany*, 12 Abb. Pr. (N. Y. Supreme Ct.) 344; *Schermerhorn v. Schermerhorn*, 5 Wend. (N. Y.) 513; *Belden v. Davies*, 2 Hall (N. Y.) 433.

What Are Nonenumerated Motions. — The following have been held to be nonenumerated motions:

A motion for judgment on the pleadings on the ground that an answer raises no issue. *People v. Northern R. Co.*, 42 N. Y. 217, *affirming* 53 Barb. (N. Y.) 98.

A motion to set aside a verdict for irregular conduct of jury. *Smith v. Cheetham*, Col. & C. Cas. (N. Y.) 425, 2 Cai. (N. Y.) 381.

A motion to bring on trial by record. *M'Kenzie v. Williams*, Col. & C. Cas. (N. Y.) 428, 2 Cai. (N. Y.) 385.

A motion for a reference. *Conway v. Hitchins*, 9 Barb. (N. Y.) 378.

A motion to set aside a report of referees on the ground of irregularity and not on the merits. *Remsen v. Isaacs*, Col. & C. Cas. (N. Y.) 159, 1 Cai. (N. Y.) 22.

1. *Callender v. Painesville, etc.*, R. Co., 11 Ohio St. 520.

On Appeal It May Be Presumed in support of the judgment from circumstances, that an order of court was made upon the motion of a particular person, where the record does not show who was the mover. *Creps v. Baird*, 3 Ohio St. 277.

The Cause May Be Erased from the Docket of the appellate court upon motion of the party who brought it there. *Wildman v. Rider*, 23 Conn. 172.

A Party Who Has Not Been Served may make a motion in the cause. *Lyle v. Smith*, 13 How. Pr. (N. Y. Supreme Ct.) 104.

Motion to Quash Execution. — As to parties, see article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303.

Joinder of Parties on Motion — Change of Venue. — All the plaintiffs or all the defendants, as the case may be, must

join in a motion for change of venue. *Whitaker v. Reynolds*, 14 Bush (Ky.) 616. But see *Brown v. State*, 18 Ohio St. 496, holding that where parties are jointly indicted, a change of venue may be ordered as to either of the defendants, upon his motion alone, as such motion and order necessarily involve and include a motion and order for a separate trial, and have all the force and effect of a motion for both purposes.

Substitution of Lost Decree. — Where the original records of the court have been destroyed, a motion under the statute to substitute a decree should be made in the name of all the parties in whose favor the decree was rendered, and if any of the parties are unwilling to move, the others may use their names upon securing them for their costs. *Gilbert v. Beck*, 42 Ala. 504.

Petition for Allowance to Wife. — In a suit involving a wife's property an allowance for her maintenance cannot be made upon the petition of the husband alone, but he must be joined therein by the wife. *Moffat v. Graham*, 1 Edw. Ch. (N. Y.) 575.

2. *Smith v. Harris*, 135 Ind. 621, holding that so long as a cause is pending in court any party has a right to present and file in such cause any paper that, upon its face, shows that it is connected therewith, and is of such character that the court could properly take action thereon and afford to the party any relief; and that under this rule comes a motion to set aside an erroneous judgment, it being the duty of the court to hear and pass upon such motion, so as to enable the party to have all his exceptions presented to the appellate court. See also *Callender v. Painesville, etc.*, R. Co., 11 Ohio St. 516.

3. **A Party in Contempt of court** cannot make a motion. *Rogers v. Paterson*, 4 Palge (N. Y.) 450; *Johnson v. Pinney*, 1 Paige (N. Y.) 646; *Lane v. Ellzey*, 4 Hen. & M. (Va.) 504; *Peltier v. Peltier*, Harr. (Mich.) 19, holding, further, that where there is merely a failure to comply with an interlocutory order a party may nevertheless move to discharge the order for irregularity.

But it is not error to entertain a motion of a party in contempt, as the

it has been held that a motion may be made only by a party to the record.¹

Persons Interested. — But this right of making and being heard on motion has been very generally extended by the courts to any person having an interest in the subject-matter of the suit, although not a party thereto.² Thus in actions of replevin, attachment, and in cases of distribution of money, it has been the practice to entertain and hear motions made by parties in

court in its discretion may overlook the contempt, provided neither party is injured thereby. *Whitman v. Johnson*, 10 Misc. Rep. (N. Y. C. Pl.) 730.

So where the party is in contempt of another court, he may nevertheless make a motion which is a matter of favor. *Strong v. Strong*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 358, 5 Robt. (N. Y.) 612.

In *Barker v. Barker*, 15 How. Pr. (N. Y. Supreme Ct.) 568, the party was in contempt for failure to obey an order to pay alimony, and he was required to obey the order before he would be heard upon a motion to have it modified.

In *Jeyes v. Foreman*, 6 Sim. 384, a notice of motion had been served on the opposite party, and before the time came for making the motion an attachment was issued against the moving party, but he was nevertheless allowed to make his motion.

1. *Aveline's Estate*, 53 Cal. 259; *Case v. Case*, 137 Ind. 526; *Gelpeke v. Milwaukee, etc., R. Co.*, 11 Wis. 454, holding that a person not a party can only be heard on leave of court, and as a matter of favor; *Ward v. Clark*, 6 Wis. 509; *Price v. Shelby Cir. Ct.*, Hard. (Ky.) 261, wherein it was said that a court is not bound to hear and determine a motion made by a stranger to the suit to set aside irregular proceedings therein, even though the interest of the stranger might be affected by the suit; it was accordingly held that a stranger whose property is seized under legal process, as the property of a defendant, cannot by motion have the property restored to him on the ground that it belongs to him and not to the defendant. See also *Hall v. Lyon*, 37 Ga. 636; *Morton v. Gahona*, 70 Ga. 569; *Atrope v. Barker*, 72 Ga. 186; *Van Dyke v. Besser*, 34 Ga. 268; *Frink v. Morrison*, 13 Abb. Pr. (N. Y. Supreme Ct.) 80; *Wallop v. Scarborough*, 5 Gratt. (Va.) 1.

Amicus Curia. — In *Piggott v. Kirkpatrick*, 31 Ind. 261, it was held that a motion to dismiss a suit on account of alleged defects in the complaint cannot properly be made by any one not a party to the suit, and therefore cannot properly be made by an *amicus curia*. See also *Taft v. Northern Transp. Co.*, 56 N. H. 414, wherein it was said that the conduct of causes is not the function of an *amicus curia*. See generally article FRIEND OF THE COURT, vol. 9, p. 723.

2. *Green v. McMurtry*, 20 Kan. 192; *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355; *Gould v. Mortimer*, 16 Abb. Pr. (N. Y. Supreme Ct.) 448; *Jones v. Roberts*, 12 Sim. 189; *Dwight's Case*, 15 Abb. Pr. (N. Y. Supreme Ct.) 259, wherein the court said that there is no reason why a person not a party on the record addressing the equitable summary jurisdiction of a court of law should not obtain the relief to which he would be entitled if he were a party; *Lowber v. New York*, 5 Abb. Pr. (N. Y. Supreme Ct.) 325, wherein it was held that whether a person who was not a party to a confessed judgment, but who complained of its injurious operation on his interests, should be heard summarily on informal affidavits or be put to the more tedious remedy of an appeal in equity, depended upon circumstances of the case as ascertained after the affidavits on both sides had been read; it was said that it is more usual to hear the motion, and to order a reference or remit the parties to a suit only in cases of necessity; *Howard v. Taylor*, 5 Duer (N. Y.) 604, holding that a purchaser *pendente lite* is himself the proper party to move that he be substituted as plaintiff.

In *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259, a sale under decree of foreclosure was set aside upon motion of one not a party to the suit, and who was ignorant of the whole proceeding until after the sale.

interest, although strangers to the record.¹

A Person Having No Interest whatever in the matter is not entitled to move.² And it seems that even a party to the suit cannot make any particular motion therein unless he has an interest in the relief sought by the motion.³

2. Who May Be Moved Against. — Any party to the record may be moved against. Any person, though not a party to the action, who has voluntarily submitted himself to the authority of the court, as, for instance, by purchasing property which is the subject of the action from a party thereto, pending the action, or

1. When Stranger to Record May Move — *Illustration.* — *Callender v. Painesville, etc., R. Co.*, 11 Ohio St. 516, wherein the court said: "In applications of this kind, the court will judge of the relation of the party so making the motion to the subject-matter of the action or proceeding; and the entertaining of the motion is an act of discretion on the part of the court. I think that the person making the motion in this case is certainly not shown by the motion to have been a mere intruder. Steele represents himself in his motion, to be a member of an unincorporated company, against which judgment is sought in the action. And if so, a judgment rendered against the company, by the name of the company, would be a judgment against all the members collectively, including him as an individual member of the association. Any member of the company, under these circumstances, I think, might very properly be admitted to make his motion, and be heard upon it, in the case." See also *Thornton v. Fairfax*, 29 Gratt. (Va.) 669.

A Void Judgment or Attachment may be attacked on motion by a stranger, as for instance, a junior judgment creditor, but it seems that a merely irregular judgment can be objected to only by the judgment debtor.

California. — *Matter of Newman*, 75 Cal. 220.

New York. — *Isham v. Ketchum*, 46 Barb. (N. Y.) 43; *Oakley v. Becker*, 2 Cow. (N. Y.) 454; *Abels v. Westervelt*, 15 Abb. Pr. (N. Y. Supreme Ct.) 230; *Pierce v. Alsop*, 3 Barb. Ch. (N. Y.) 184.

Pennsylvania. — *Lowber's Appeal*, 8 W. & S. (Pa.) 387.

South Carolina. — *Ferguson v. Gilbert*, 17 S. Car. 31; *Ex p. Carroll*, 17 S. Car. 446; *Mooney v. Welsh*, 1 Mill (S. Car.) 133; *Barns v. Branch*, 3 Mc-

Cord L. (S. Car.) 19; *Foster v. Jones*, 1 McCord L. (S. Car.) 116; *Chambers v. McKee*, 1 Hill L. (S. Car.) 229; *Camberford v. Hall*, 3 McCord L. (S. Car.) 345; *Kincaid v. Neall*, 3 McCord L. (S. Car.) 201; *Lindau v. Arnold*, 4 Strobb. L. (S. Car.) 290; *Byne v. Byne*, 1 Rich. L. (S. Car.) 438; *Gardner v. Hust*, 2 Rich. L. (S. Car.) 601; *Weyman v. Murdock*, Harp. L. (S. Car.) 125; *Walker v. Roberts*, 4 Rich. L. (S. Car.) 563.

2. Thomson v. Tracy, 60 N. Y. 31; *O'Mahoney v. Belmont*, 62 N. Y. 133.

Effect of Assignment for Benefit of Creditors. — The mere fact that the defendant has made an assignment of his property for the benefit of creditors does not deprive him of the right to move to vacate a judgment and execution void for want of jurisdiction over his person. He is nevertheless interested therein. *Lambert v. Converse*, 22 How. Pr. (N. Y. Supreme Ct.) 265; *Dickinson v. Benham*, 12 Abb. Pr. (N. Y. Supreme Ct.) 158, 20 How. Pr. (N. Y.) 343.

3. See Savage v. Challiss, 4 Kan. 319; *People v. Tweed*, 5 Hun (N. Y.) 353; *Ramsey v. Erie R. Co.*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 174, 33 How. Pr. (N. Y.) 62, holding that an order appointing a referee to take the deposition of a witness is a matter exclusively between the party obtaining the order and the person whose deposition is to be taken, and that the latter only can move generally to have it vacated. See also *Jamison v. Tudor*, 3 B. Mon. (Ky.) 356, holding that a defendant in an execution under which the land has been sold has no such interest in the irregularity of the sheriff's deed to the purchaser as will authorize him to move to quash it for irregularity.

In *State v. Sherman*, 42 Mo. 210, it was said that the motion to make a pleading more definite and certain must be made by the adverse party.

at a judicial sale made by the direction of the court, may be proceeded against respecting the subject, by motion, without being made a party to the record.¹

VI. TIME OF MOVING—Pending Action.—A motion cannot ordinarily be made either before the commencement or after the termination of an action, for it is only by the pendency of the action that the court has jurisdiction.²

Apt Time.—So also motions must be filed or made at the apt and proper time, or the court may refuse to entertain them.³

1. *Hill v. Hill*, 58 Ill. 240; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 387; *Lord v. Merony*, 79 N. Car. 14; *Lord v. Beard*, 79 N. Car. 5; *Rucker v. Moore*, 1 Heisk. (Tenn.) 727; *Holland v. Seaver*, 21 N. H. 386; *Smith v. Equitable Mortg. Co.*, 98 Ga. 240.

The Purchaser at an Execution Sale is properly brought in by notice, without the issuance and service of summons. *American Wine Co. v. Scholer*, 13 Mo. App. 345, 85 Mo. 496. See also article JUDICIAL SALES, vol. 12, p. 65 *et seq.*, and numerous cases there cited.

Effect of Order on One Not a Party.—Where the court allows any person to appear and be heard upon the argument of a motion, in the decision of which he is interested, such hearing is as effectual as though such person had received notice of the motion, and had been named as a formal party to it; and he is fully concluded by the disposition which the court may make of such motion. *Jay v. De Groot*, 2 Hun (N. Y.) 205. See also *Acker v. Ledyard*, 8 Barb. (N. Y.) 514, wherein it was held that an order of the court is not binding on one not a party to the suit even though he appeared and opposed the motion by counsel. This case was reversed in 8 N. Y. 62, but this point was not considered.

2. Motions Before Commencement of Suit.—*Freeman v. Young*, 3 Robt. (N. Y.) 666, holding that a motion to set aside a complaint in an action commenced by attachment for nonconformity with the summons, cannot be made before the summons has been served.

In *Kattenstroth v. Astor Bank*, 2 Duer (N. Y.) 632, an order to show cause why a receiver should not be appointed was served before the commencement of the suit, the summons not having been served until the return day of the order. The motion for the appointment of a receiver was accordingly denied. But see *Justice v. Newbern Nat. Bank*, 83 N. Car. 8, wherein

it is held that a motion for leave to inspect books and papers may be made and granted before the complaint has been filed, where it is made to appear that such discovery is necessary to enable the plaintiff to properly state the facts upon which the action is founded.

The rule that a motion cannot be made before the commencement of an action does not apply in proceedings not commenced by process, but by motion or petition, as in the case of an application for a writ of mandamus, prohibition, and other similar cases.

Motion After Termination of Suit.—In *Matter of Bohnet*, 8 N. Y. App. Div. 293, it was held that a motion to bring in new parties made in a proceeding for mandamus, after a peremptory mandamus had been issued, was properly refused, on the ground that no proceeding was pending when the motion was made. See also *Cox v. Brackett*, 41 Ill. 222, wherein it was held following *Cook v. Wood*, 24 Ill. 295, that a motion to supply a lost plea is too late if made at a term after final judgment. But see *Loehner v. Hill*, 19 Mo. App. 141, holding that a motion to assess damages on an injunction bond may be made after the injunction has been dissolved and the bill dismissed, provided it be made before the term has lapsed, as the cause is not out of court until the term has lapsed.

Power over Judgment at Subsequent Term.—As to the power of the court over its judgment at a subsequent term, see generally article OPENING, AMENDING, AND VACATING JUDGMENTS.

3. *Hart v. Spect*, 62 Cal. 137; *Ferguson v. Rawlings*, 23 Ill. 69; *Leiferman v. Osten*, 167 Ill. 93; *Evans v. Bouton*, 85 Ill. 579; *Etter v. Anderson*, 84 Ind. 333; *Magee v. Fogerty*, 6 Mont. 237; *Brygger v. Schweitzer*, 5 Wash. 564, wherein it was said that the practice of filing motions or petitions in causes out of their proper time tends to embarrass the administration of justice, and can-

This requirement embraces within its meaning promptness, as well as the appropriate order of proceeding.¹

not with propriety be allowed in the absence of any explanation of the reasons for such a course. *State v. Langley*, 13 Wash. 636, holding that where a party fails to apply for an order at the proper time he is not thereafter entitled to an order *nunc pro tunc*.

Under the Practice Conformity Act all motions in a suit at common law, which by the practice of the state courts are required to be made at a special term may be made at a stated term of a federal court. *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411.

1. **Meaning of "Apt Time."** — "Apt time sometimes depends upon lapse of time, as when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards. But it more usually refers to the order of proceeding, as fit or suitable time. No time is prescribed within which a discharge in bankruptcy is to be pleaded. When anything is done in the proper order, then whether the time is long or short makes no difference. Now, in this case, the very first step taken after the defendant was discharged, was a motion to docket, and to be allowed to plead the discharge. That was in apt time although it was a long time — some two years — after the discharge. Why no steps had been taken during these two years, by either of the parties — by the plaintiff to dismiss, or by the defendant to have put upon the trial docket — does not appear; nor is it important. There the case stood upon the docket, continued from term to term, until spring term, 1875, when the defendant moved to docket and to plead his discharge. At an earlier time he might have moved, but at no earlier stage of the proceedings. No step backwards was taken." *Pugh v. York*, 74 N. Car. 384.

Appropriate Order of Proceeding. — For instances of motions refused because not made in the appropriate order of proceeding, see *Hart v. Specht*, 62 Cal. 187; *Hilton v. Patterson*, 18 Abb. Pr. (N. Y. Supreme Ct.) 245; *Ferguson v. Rawlings*, 23 Ill. 69, holding that a motion to dismiss cannot be entertained whilst a regular default exists; a motion to open the default must first be made and granted.

The court may refuse to entertain a motion made while it is engaged in hearing another motion. *Schuetze v. Continental L. Ins. Co.*, 69 Wis. 252.

A motion cannot be made while a previous motion for the same relief is pending undetermined. *Hoover v. Rochester Printing Co.*, 2 N. Y. App. Div. 11, holding further that the leave to withdraw the first motion must first be obtained and the costs thereof paid. See also *infra*, XIV. *Rehearing and Reargument of Motion*; XV. *Renewal of Motions*.

A motion to consolidate should properly be made after declaration and before plea. *Worthy v. Chalk*, 10 Rich. L. (S. Car.) 141.

Motions to readjust costs should be made before they are paid. *Collomb v. Caldwell*, 5 How. Pr. (N. Y. Supreme Ct.) 336, 1 Code Rep. N. S. (N. Y.) 41. See also *Dresser v. Wickes*, 2 Abb. Pr. (N. Y. Supreme Ct.) 460.

Inconsistent Motions — Effect. — In *Stein v. Chicago*, etc., R. Co., 41 Ill. App. 38, it was held that the right to make a motion for a new trial is not waived by a withdrawal of such motion pending a motion for judgment *non obstante veredicto* as the two motions do not lie together, and the motions for judgment comes first.

In *Nixon v. Downey*, 49 Iowa 166, the court said: "The motion for a judgment and the motion for a new trial are, of course, inconsistent, so far as the action is concerned which they are intended to invoke. In asking the court to sustain the motion for judgment the defendant virtually asked the court not to sustain the motion for a new trial. That was certainly a waiver of the motion for the time. We think it should have the same effect as withdrawing it from the files." See also *Stone v. Hawkeye Ins. Co.*, 68 Iowa 737; *Diamond Plate Glass Co. v. De Hority*, 143 Ind. 381, wherein it was said that there is authority for saying that a motion for judgment on the special findings and a motion for a new trial may be pending at the same time, and if nothing to the contrary appears it would be presumed on appeal that they were ruled in their proper order. Citing *inter alia* *Habersham v. Wetter*, 59 Ga. 11; *Pope v. Latham*, 1 Ark. 66; *Jewell v. Blandford*, 7 Dana (Ky.) 473;

Promptness. — And it is a general rule that a motion must be made promptly whenever the occasion for it arises, or it may be properly refused upon the ground of laches.¹ This rule is especially true of motions to set aside proceedings for mere irregularities,² and it has been held that such motions must be made at the first practicable opportunity,³ or a good and sufficient reason must be shown for not making them.⁴

Water, etc., *Co. v. Gildersleeve*, 4 N. Mex. 171; *Farmers' Bank v. Bayliss*, 41 Mo. 274.

1. *Alabama*. — *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501.

Colorado. — *Holliday v. Kirk*, 3 Colo. 324.

Georgia. — *McLendon v. Frost*, 57 Ga. 448.

Illinois. — *Stewart v. Carbray*, 59 Ill. App. 397; *Culver v. Cougle*, 165 Ill. 417.

Indiana. — *State v. Leonard*, 7 Blackf. (Ind.) 223.

Maryland. — *Benson v. Davis*, 6 Har. & J. (Md.) 272.

New Jersey. — *Halsey v. Miller*, 16 N. J. L. 63.

New York. — *Robinson v. Hudson River R. Co.*, 1 Hilt. (N. Y.) 144, 3 Abb. Pr. (N. Y.) 115; *Moreland v. Sanford*, 1 Den. (N. Y.) 660.

North Carolina. — *Pugh v. York*, 74 N. Car. 383.

United States. — *Northrop v. Gregory*, 2 Abb. (U. S.) 503.

A motion for costs of circuit should be made by a party entitled thereto, at the first opportunity after the circuit adjourns. *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28. See also *Jones v. Van Epps*, 1 How. Pr. (N. Y. Supreme Ct.) 105; *Kirby v. Sisson*, 1 Wend. (N. Y.) 83.

The Attorney's Ignorance of the practice is no excuse for delay. *Moreland v. Sanford*, 1 Den. (N. Y.) 660.

2. Motions to Set Aside Proceedings for Irregularity Must Be Made Promptly — *Iowa*. — *Keeney v. Lyon*, 21 Iowa 277.

Kentucky. — *Bent v. Maupin*, 86 Ky. 271, 9 Ky. L. Rep. 469; *Carlile v. Carlile*, 7 J. J. Marsh. (Ky.) 625; *Cox v. Joiner*, 4 Bibb (Ky.) 94.

Missouri. — *St. Louis v. Meyer*, 13 Mo. App. 367, 87 Mo. 276.

New York. — *Patterson v. Graves*, 11 How. Pr. (N. Y. Supreme Ct.) 91; *Jones v. U. S. Slate Co.*, 16 How. Pr. (N. Y. Supreme Ct.) 129; *Winans v. Mason*, 33 Barb. (N. Y.) 522, 21 How. Pr. (N. Y.) 153; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y.

Supreme Ct.) 7; *Reddy v. Wilson*, 9 How. Pr. (N. Y. Supreme Ct.) 34; *Gouverneur v. Elmendorf*, 4 Johns. Ch. (N. Y.) 357; *Persse, etc., Paper Works v. Willet*, 14 Abb. Pr. (N. Y. Super. Ct.) 119; *Lawrence v. Jones*, 15 Abb. Pr. (N. Y. Supreme Ct.) 110; *Low v. Graydon*, 14 Abb. Pr. (N. Y. Supreme Ct.) 443; *Strong v. Strong*, 4 Robt. (N. Y.) 621.

North Carolina. — *Cardwell v. Cardwell*, 64 N. Car. 621; *Waddell v. Wood*, 64 N. Car. 624; *Howell v. Barnes*, 64 N. Car. 626.

South Carolina. — *Hanks v. Ingram*, 2 Bailey L. (S. Car.) 440.

3. *Beall v. Blake*, 13 Ga. 217; *Clifford v. Eagle*, 35 Ill. 444; *Center v. Gibney*, 71 Ill. 557; *Leiferman v. Osten*, 167 Ill. 97; *State v. Leonard*, 7 Blackf. (Ind.) 223, holding that in a suit by the state on a collector's bond a motion to dismiss for want of the indorsement of the relator's name on the writ must be made on defendant's first appearance to the suit; *State v. Gettings*, 35 Md. 169, holding that defendant need not move for a *non pros*, on the very day of the return of the writ; *Reddy v. Wilson*, 9 How. Pr. (N. Y. Supreme Ct.) 34, holding that although a motion to set aside a complaint for stating no place of trial must be made promptly, it is not too late when it is made at a circuit and special term only a week later than the earliest possible term; *Hanks v. Ingram*, 2 Bailey L. (S. Car.) 440, holding that it is too late after the return term to except to a writ for irregularity by motion to set aside the proceedings.

In *New York* it was formerly the rule that a motion to set aside proceedings for irregularity must be made at the next following special term. *McEvers v. Markler*, 1 Johns. Cas. (N. Y.) 248, Col. & C. Cas. (N. Y.) 96. But this rule no longer prevails. *Titus v. Rel-yea*, 8 Abb. Pr. (N. Y. Supreme Ct.) 177, 16 How. Pr. (N. Y.) 371.

4. *Lawrence v. Jones*, 15 Abb. Pr. (N. Y. Supreme Ct.) 110; *O'Flynn v. Eagle*, 7 Mich. 306.

Qualification of Rule. — This rule is confined to motions based upon irregularities which may be waived, and has no application to motions based on matters of substance.¹

Waiver by Proceeding in Cause. — The taking of any step in the orderly progress of a cause before moving to set aside the proceedings for irregularity is a waiver of all prior irregularities.² Thus a motion to strike allegations from a pleading,³ or to make a plead-

It Is an Excuse that the motion was previously noticed for a term which adjourned unexpectedly, and it was therefore noticed at the earliest practicable day of another term. *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28.

1. *Titus v. Relyea*, 8 How. Pr. (N. Y. Supreme Ct.) 177, 16 Abb. Pr. (N. Y.) 371; *Bulkley v. Bulkley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 307; *Doty v. Russell*, 5 Wend. (N. Y.) 129; *Callagan v. Hallett*, 1 Cai. (N. Y.) 104; *Twine v. Carey*, 2 Okla. 249.

In *Callagan v. Hallett*, 1 Cai. (N. Y.) 104, the court held that it was not too late to move for an arrest of the judgment taken by default after the defendant had attended the execution of the writ of inquiry and examined witnesses, where it appeared on the face of the record that the action was not maintainable, as such objection goes to the merits and is not a mere matter of form.

2. *Georgia*. — *Beall v. Blake*, 13 Ga. 217.

Illinois. — *People v. Cloud*, 50 Ill. 439.

Missouri. — *State v. Lichliter*, 95 Mo. 402.

New York. — *People v. Albany*, etc., R. Co., 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 131; *Persse*, etc., *Paper Works v. Willet*, 14 Abb. Pr. (N. Y. Super. Ct.) 119; *Low v. Graydon*, 14 Abb. Pr. (N. Y. Supreme Ct.) 443; *New York v. Lyons*, 24 How. Pr. (N. Y. C. Pl.) 280; *Strong v. Strong*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 233, 4 Robt. (N. Y.) 621.

A Motion to Quash service is waived by a prior plea in abatement on the same ground. *Grand Lodge Brotherhood v. Cramer*, 164 Ill. 9.

A motion to quash for defects in the writ or service thereof must be made within the time limited for pleading in abatement. *Mace v. Woodward*, 38 Me. 426; *Smith v. Davis*, 38 Me. 459; *State v. Gittings*, 35 Md. 169; *Com. v. Schaffner*, 146 Mass. 512; *Crawford v. Crawford*, 44 N. H. 428; *Howard v.*

Crawford, 21 Tex. 399; *Pollard v. Wilder*, 17 Vt. 48.

A Motion Raising Questions Already at Issue upon the pleadings will not be entertained. *Gruler v. McRoberts*, 48 Mich. 316; *Mahan v. Myers*, 34 Me. 34, holding that it is irregular upon motion to grant leave to summon any additional promisors pending the issue of a plea in abatement for the nonjoinder.

Waiver by Appeal. — Irregularities known at the time of taking an appeal are waived as grounds for relief on motion by appeal. *People v. Albany*, etc., R. Co., 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 131, *explaining Clumpha v. Whiting*, 10 Abb. Pr. (N. Y. Supreme Ct.) 448. In the former case the court said: "This principle of waiver of irregularities in proceedings in actions, on the part of any party who might have taken advantage of them had he chosen to do so, by moving in the action afterwards as though the proceedings had been regular, has been so long established in practice and is so well settled that it admits of no doubt or question. The exception is that the waiver does not extend to irregularities of which the party was wholly ignorant when the subsequent steps were taken." The court then proceeded to *distinguish Clumpha v. Whiting*, 10 Abb. Pr. (N. Y. Supreme Ct.) 448, by saying that in that case the defendant had moved to set aside the proceedings for irregularity, and that this motion was still pending and undisposed of at the time of the subsequent appeal, and it was said that a party after moving and taking advantage of the irregularity may appeal to save that right also by preventing the time for appealing from expiring before the motion could be heard. This gives a party the benefit of all the remedies which the law affords, if he is diligent in taking his advantage in time.

3. *Savage v. Challiss*, 4 Kan. 319; *Sheehan*, etc., *Transp. Co. v. Sims*, 36 Mo. App. 224; *State v. Roper*, 46 Neb. 724, holding, further, that filing an an-

ing more definite and certain,¹ or to compel plaintiff to elect upon which count or cause of action he intends to rely,² should be made before pleading over.³

Statutes and Rules of Court. — The time for making motions in the various states is largely regulated by statutes and rules of court,⁴ which should be consulted by the practitioner and strictly observed.⁵

Extending Time. — Courts are sometimes authorized to extend the time within which motions may be made.⁶

swer under protest in complications with an order of court is not a waiver.

In *Bank of Charleston Nat. Banking Assoc. v. Zorn*, 14 S. Car. 444, it was held that a motion made at the trial to strike out part of an answer might be entertained if the plaintiff did not object. See also *State v. Price*, 15 Mo. 375, holding that a motion to strike out counts from a declaration must be made before the jury is sworn or the trial submitted to the court. But see *Sheehan, etc., Transp. Co. v. Sims*, 36 Mo. App. 224, holding that a motion to strike out part of a petition is too late after the cause is called for trial.

1. *Young v. Lynch*, 66 Wis. 514, holding that such a motion may be made at any time before the time for answering, either as allowed by law or by a stipulation extending that time, has expired.

After Going to Trial such a motion comes too late. *Nischke v. Wirth*, 66 Wis. 319; *Autenrieth v. St. Louis, etc., R. Co.*, 36 Mo. App. 254.

2. *Gribble v. McKleroy*, 14 La. Ann. 805; *Stevenson v. Judy*, 49 Mo. 227. But see *Muzzy v. Ledlie*, 23 Wis. 445, holding that such a motion may be made after the time to answer has been extended.

3. **Answer Unnecessary Pending Motions.** — A motion going to the merits of the petition will dispense with the necessity of answering until the motion is disposed of. *Hill v. Meyer*, 47 Mo. 585.

A Motion for the "Further Account" which the *New York* statute permits defendant to call for may be enforced by motion after all the pleadings are put in, as the object of such account is not merely to enable the opposite party to put in the proper answer or reply, but also to enable such party to see what items are claimed and to be prepared for trial. The account may be called for when the party has either

object in view. *Yates v. Bigelow*, 9 How. Pr. (N. Y. Supreme Ct.) 186.

4. **Motions to Strike.** — For example, in *New York*, by rule of court, notice of a motion to strike out matter from a pleading must be served within twenty days after the service of the pleading. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657; *Gibson v. Gibson*, 68 Hun (N. Y.) 381; *Siriani v. Deutsch*, 12 Misc. Rep. (N. Y. Super. Ct.) 213.

Motions for New Trials are ordinarily required by statute to be made at the trial term, and frequently within a few days of the verdict of decision. See article NEW TRIAL. See also *Stearnes v. Richmond*, 9 Conn. 112; *William H. T. v. State*, 18 Fla. 883; *Dupuis v. Thompson*, 16 Fla. 69; *Sedgwick v. Dawkins*, 16 Fla. 198; *Long v. Hughes*, 1 Duv. (Ky.) 387; *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411.

5. **Notice Within Time of Motion to Be Made After Time.** — In *Spencer v. Branham*, 109 Cal. 336, it was held that when a motion must be made upon notice within the given period, a party cannot extend his own time by filing a written motion within the period and giving notice of the hearing at a time after the period has expired. The court said: "Here, although the attention of the court may have been called to it, no present action was requested. If the motion had been made, had the court continued the hearing for argument or for further evidence, it would not have lost jurisdiction, for in such case the application would have been made in time."

6. *Bailey v. Drake*, 12 Wash. 99, holding that under Laws of Wash. 1893, c. 127, § 24, the court may make an order *nunc pro tunc* extending the time within which a motion may be filed.

Where a motion for a new trial must be made within four days after the

In Vacation. — Many motions and orders may be made in vacation.¹

VII. PLACE OF MOVING — 1. Generally. — The place of making motions is largely regulated in the various states by statutes and rules of court, which must be consulted in each case. Ordinarily motions must be made in the court wherein the action in which the motion is made is pending.² Where the statute authorizes a motion to be made to a court or a judge thereof, the motion may be made either to the court or to the judge at chambers.³ By statute motions may sometimes be made before the judge of another circuit.⁴ Motions which should properly be made in the trial court cannot be made for the first time on appeal.⁵

2. In New York — a. GENERAL RULES — (1) Court or Judge — Effect of Statute. — Where the statute provides that a particular order shall be made by the court, a motion for such an order must be made to the court as distinguished from the judge thereof,⁶

verdict, and during the same term, a motion in arrest of judgment made at such term cannot be changed by amendment or otherwise at a subsequent term into a motion for new trial. *Sedgwick v. Dawkins*, 16 Fla. 198.

1. See article CHAMBERS AND VACATION, vol. 4, p. 336. See also *In re Gill*, 20 Wis. 686, wherein it is held that except in cases specified by statute the courts in *Wisconsin* are always open for motions and orders made by circuit or county judges, or orders of court commissioners in vacation operate as orders of the court.

2. *Thomas v. Raymond*, 4 S. Car. 347, holding that a motion in the cause to set aside the decree therein can be made only in the circuit where the action is pending. See generally *Ross v. Ross*, 10 Daly (N. Y.) 314; *Caudle v. Moran*, 119 N. Car. 432.

"Orders can only be made which affect the substantial rights of a party to an action in the action itself." *Dupignac v. Van Buskirk*, 44 Hun (N. Y.) 45, 12 Civ. Pro. Rep. (N. Y.) 351. See also *Cooke v. Smith*, 7 Hill (N. Y.) 186; *Dederick v. Hoysradt*, 4 How. Pr. (N. Y. Supreme Ct.) 350, 3 Code Rep. (N. Y.) 86; *Jackson v. Sheldon*, 9 Abb. Pr. (N. Y. Supreme Ct.) 127; *Alcott v. Davison*, 2 How. Pr. (N. Y. Supreme Ct.) 44, holding that the papers should be entitled in all the causes.

3. *Cureton v. Dargan*, 12 S. Car. 125. See also *infra*, VII. 2. a. (1) *Court or Judge*.

4. *Swepson v. Call*, 13 Fla. 337, holding that an order made by the judge of another circuit is *pro hac vice* the order

of the court in which the cause is pending, and such order must be filed therein.

5. *California*. — *Gordon v. Clark*, 22 Cal. 534.

Louisiana. — *Ledoux v. Smith*, 4 La. Ann. 482; *Tear v. Chambers*, 2 La. Ann. 870; *Gamble v. McClintock*, 9 La. Ann. 160.

Massachusetts. — *Com. v. Hallahan*, 143 Mass. 168; *Com. v. Legassy*, 113 Mass. 10; *Com. v. Doherty*, 116 Mass. 13.

South Carolina. — *State v. Rankin*, 3 S. Car. 438; *Craven v. Rose*, 3 S. Car. 72; *Hanks v. Ingram*, 2 Bailey L. (S. Car.) 440.

Washington. — *State v. Moss*, 13 Wash. 42, affirmed on rehearing in 13 Wash. 46.

Wisconsin. — *Northwestern Iron Co. v. Central Trust Co.*, 90 Wis. 580.

Chambers in Vacation. — As to motions and orders which may be made in chambers or vacation, see article CHAMBERS AND VACATION, vol. 4, p. 336.

6. *Disbrow v. Folger*, 5 Abb. Pr. (N. Y. Supreme Ct.) 53; *Matter of Bookhout*, 21 Barb. (N. Y.) 348. See also *People v. Haverstraw*, 151 N. Y. 75, wherein the distinction between a judge and a court is drawn.

Order of Judge Cannot Be Treated as a Court Order. — In *Wood v. Kimball*, 9 Abb. Pr. (N. Y. Supreme Ct.) 419, 18 How. Pr. (N. Y.) 163, an order entitled at chambers, but made by a judge holding chambers and special term at the same time, was deemed an order made out of court, and set aside because not made upon the notice required in such cases. The court said: "It seems idle

and conversely, when the statute provides that an order shall be made by a judge, the motion therefor should be made to the judge and not to the court.¹

Contested Motions must, as a general rule, be made to the court,² unless otherwise ordered.³

Ex Parte Motions may, as a rule, be made before a judge.⁴

to say that the same judge, sitting at the same time in special term and chambers, may make an order valid if he states it to be made in court, and that it is void if made by him in chambers. Yet such is the distinction made in the code." *Citing Steam Nav. Co. v. Weed*, 8 How. Pr. (N. Y. Supreme Ct.) 49, and *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 184. *Compare Territory v. Shearer*, 2 Dakota 332, wherein the words "By the court," preceding the judge's signature to an order granted by him out of court, were regarded as surplusage.

1. See *Heishon v. Knickerbocker L. Ins. Co.*, 77 N. Y. 278, wherein it was held, under a statute authorizing a judge of the court wherein an action was pending to make an order for the examination of the defendant, that the court at special term had no power to make such an order. In the opinion it was said: "It matters not that the examination was ordered to be taken before the same judge who held the special term. It was a court order, and not the order of the judge."

Caption and Direction to Enter — Effect. — Upon motion to vacate an attachment on the ground that the order for service of summons by publication was made by the court and not by the judge, neither the caption of the order, "At a Special Term," etc., nor the direction to enter it, is conclusive as to whether the order was made by the court or the judge; but the fact will be considered and will be determined. *Phinney v. Broschell*, 19 Hun (N. Y.) 116, *affirmed* in 80 N. Y. 544.

If an order is signed by a judge with his full name, with no directions to enter it, and it is not entered, it is a judge's order, and not a special term order, although it has a caption. *Atlantic, etc., Tel. Co. v. Baltimore, etc.*, R. Co., 46 N. Y. Super. Ct. 377.

2. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439.

Generally, for illustrations of motions which must be made before the court instead of before the judge, see *Doty*

v. Brown, 3 How. Pr. (N. Y. Supreme Ct.) 375; *Hawkins v. Dutchess, etc.*, *Steamboat Co.*, 7 Cow. (N. Y.) 467; *Davenport v. Sniffen*, 1 Barb. (N. Y.) 223; *Matter of Bookhout*, 21 Barb. (N. Y.) 348. *Compare Sisson v. Lawrence*, 25 How. Pr. (N. Y. Supreme Ct.) 435.

Nonenumerated Motions must be heard at special term except when otherwise directed by law. *Hun's Court Rules*, Rule 38.

Consent of Parties. — Contested motions requiring notice cannot be heard at a special term adjourned by the justice holding it to his chambers, unless by the consent of all the parties; the fact that the order adjourning the court to the chambers of the justice stated that it was "for *ex parte* business only" does not prevent the justice from hearing, if he sees fit, contested motions brought on by consent. *Matter of Wadley*, 29 Hun (N. Y.) 12.

Exceptional Rule. — Motions in the first department are governed by rules peculiar to that department. These are reserved for separate treatment in a succeeding section. See *infra*, VII. 2. *b. (1) Rules in First District.*

3. *Mayer v. Apfel*, 2 Sweeny (N. Y.) 729. See also *Hun's Court Rules*, Rule 38.

4. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439, wherein the court said: "Applications to the court, or to a judge, denominated motions, obviously divide themselves into two classes. One are *ex parte* motions, or applications for an order — such as the judges are accustomed to make at chambers, as orders of arrest, to stay proceedings, to extend time to answer, and the like. The other class are special motions, or applications for an order, made on notice to the opposite party, or on an order to show cause. Unless where the code expressly provides otherwise, as in §§ 225 and 247, this last class of motions can only be made to the court. The former class are made to any judge at chambers."

Ex parte orders may be granted by

(2) *General or Special Term—Appellate Division.*—Until recently the New York Supreme Court consisted of both general and special terms, but both branches together constituted but one court, and accordingly where a statute conferred power to make an order upon the Supreme Court, such power might have been exercised by the court at either term in the absence of some statute expressly restricting such power to one or the other branch of the court.¹ But although this power existed, the established rule of practice required all motions to be made in the first instance at special term except such as were expressly directed or permitted to be made elsewhere, and except also such as were incidental to proceedings at the general term.² The general term was practically confined to the exercise of appellate jurisdiction.³

any justice of the court, wherever he may be found, within the territorial limits in which he is authorized to do official acts. *Cobb v. Lackey*, 2 Abb. Pr. (N. Y. Super. Ct.) 158. Order for payment of costs may be made by the judge. *Hulsaver v. Wiles*, 11 How. Pr. (N. Y. Supreme Ct.) 446. And see generally *Sisson v. Lawrence*, 25 How. Pr. (N. Y. Supreme Ct.) 435.

1. *Salmon v. Gedney*, 75 N. Y. 479; *Tracy v. Talmadge*, 1 Abb. Pr. (N. Y. Supreme Ct.) 460, wherein it was held that a motion to set aside a report of referees might be made either at general or special term, according to convenience. In this case, Mitchell, C. J., after stating the practice and the statutes regulating to which term the motion should be made in various classes of cases, said: "This variability in the law, and this want of uniformity of purpose at any one time, as to the class of cases to be heard at either term, show that there was never any definite purpose in our legislature that all matters in the nature of an appeal should be first heard at the general term, or that all matters not of that character should be heard at the special term only." See also generally *People v. Nichols*, 79 N. Y. 582; *People v. Robinson*, 25 How. Pr. (N. Y. Supreme Ct.) 345; *Union Mills First Nat. Bank v. Clark*, 42 Hun (N. Y.) 90; *Strong v. Hardenburgh*, 25 How. Pr. (N. Y. Supreme Ct.) 438, holding that a motion might be made at special term to open a default taken on appeal at the general term.

2. *Illustrations of Motions Properly Made at Special Term.*—*Larkin v. Steele*, 25 Hun (N. Y.) 254; *Griswold v. Van Deusen*, 2 E. D. Smith (N. Y.)

178; *Brush v. Mullany*, 12 Abb. Pr. (N. Y. Supreme Ct.) 344; *Mayer v. Apfel*, 2 Sweeny (N. Y.) 729; *Butler v. Niles*, 3 Robt. (N. Y.) 644, 28 How. Pr. (N. Y.) 181; *Melville v. Mathewson*, 51 N. Y. Super. Ct. 506; *Matter of Walker*, 2 Duer (N. Y.) 655; *Davis v. Duffie*, 8 Bosw. (N. Y.) 691; *Titus v. Relyea*, 8 Abb. Pr. (N. Y. Supreme Ct.) 177; *Strong v. Hardenburgh*, 25 How. Pr. (N. Y. Supreme Ct.) 438.

Nonenumerated and Contested Motions were required to be made at special term unless otherwise directed by law. *Hun's Court Rules*, rule 38; *Mayer v. Apfel*, 2 Sweeny (N. Y.) 729.

In *Barnum v. Seneca County Bank*, 6 How. Pr. (N. Y. Supreme Ct.) 82, it was held that the rule requiring nonenumerated motions to be heard at special term, except when otherwise directed by law (*Hun's Court Rules*, rule 38), did not require a motion to dismiss an appeal from a decision at circuit or special term to be made at the special term; but that, on the contrary, such a motion should be made to the general term, as such interference on the part of the special term would subvert the appellate jurisdiction. To the same effect is *Harris v. Clark*, 10 How. Pr. (N. Y. Supreme Ct.) 415.

3. *Melville v. Mathewson*, 51 N. Y. Super. Ct. 506, wherein the court said: "It is the plain intention of the Code of Civil Procedure, and of the Rules of Practice, that the general term of this court should exercise only an appellate jurisdiction." *Citing Matter of Walker*, 2 Duer (N. Y.) 655. But see *Sherman v. Chittenden*, 1 How. Pr. (N. Y. Supreme Ct.) 91, and *Williams v. Raymond*, 2 How. Pr. (N. Y. Supreme Ct.) 50.

By recent constitutional amendment, the courts of New York have been reorganized; the general terms have been abolished, and in their place is erected the Appellate Division of the Supreme Court with the jurisdiction formerly exercised by the General Terms.¹ The effect of these changes upon the matter under discussion has not yet been reflected in the decisions.²

(3) *What County or Judge.* — A Motion upon Notice, in an action in the Supreme Court, must be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable.³ But this rule does not apply to a case where it is

1. See Const. N. Y., art. vi., Amendment of 1894, ratified Nov. 6, 1894.

2. *Sturz v. Fischer*, 2 N. Y. Ann. Cas. 365, and *Matter of Van Ness*, 21 Misc. Rep. (N. Y. Supreme Ct.) 249, were both decided subsequent to the constitutional changes above mentioned, and in each instance it was held that the motions in question were properly made to the special term.

3. N. Y. Code Civ. Pro., § 769; *Erisman v. Pidcock*, 62 How. Pr. (N. Y. Supreme Ct.) 327; *Peebles v. Rogers*, 5 How. Pr. (N. Y. Supreme Ct.) 208; *Inglehart v. Johnson*, 6 How. Pr. (N. Y. Supreme Ct.) 80; *Gould v. Chapin*, 4 How. Pr. (N. Y. Supreme Ct.) 185, 2 Code Rep. (N. Y.) 107; *Sturgess v. Weed*, 13 How. Pr. (N. Y. Supreme Ct.) 130; *Wells v. Jones*, 2 Abb. Pr. (N. Y. Supreme Ct.) 20; *Bangs v. Selden*, 13 How. Pr. (N. Y. Supreme Ct.) 163; *Askins v. Hearn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 184; *Johnston v. Bryan*, 5 How. Pr. (N. Y. Supreme Ct.) 355; *Davison v. Powell*, 13 How. Pr. (N. Y. Supreme Ct.) 287; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y. Supreme Ct.) 367; *Beardsley v. Dickerson*, 4 How. Pr. (N. Y. Supreme Ct.) 81; *Newcomb v. Reed*, 14 How. Pr. (N. Y. Supreme Ct.) 100; *McCarthy v. McCarthy*, 54 How. Pr. (N. Y. Supreme Ct.) 97; *Phillips v. Wheeler*, 67 N. Y. 104; *Silver Creek Bank v. Browning*, 16 Abb. Pr. (N. Y. Supreme Ct.) 272. But see *Moulton v. Beecher*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 193.

The word "motion" in this section is used in the narrow sense of nonenumerated motions. *Christy v. Kiersted*, 47 How. Pr. (N. Y. Supreme Ct.) 467.

A Motion Is Presumed to Have Been Made in the Proper County. — If it is not so made, it may be shown in opposition or on motion to vacate. *Newcomb v. Reed*, 14 How. Pr. (N. Y. Supreme Ct.) 100. But see *Schemerhorn v. Develin*, 1 Code Rep. (N. Y. Supreme

Ct.) 13; *Dodge v. Rose*, 1 Code Rep. (N. Y. Supreme Ct.) 123.

Order in Wrong County — Void or Voidable. — Whether an order made in improper county would be void, see *Newcomb v. Reed*, 14 How. Pr. (N. Y. Supreme Ct.) 100; *Blackmar v. Van Inwager*, 5 How. Pr. (N. Y. Supreme Ct.) 367; *Geller v. Hoyt*, 7 How. Pr. (N. Y. Supreme Ct.) 265; *Pinckney v. Hagerman*, 4 Lans. (N. Y.) 374, affirmed 53 N. Y. 31; *Erlsman v. Pidcock*, 62 How. Pr. (N. Y. Supreme Ct.) 327; *Harris v. Clark*, 10 How. Pr. (N. Y. Supreme Ct.) 415; *Bangs v. Selden*, 13 How. Pr. (N. Y. Supreme Ct.) 374.

County in Which Triable. — The county designated in the summons and complaint is the one where the action is triable. *Gould v. Chapin*, 4 How. Pr. (N. Y. Supreme Ct.) 185; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y. Supreme Ct.) 367; *Johnston v. Bryan*, 5 How. Pr. (N. Y. Supreme Ct.) 355; *Davison v. Powell*, 13 How. Pr. (N. Y. Supreme Ct.) 287; *Erisman v. Pidcock*, 62 How. Pr. (N. Y. Supreme Ct.) 327; *Inglehart v. Johnson*, 6 How. Pr. (N. Y. Supreme Ct.) 80.

The county "where the action is triable," means the county which has been fixed as the place of trial, either by being named by plaintiff in his complaint, or by being changed by court. It does not mean any county in which plaintiff might have laid the place of trial. *Askins v. Hearn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 184; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y. Supreme Ct.) 367; *Bangs v. Selden*, 13 How. Pr. (N. Y. Supreme Ct.) 163, 374, overruling *Peebles v. Rogers*, 5 How. Pr. (N. Y. Supreme Ct.) 208.

Where the parties to an action reside in different judicial districts, and in counties not adjoining, and plaintiff names the county of his residence as the place of trial, that is the county in which the action is triable, until the

specially provided by law that a motion may be made in the county where the applicant, or other person to be affected thereby, or the attorney resides.¹

Motions Without Notice.—Where an order in an action may be made by a judge of the court, out of court, and without notice,

place of trial is changed by an order of the court. *Askins v. Hearn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 184; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y. Supreme Ct.) 367.

Where no place of trial is mentioned in the complaint, the motion may be made in any district within which the action is properly triable. *Hotchkiss v. Crocker*, 15 How. Pr. (N. Y. Supreme Ct.) 336.

"In *Wheeler v. Maitland*, 12 How. Pr. (N. Y. Supreme Ct.) 35, it is held that the appointment of a referee residing in a different county does not change the place of trial; but the learned judge who gave the opinion in that case says that it is pretty clear that the referee could not, without the assent of the parties, try the cause elsewhere than in the county named as the place of trial." *Scrugham, J.*, in *Brush v. Mullany*, 12 Abb. Pr. (N. Y. Supreme Ct.) 344. See also *Rinn v. Astor F. Ins. Co.*, 59 N. Y. 143.

Exceptional Rule in First District.—See *infra*, VII. 2. b. (1) *Rules in First District*.

After Judgment.—Section 769 applies only to motions made before judgment. After judgment a motion in the Supreme Court may be made in any county. But the papers used upon the motion must be filed in the county where the judgment was entered (General Rules No. 3), within ten days after the making of the order; and if not so filed, the opposing party may make a motion to vacate the order, in such county. *Curtis v. Greene*, 28 Hun (N. Y.) 294, citing *Rice v. Ehle*, 65 Barb. (N. Y.) 185.

The provision of the Code (sub. 4, § 401; Code Civ. Proc., § 769), that motions must be made in the district in which the action is triable, or in an adjoining county, etc., refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure. *Phillips v. Wheeler*, 67 N. Y. 104.

Consent.—A motion made in the proper county may, by consent, be heard and determined in any county in the state, even where it could not

otherwise have been properly made. *Rice v. Ehle*, 65 Barb. (N. Y.) 185, reversed on another point in 55 N. Y. 518. And the order thus made is reversible as if it were made in the proper county. *Rice v. Ehle*, 65 Barb. (N. Y.) 185.

But consenting to the hearing of the motion in another place, does not waive the objection that the motion was noticed for a wrong place. *McCarthy v. McCarthy*, 54 How. Pr. (N. Y. Supreme Ct.) 97, reversed on another point in 13 Hun (N. Y.) 579.

A contested motion cannot be heard at a special term adjourned by the justice holding it to his chambers, except by consent of all the parties. *Matter of Wadley*, 29 Hun (N. Y.) 12.

Proper County in Particular Cases.—An order is not without jurisdiction, although at the same special term an order was made changing the place of trial to the proper county. *Elting v. Dayton*, (Supreme Ct.) 4 N. Y. St. Rep. 481, appeal dismissed in 106 N. Y. 666.

Motions for allowance in cases tried by referee should, in general, be made in the county where the judgment was rendered. *Niver v. Rossman*, 5 How. Pr. (N. Y. Supreme Ct.) 153.

A motion for a new trial must be made within the department where the cause is laid, notwithstanding the above provision as to adjoining counties. *Lord v. Wilkinson*, 66 Barb. (N. Y.) 607.

1. N. Y. Code Civ. Pro., § 769; *Cunningham v. Widing*, 5 Abb. Pr. (N. Y. Supreme Ct.) 413.

Where No Place of Trial Is Fixed.—If the summons and complaint are defective in not fixing a place for trial of the action, the defendant may move to strike out complaint for irregularity in the district where he resides as well as in that in which the plaintiff resides, as the action is in fact triable in either district. *Hotchkiss v. Crocker*, 15 How. Pr. (N. Y. Supreme Ct.) 336. See also *Johnston v. Bryan*, 5 How. Pr. (N. Y. Supreme Ct.) 355; *Davison v. Powell*, 13 How. Pr. (N. Y. Supreme Ct.) 287.

and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the state; or, except to stay proceedings after verdict, report, or decision, by a justice of the supreme court, or by a judge of a superior city court within the city wherein his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides.¹

1. N. Y. Code Civ. Pro., § 772; *Hull v. Hart*, 27 Hun (N. Y.) 21; *Silver Creek Bank v. Browning*, 16 Abb. Pr. (N. Y. Supreme Ct.) 272; *Adams v. Sage*, 13 How. Pr. (N. Y. Supreme Ct.) 18; *Sisson v. Lawrence*, 16 Abb. Pr. (N. Y. Supreme Ct.) 259 note, 25 How. Pr. (N. Y.) 435; *Otis v. Spencer*, 8 How. Pr. (N. Y. Supreme Ct.) 171; *Hazard v. Wilson*, 3 Abb. N. Cas. (N. Y. C. Pl.) 50; *Marks v. King*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 374; *Askins v. Hearn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 184; *Chubbuck v. Morrison*, 6 How. Pr. (N. Y. Supreme Ct.) 367.

"The limitation, contained in the last section, of the county judges, who may make an order, does not apply to a case where it is prescribed in this act, in general words, that a particular order may be made by a county judge, or by any county judge." N. Y. Code Civ. Pro., § 773.

"Where notice is not required to be given, there the application is not within the terms of the restraint created by this section [§ 769], and it may be made elsewhere, for the special term, when not restrained by statutory provisions, may hear and dispose of applications for orders in the course of legal proceedings, wherever it may at the time be held. The jurisdiction in such a case is necessarily of a general character, and not restricted to the district in which the court may be held. This follows from the nature of the court itself, which is authorized to exercise the authority of the Supreme Court of the state; and this conclusion has, to a certain extent, been sanctioned by the cases of *Rice v. Ehle*, 65 Barb. (N. Y.) 185; *Tracy v. Talmadge*, 1 Abb. Pr. (N. Y. Supreme Ct.) 463; *Wells v. Jones*, 2 Abb. Pr. (N. Y. Supreme Ct.) 20." *Erismann v. Pidcock*, 62 How. Pr. (N. Y. Supreme Ct.) 327.

Vacation and Term Time.—Motions upon notice, or orders to show cause, can be moved in vacation, in the absence of the adverse party, only before the justice who sits at chambers, on

the day for which the notice is given or the order to show cause is returnable. Defaults for not making such motions can be moved before such justice only. Chambers, during vacation, is regularly held in the general term room. During term time, motions on notice, and orders to show cause, in the absence of the opposing attorney, or counsel, can be moved only before the justice who holds the special term. Motions to discharge such notices or orders to show cause, on account of the default of the party serving them to bring them on, can be made before such justice only. When the attorneys or counsel of both parties attend, they may be heard before any justice of the court who is disengaged. But there is but one place where defaults can be taken on the failure of the attorney serving a notice or order to show cause to bring on his motion, or on the failure of the attorney on whom it is served to appear and oppose. *Cobb v. Lackey*, 2 Abb. Pr. (N. Y. Super. Ct.) 158.

Superior City Court.—Under the provisions of Code Civ. Pro., § 772, a judge of the Superior City Court could make an order in a cause pending in any court which a judge of that court could make out of court, provided it was made in the city where his court was located. *Evert v. Duden*, 5 N. Y. Month. L. Bul. 88.

By the new constitution, Superior City Courts have been abolished from and after January 1, 1896, and the actions and proceedings pending in such courts transferred to the Supreme Court. Const., art. 6, § 5 (Amendment of Convention of 1894, ratified Nov. 6, 1894).

Transfer of Motion.—"Where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that

Motion in Several Actions. — Where one motion is necessarily made and entitled in several actions pending in different counties and judicial districts, the rules just given do not apply.¹

b. EXCEPTIONAL RULES — (1) *Rules in First District.* — Owing to the press of business in the first judicial district, it has been excepted from the operations of the general rules which have been given, and motions in this district are governed by special rules which do not prevail elsewhere.

Court or Judge. — Thus in the first judicial district a motion which elsewhere must be made in court may be made to a judge out of court, except for a new trial on the merits.²

What County or District. — So also where an action is triable in the first district a motion upon notice must be made in that district, and cannot be made in an adjoining county or elsewhere.³ And conversely, where an action is triable elsewhere than in the first

time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made." N. Y. Code Civ. Pro., § 771.

1. *Phillips v. Wheeler*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 242, 2 Hun (N. Y.) 603, 6 Thomp. & C. (N. Y.) 306, affirmed 67 N. Y. 104, decided under Code, § 401, which is in substance the same as Code Civ. Pro., § 769, and holding that the case was governed by Rule 97 (Hun's Court Rules, Rule 84), applying to cases not regulated by statute. See generally as to motions which concern several actions, *Bennett v. Leroy*, 5 Abb. Pr. (N. Y. Super. Ct.) 156; *Cooke v. Smith*, 7 Hill (N. Y.) 186; *Alcott v. Davison*, 2 How. Pr. (N. Y. Supreme Ct.) 44; *Dederick v. Hoysradt*, 4 How. Pr. (N. Y. Supreme Ct.) 350, 3 Code Rep. (N. Y.) 86; *Jackson v. Sheldon*, 9 Abb. Pr. (N. Y. Supreme Ct.) 127.

Consolidation. — A motion to consolidate may be made anywhere in the district containing the county in which either action is triable. *Phillips v. Wheeler*, 67 N. Y. 104; *Percy v. Seward*, 6 Abb. Pr. (N. Y. Supreme Ct.) 326. But where one of the actions was in the first district and the other in Kings county, an order consolidating the actions made in Kings county was held to be contrary to the prohibition of the statute relating to actions triable in the first district. *Dupignac v. Van Buskirk*, 44 Hun (N. Y.) 45, 12 Civ. Pro. Rep. (N. Y.) 351. See *infra*, VII.

2. *b. (1) Rules in First District.*

3. Code of Civ. Pro. (N. Y.), § 770. See also Code of Pro., § 401; *Bouci-*

cault v. Boucicault, 21 Hun (N. Y.) 431; *Lowber v. New York*, 5 Abb. Pr. (N. Y. Supreme Ct.) 325; *Disbrow v. Folger*, 5 Abb. Pr. (N. Y. Supreme Ct.) 53; *Boegler v. Eppley*, 40 Hun (N. Y.) 523; *Lachenmeyer v. Lachenmeyer*, 26 Hun (N. Y.) 542.

In the first district an order made by a judge at chambers operates as an order of the court. *Disbrow v. Folger*, 5 Abb. Pr. (N. Y. Supreme Ct.) 53. Besides, an order made at chambers in this district is always made during the term of the court, as a special term is always held during the hours of attending at chambers. *Main v. Pope*, 16 How. Pr. (N. Y. Supreme Ct.) 271.

3. Code Civ. Pro. (N. Y.), § 769; *Dupignac v. Van Buskirk*, 44 Hun (N. Y.) 45; *Hull v. Hart*, 27 Hun (N. Y.) 21; *Sumner v. Osborn*, 22 Hun (N. Y.) 13; *Lord v. Wilkinson*, 66 Barb. (N. Y.) 607; *Curtis v. Greene*, 28 Hun (N. Y.) 294; *Cunningham v. Widing*, 5 Abb. Pr. (N. Y. Supreme Ct.) 413; *Phillips v. Wheeler*, 67 N. Y. 104, affirming 2 Hun (N. Y.) 603; *Wells v. Jones*, 2 Abb. Pr. (N. Y. Supreme Ct.) 20; *Darrow v. Morgan*, 65 N. Y. 333; *Hun v. Salter*, 92 N. Y. 651; *Thompson v. Thompson*, 52 Hun (N. Y.) 117, 16 Civ. Pro. Rep. (N. Y.) 317; *Fort Edward Nat. Bank v. Goodwin*, 6 Hun (N. Y.) 481; *Phoenix Foundry, etc., Co. v. North River Constr. Co.*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 106; *Attrill v. Rockaway Beach Imp. Co.*, 25 Hun (N. Y.) 377.

Ex Parte Motions. — The rule stated in the text applies only to motions made upon notice, and an order which may be made *ex parte* may be moved

district, a motion upon notice cannot be made in the first district.¹

Place Specially Designated by Law. — These general rules for the first district, like all other general rules, must, of course, yield in a case where it is specially prescribed by law that a motion can be made in a particular place.²

(2) **Rules as to Vacating or Modifying Orders.** — The exceptional rules as to where and before whom motions to vacate or modify orders must be made rest upon the principle and policy that the decisions or orders of an absent judge ought not to be interfered with, or reviewed, or revised by another judge of only co-ordinate authority.³

Order of Judge. — A motion to vacate or modify an order made by a judge out of court should be made either to the judge who made the order,⁴ or to the court wherein the action is pending,

for before a judge out of court in any part of the state. *Hull v. Hart*, 27 Hun (N. Y.) 22.

1. Code Civ. Pro. (N. Y.), § 769; *Canal Bank v. Harris*, 19 Barb. (N. Y.) 587, 1 Abb. Pr. (N. Y.) 192, 10 How. Pr. (N. Y.) 452; *Harris v. Clark*, 10 How. Pr. (N. Y. Supreme Ct.) 415; *Wheeler v. Maitland*, 12 How. Pr. (N. Y. Supreme Ct.) 35; *Wheeler v. Millar*, 61 How. Pr. (N. Y. Supreme Ct.) 396. See also *Fort Edward Nat. Bank v. Goodwin*, 6 Hun (N. Y.) 481.

The fact that a cause triable in another county has been referred to a referee in the first district does not change the place of trial of a cause and does not authorize a motion in such cause to be made in the first district. *Wheeler v. Maitland*, 12 How. Pr. (N. Y. Supreme Ct.) 35.

Exceptions. — A motion to require an attorney to give up to his client papers in a suit is not necessarily a motion in such suit, and may be made in the first district although the action is triable elsewhere. *Cunningham v. Widing*, 5 Abb. Pr. (N. Y. Supreme Ct.) 413.

In *Wells v. Jones*, 2 Abb. Pr. (N. Y. Supreme Ct.) 20, it was held that an application for an order of supersedeas under 2 Rev. Stat. 556, §§ 36, 37, may be made to a judge of the first district, although the action is triable elsewhere. It is a motion excepted from section 401 of the code by section 471, which preserves the existing statutory remedies not inconsistent. Compare *Sturges v. Weed*, 13 How. Pr. (N. Y. Supreme Ct.) 130.

2. See Code Civ. Pro. (N. Y.), §§ 769, 773.

3. *Morris v. Brower*, 4 Sandf. (N. Y.) 701; *Ryle v. Harrington*, 4 Abb. Pr. (N. Y. Supreme Ct.) 421, 14 How. Pr. (N. Y.) 59; *Jackson v. Fassett*, 9 Abb. Pr. (N. Y. Supreme Ct.) 137, 17 How. Pr. (N. Y.) 453; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y. Super. Ct.) 141; *Mayer v. Apfel*, 2 Sweeny (N. Y.) 729; *Hart v. Butterfield*, 3 Hill (N. Y.) 456.

The legislature never intended to impose upon the judges the duty or confer the right to review at chambers each others' *ex parte* orders. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439.

Notice of Motion. — As to when such motions must be made upon notice and when they may be made *ex parte*, see *infra*, IX. *Notice of Motion*.

4. *Herzig v. Metzger*, 62 How. Pr. (N. Y. Marine Ct.) 355; *Marks v. King*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 374; *Ward v. Sands*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 60; *Levy v. Loeb*, 5 Abb. N. Cas. (N. Y. Super. Ct.) 157; *Peck v. Yorks*, 41 Barb. (N. Y.) 547, affirming 24 How. Pr. (N. Y.) 363; *Morehouse v. Yeager*, 41 N. Y. Super. Ct. 306; *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439.

In *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y. Supreme Ct.) 403, an *ex parte* order vacating a stay of proceedings granted by another judge was set aside on the ground that an order can be vacated without notice only by the judge who made the order. See also *Swift v. Wylie*, 5 Robt. (N. Y.) 641.

As to necessity of notice of such motion see *infra*, IX. *Notice of Motion*.

whether held by the judge who made the order or by another judge.¹

Court Orders. — A motion to vacate or modify an order made by the court as distinguished from the judge thereof should be made to the court in the same district,² and such court has power to vacate or amend orders made at a special term of the same court, although held by a different judge.³ But, in accordance with the

1. *West Side Bank v. Pugsley*, 12 Abb. Pr. N. S. (N. Y. Ct. App.) 28, 47 N. Y. 368; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Genesee Bank v. Spencer*, 15 How. Pr. (N. Y. Supreme Ct.) 14; *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439; *Ramsey v. Erie R. Co.*, 7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 156, 38 How. Pr. (N. Y.) 193; *Sutton v. Sabey*, 22 Hun (N. Y.) 557; *People v. Cooper*, 57 How. Pr. (N. Y. Supreme Ct.) 463.

Remedy for Irregular Vacation. — There is no authority for one justice of this court to vacate an order made by another justice, except upon notice to the parties who have a right to be heard. But such an order cannot be disregarded, and it seems it can be corrected only upon appeal, or by the same justice who made it, upon a motion before him for that purpose. *Swift v. Wylie*, 5 Robt. (N. Y.) 641.

Under Code Civ. Pro., § 772, whenever a judge's *ex parte* order "grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case it may be vacated or modified without notice by the judge who made it, upon notice by him or by the court."

In *McCarthy v. McCarthy*, 13 Hun (N. Y.) 579, it was held that an order for substituted service did not grant a provisional remedy within the meaning of the above statute, and that under such statute the judge who granted the motion had jurisdiction to entertain a motion to vacate or modify his order. See also *Peck v. Yorks*, 24 How. Pr. (N. Y. Supreme Ct.) 363, *affirmed* 41 Barb. (N. Y.) 547; *Bruce v. Delaware, etc., Canal Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 440; *Mills v. Thursby*, 1 Code Rep. (N. Y. Supreme Ct.) 121.

If an application for an order, made to a judge of the court or to a county judge, is wholly or partly refused, or granted conditionally, or on terms, a subsequent application in reference to the same matter, and in the same stage

of the proceedings, shall be made only to the same judge or to the court. If it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it, or if he is absent or otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts. Code Civ. Pro., § 776. This section was construed in *People v. Cooper*, 57 How. Pr. (N. Y. Supreme Ct.) 463, wherein it was held that Code Civ. Pro., § 722, authorized a special term at chambers in the district wherein a proceeding is pending to vacate an order made by a judge out of court, and that section 776 contains no limitations of the general powers of the court, but merely prescribes the practice to be pursued upon a second order when the same has been previously refused or granted upon terms by another judge.

2. *Fort Edward Nat. Bank v. Goodwin*, 6 Hun (N. Y.) 481, holding that a motion in one district of the Supreme Court to set aside an order granted on full hearing in another district, in an action there pending, is improper even though the order affects the conduct of the action in the district where the motion is made. See also *Phoenix Foundry, etc., Co. v. North River Constr. Co.*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 106, 33 Hun (N. Y.) 156; *Phillips v. Wheeler*, 67 N. Y. 107.

A Motion for a Resettlement of Findings of law on the ground that they are not in accordance with the facts found and the opinion will be denied when made before a judge other than the one trying the case. *Silverstein v. Vulte*, 45 N. Y. Super. Ct. 590. But see *Dinkelspiel v. Levy*, 12 Hun (N. Y.) 130.

3. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, wherein Cardozo, J., in the course of an able and elaborate opinion, said: "The application is to the court — not to the judge — and any application which the court may entertain may always be made to the court, however it is constituted." See also *Selden*

principle of policy already stated, it has become a well-established rule of practice not to exercise this power, and the motion must be made to a term held by the same judge who granted the order,¹ except, perhaps, in a case where the policy of the rule is clearly not applicable.²

VIII. MANNER OF MOVING—1. Formal Requisites — In General — Technical Exactness.—Motions when in writing need not be drawn with the technical exactness required in pleading,³ for even a written motion is not a pleading.⁴

Clerical Errors may be disregarded.⁵

v. Christophers, 1 Abb. Pr. (N. Y. Supreme Ct.) 272; *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Buckingham v. Dickinson*, 54 N. Y. 682; *Bourdon v. Martin*, 74 Hun (N. Y.) 246, *affirmed* without opinion in 142 N. Y. 669; *Kamp v. Kamp*, 59 N. Y. 212; *Matter of Hartman*, 23 N. Y. Wkly. Dig. 128.

1. *People v. National Trust Co.*, 31 Hun (N. Y.) 20; *Fisher v. Hepburn*, 48 N. Y. 41, wherein the Court of Appeals reversed an order of the general term affirming an order of the special term made in violation of this rule of practice. The court said: "It would be a very unwise administration of justice and lead to much vexatious litigation, if a judge holding one special term could, upon mere motion, set aside the decision and judgment of another judge at special term upon allegations that the latter had erred as to any of the questions submitted for his determination."

The doctrine of this case was *re-affirmed* in *Kamp v. Kamp*, 59 N. Y. 212, wherein it was said that the true reason of the rule "rests not so much on a want of power to correct what has been mistakenly done as the confusion and vexatious litigation that would be likely to arise from so unwise a course in the administration of justice." Elsewhere the court further said: "The reason of the rule, which is simply one of convenience, does not apply when the court is entirely without jurisdiction, and the whole proceeding, including the order of judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times." See generally *Silverstein v. Vulte*, 45 N. Y. Super. Ct. 590; *Dinkelspiel v. Levy*, 12 Hun (N. Y.) 130.

2. Certainly the rule does not apply where by reason of death, disability, expiration of office, or other like causes,

it is impossible to move before the judge who made the order. The business of the court must, nevertheless, be transacted by the court, by whomsoever it is held.

Default Orders.—The rule does not apply to orders by default, because in such case the reason of the rule fails. *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *People v. National Trust Co.*, 31 Hun (N. Y.) 20; *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 233; *Matter of Hartman*, 23 N. Y. Wkly. Dig. 128.

A Motion on Further Facts for a new or different order does not fall within the rule. *Selden v. Christophers*, 1 Abb. Pr. (N. Y. Supreme Ct.) 272; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Riggs v. Pursell*, 74 N. Y. 370, wherein it was held that after the determination of the cause by the appellate court, the court of original jurisdiction has no power to modify the judgment entered as the result of the appeal; but that the affirmance does not preclude the court below from granting leave to renew it on further facts.

Order Made in Wrong Place.—A motion to vacate an order made in a wrong place does not come within the rule and should properly be made in some county wherein a motion in the action could properly be made. *Attrill v. Rockaway Beach Imp. Co.*, 25 Hun (N. Y.) 376; *Fitch v. Hall*, 18 How. Pr. (N. Y. Supreme Ct.) 314; *Seaman v. Whitehead*, 78 N. Y. 308.

3. *Logan v. Steel*, 7 J. J. Marsh. (Ky.) 42; *Lashley v. King*, 20 Ind. 232, holding that a written motion pending a cause may be sufficient though it would be defective as a complaint.

4. *Adler v. Lang*, 26 Mo. App. 226.

5. *Theile v. Chicago Brick Co.*, 60 Ill. App. 559, holding that where it is apparent that an error in a motion is merely a clerical one, as where the

Erasures and Interlineations. — But where the motion papers are defaced with erasures, interlineations, etc., the motion may be refused.¹

Motion Open to Objection Raised. — So, also, where the motion papers are subject to the same objection as they seek to raise in the adversary's proceedings, the motion will be denied.²

Motions and Offers Conditioned upon the court's making a certain ruling in advance may be refused.³

Place and Time. — The motion need not show that it was made in the proper county,⁴ or that it was made in proper time,⁵ as these are matters to be shown in opposition.⁶

An Objection to the Form of the motion papers must be taken before the motion is discussed, as the entering in to the argument will be deemed to be a waiver of all mere formal objections.⁷

2. Oral or Written. — In the Absence of Any Statute or Rule of court to the contrary, motions need not be in writing,⁸ though it has been

word "defendant" is used in place of the word "plaintiff," the clear intent may be followed and the mistake disregarded.

1. *Henry v. Bow*, 20 How. Pr. (N. Y. Supreme Ct.) 215.

2. *Sawyer v. Schoonmaker*, 8 How. Pr. (N. Y. Supreme Ct.) 198, wherein a motion to set aside the proceedings because the folios were not numbered was denied with costs because the motion papers were open to the same objection. *Hawley v. Donnelly*, 8 Paige (N. Y.) 415, holding that where the party who founds the application upon papers wrongly entitled asks to have his adversary's proceedings set aside for a technical defect, he will be held to strict rules, and his motion will be denied.

3. *Lee v. McLeod*, 15 Nev. 158.

4. *Newcomb v. Reed*, 14 How. Pr. (N. Y. Supreme Ct.) 100, wherein the case of *Schemerhorn v. Develin*, 1 Code Rep. (N. Y. Supreme Ct.) 13, where a contrary holding was made, was said to have been published without any knowledge of or preparation by the judges, and that if the decision was ever made as stated, it was made without due consideration and was erroneous. But see *Dodge v. Rose*, 1 Code Rep. (N. Y. Supreme Ct.) 123.

5. *Barber v. Bennett*, 4 Sandf. (N. Y.) 705; *Roosa v. Saugerties*, etc., *Turnpike Road Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 237.

6. See cases cited in the last two notes.

7. *Roosevelt v. Dean*, 3 Cai. (N. Y.) 105.

Objections First Raised on Appeal. — Defects which might have been remedied at the trial by amendment cannot be raised for the first time on appeal. *Jackson v. Smith*, 16 Abb. Pr. (N. Y. C. Pl.) 201, 25 How. Pr. (N. Y.) 476.

8. *California*. — *People v. Ah Sam*, 41 Cal. 645.

Illinois. — *Reilly v. Wilkins*, 67 Ill. App. 104; *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Pick v. Glickman*, 54 Ill. App. 646.

Indiana. — *Swinney v. Nave*, 22 Ind. 178; *St. Louis, etc., R. Co. v. Vallrius*, 56 Ind. 511.

Kansas. — *White-Crow v. White-Wing*, 3 Kan. 277.

But see *Lewis v. Firemen's Ins. Co.*, 67 Ill. App. 195.

In *Martin v. Bevan*, 58 Ind. 282, it was held that a motion might be made either orally or in writing.

When Written Motion Is Necessary. —

"A motion made during the progress of a case, for the allowance of any privilege or the adjudication of any right which may fall within the pleadings of a cause pending in the superior court, may be made orally, as well as in writing, and if the judgment of the court pronounced upon such motion be registered upon the minutes of the court, this will suffice to sustain the judgment. But where it is sought to invoke the powers of the court touching matters which lie outside the pleadings, though in some sense pertinent to the cause, the court can acquire jurisdiction for that purpose only through the means of a written application or motion for the relief desired;

said to be the better practice in all cases to reduce the motion to writing or to have it entered in the minutes of the court.¹

Motions of Course in Progress of Cause.— But even a rule requiring motions to be made in writing and filed does not apply to motions of course made in the progress of the cause, to which general rules cannot apply.²

View that Motions Are Necessarily Oral.— Indeed, it has been insisted in numerous cases that all motions are necessarily oral, and although in practice the form of the application is often reduced to writing and filed, this in itself does not constitute the making of a motion.³

Two Methods of Moving.— In fact, two methods of moving prevail in American practice. In some jurisdictions the practice is to file with the clerk a written statement that the party moves the court for certain specified relief, and to give the adverse party, in advance of the hearing, a copy of this statement. In other jurisdictions it is the practice to serve on the adverse party written notice that the motion will be made at a time and place named, for certain specified relief, and then at the time and place designated to move orally for such relief. In this latter method the written notice of motion corresponds substantially with the written motion in the former.⁴

A Written Specification of the Grounds or reasons upon which the motion is based is sometimes required by statute or rule of

and this is true, whether such collateral matter be between the same parties who are at issue upon the main case, or be between one of the parties to the main case and a stranger to the record." *Smith v. Equitable Mortg. Co.*, 98 Ga. 240.

1. *Herrlich v. McDonald*, 80 Cal. 472.

Motions Should Be in Writing.— *Matthews v. Blossom*, 15 Me. 400; *Chicago, etc., R. Co. v. Goff*, 158 Ill. 453; *Hay v. State*, 58 Ind. 337; *Morse v. Swan*, 2 Mont. 306, holding that if an attorney desires to obtain advantage of any motion decided in his favor he should make it in writing or see that it is made matter of record.

2. *Johnson v. Adleman*, 35 Ill. 265; *Lake's Appeal*, 32 Conn. 331.

Oral Motions of Course—Illustrations.— A motion simply directing the attention of the court to the case as it is presented in the pleadings and record, in order that the party may have the relief to which he thus appears entitled, need not be in writing. *Palmer v. Jones*, 49 Iowa 405. See also *Scotten v. Devilbiss*, 60 Ind. 37; *Burntrager v. McDonald*, 34 Ind. 277; *Orr v. Worden*, 10 Ind. 553; *Young v. Burlington Wire*

Mattress Co., 79 Iowa 415, holding that a motion to instruct the jury to render a verdict for the defendant on the evidence is not such a motion as need be in writing; *Bishop v. Vose*, 27 Conn. 1, holding that a motion to strike a case from the docket for want of jurisdiction is merely a mode of calling the attention of the court to the facts appearing of record, and is itself no part of the record of the case and may be made orally.

3. *People v. Ah Sam*, 41 Cal. 645, holding that on appeal the form of the application filed is not evidence of the application or motion actually made.

4. **For Illustrations** as to the former manner of moving, see generally the cases cited in this section. For illustrations as to the latter, see *infra*, IX. *Notice of Motion*. A comparison of section VIII. *Manner of Moving*, with section IX. *Notice of Motion*, will show the substantial identity of the written notice required in the one method with the written motion required in the other. Accordingly, decisions as to the sufficiency of the notice are in point as to the sufficiency of a written motion, and *vice versa*.

court,¹ and no reason not so specified can be urged on the argument in support of the motion.²

Waiver.—A written motion or a written statement of the grounds or reasons on which the motion is based may be waived.³

3. Entitling Papers. (See also *infra*, XII. *Affidavits and Proofs*.)—The motion papers should be entitled in the cause wherein the motion is made.⁴

Motion Affecting Several Actions.—Where one motion is made affecting several actions, it should ordinarily be entitled in all the actions.⁵

Where There Is No Suit Pending, the moving papers should not be entitled.⁶

1. *Dupuis v. Thompson*, 16 Fla. 69; *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 530; *Ottawa, etc., R. Co. v. McMath*, 91 Ill. 104; *State v. Sherman*, 42 Mo. 215; *Fox v. Young*, 22 Mo. App. 386; *Carver v. Thornhill*, 53 Mo. 286.

The *Better Practice* is to file the points in writing relied on as a ground for the motion and preserve them in a bill of exceptions, and the trial court may on its own motion require such reasons to be filed and the opposite party may by rule compel this to be done. But if neither the court nor the opposite party requires such points in writing to be filed it will be regarded as waived. *Ottawa, etc., R. Co. v. McMath*, 91 Ill. 104.

2. *State v. Sherman*, 42 Mo. 215; *Carver v. Thornhill*, 53 Mo. 286. Both these cases were decided under a statute expressly so declaring.

The *Reason of This Rule* is to afford the trial court an opportunity to correct its errors by specifically pointing them out. *Fox v. Young*, 22 Mo. App. 386.

3. *Chicago, etc., R. Co. v. Goff*, 158 Ill. 453; *Ottawa, etc., R. Co. v. McMath*, 91 Ill. 104; *Forest City Stone Co. v. French*, 1 Cleve. L. Rep. (Ohio) 69, 4 Ohio Dec. (Reprint) 141.

4. *Davis v. Richards*, 2 N. Y. Month. L. Bul. 97; *Phelps v. Hall*, 5 Johns. (N. Y.) 367; *Pell v. Jadwin*, 3 Johns. (N. Y.) 448.

In proceedings against parties to the suit in the ordinary progress of the cause, the affidavits, orders, and petitions are properly entitled in the original cause, as well after an order for an attachment has been entered as before, but to entitle them in the matter of the attachment is not irregular. *Stafford v. Brown*, 4 Paige (N. Y.) 360. But see *In the Matter of Bronson*, 12 Johns. (N. Y.) 460.

Where the Names of the Parties Were Reversed in every paper served, the error has been held fatal. *Parkman v. Sherman*, 1 Cai. (N. Y.) 344, Col. & C. Cas. (N. Y.) 260, *distinguishing* *Ryers v. Hillyer*, 1 Cai. (N. Y.) 112, where, although the parties were reversed in the title of the notice of motion, the affidavit accompanying was rightly entitled and no one was misled. See also *Thelle v. Chicago Brick Co.*, 60 Ill. App. 559.

Where There Are Several Defendants, if one defendant move in the cause his papers must be entitled with his own name as impleaded with the others, *Foote v. Emmons*, 2 How. Pr. (N. Y. Supreme Ct.) 89; *Felt v. Hyde*, 1 How. Pr. (N. Y. Supreme Ct.) 64; but otherwise where the motion is made for all the defendants, *Rowell v. Crowfoot*, 3 How. Pr. (N. Y.) 15.

Removal of Cause.—On a motion in the Supreme Court to remove a cause from the Common Pleas, the papers should be entitled in the Common Pleas. *Miller v. Dows*, 2 How. Pr. (N. Y. Supreme Ct.) 98.

5. *Parent v. Kellogg*, 1 How. Pr. (N. Y. Supreme Ct.) 70, wherein a motion entitled in one cause only was denied; *Kellogg v. Collier*, 47 Wis. 649, holding that although the motion should properly have been entitled in both actions, it was not a fatal defect that it was entitled only in one action; *Jackson v. Sheldon*, 9 Abb. Pr. (N. Y. Supreme Ct.) 127. But see *Holmes v. Williams*, 3 Cal. (N. Y.) 98, wherein a motion to amend an erroneous ca. sa., on which the defendant was taken and for which he had brought an action for false imprisonment, was made on papers entitled only in the latter suit and was granted.

6. *People v. Tioga C. Pl.*, 1 Wend. (N. Y.) 291; *Haight v. Turner*, 2 Johns.

Disregarding Mistake.—A mistake in entitling a paper may ordinarily be disregarded where no one has been misled thereby.¹

4. Statement of Grounds or Reasons of Motion.—A Motion Must State the Grounds or reasons on which it is based, or it will be overruled.² And, as has been seen, this is sometimes specifically required by statute or rule of court to be done in writing.³ Ordinarily, only the reasons assigned in the motion will be considered,⁴ and where the ground assigned is insufficient, the motion may be properly overruled.⁵ But there are cases in which motions may be granted for reasons not assigned.⁶

(N. Y.) 371; *People v. Dikeman*, 7 How. Pr. (N. Y. Supreme Ct.) 124; *Whitney v. Warner*, 2 Cow. (N. Y.) 499; *Nichols v. Cowles*, 3 Cow. (N. Y.) 345; *Matter of Bronson*, 12 Johns. (N. Y.) 460.

1. *Hazard v. Wilson*, 3 Abb. N. Cas. (N. Y. C. Pl.) 50; *Kellogg v. Collier*, 47 Wis. 649.

Time of Objecting.—The objection to the entitling of motion papers cannot be taken for the first time on appeal from the motion. *Watts v. Nichols*, 19 N. Y. Wkly. Dig. 165.

2. *California*.—*Poehlmann v. Kennedy*, 48 Cal. 201; *Silva v. Holland*, 74 Cal. 530.

Illinois.—*Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 530; *Metropolitan West Side El. R. Co. v. White*, 166 Ill. 376; *Williams v. People*, 164 Ill. 481; *People v. Kipley*, 167 Ill. 638; *People v. Seibert*, 167 Ill. 639.

Indiana.—*Hay v. State*, 58 Ind. 337; *Lafayette Agricultural Works v. Phillips*, 47 Ind. 259; *Lucas v. Smith*, 54 Ind. 530; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Pittsburgh, etc., R. Co. v. Nuzum*, 60 Ind. 533; *Ricketts v. Dorell*, 59 Ind. 427; *Murphy v. Teter*, 56 Ind. 545.

Iowa.—*Hall v. Crouse*, 14 Iowa 487. *Mississippi*.—*Huston v. Hayter*, 6 How. (Miss.) 580.

New York.—*Lanahan v. Henry Zeltner Brewing Co.*, 20 Misc. Rep. (N. Y. Supreme Ct.) 551.

South Dakota.—*Tanderup v. Hansen*, 8 S. Dak. 375.

Tennessee.—*Moore v. Webb*, 6 Heisk. (Tenn.) 301; *Melton v. Edwards*, 6 Heisk. (Tenn.) 250; *Odell v. Koppee*, 5 Heisk. (Tenn.) 88.

Vermont.—*Barnet v. Emery*, 43 Vt. 178; *Bickford v. Travelers' Ins. Co.*, 67 Vt. 418; *State v. Nulty*, 57 Vt. 543.

A party filing a motion for relief may urge any existing cause, but his opponent may have a rule entered requiring

specific grounds. *Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375.

Not only must a given cause be shown, but it must be set out so as to enable the court to determine what it really is. *Wilson v. Waters*, 7 Coldw. (Tenn.) 323.

Grounds of Motion Should Be Spread on Record.—*Moore v. Webb*, 6 Heisk. (Tenn.) 301; *Odell v. Koppee*, 5 Heisk. (Tenn.) 88; *Melton v. Edwards*, 6 Heisk. (Tenn.) 250.

When Omission of Grounds Will Not Constitute Error.—A failure to assign any grounds for a motion to direct a verdict for the plaintiff cannot be assigned as error, since the court could have directed a verdict for the plaintiff on his own motion. *Johnson v. Rider*, 84 Iowa 50.

3. See *supra*, VIII. 2. *Oral or Written*.

4. *Challiss v. Headley*, 9 Kan. 684; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *People v. Stevens*, 1 How. Pr. (N. Y. Supreme Ct.) 241; *Roche v. Ward*, 7 How. Pr. (N. Y. Supreme Ct.) 416.

5. *Hershiser v. Delone*, 24 Neb. 381.

6. Motion Granted on Grounds Not Assigned.—In *Butler v. Corbitt*, 2 Strobb. L. (S. Car.) 1, it was held that while the court will not interpolate a new motion for a party, it will not be inclined to refuse a motion actually made because the particular reason assigned in the way of argument is insufficient, when a good reason is apparent. But a motion should not be sustained upon grounds totally different from those assigned in it. *Corwith v. Illinois State Bank*, 8 Wis. 376.

Where the affidavits offered in opposition to a motion show that the moving party is entitled to the relief sought, though on grounds not stated in the moving papers, he may take advantage of the grounds thus shown. *Richards v. White*, 7 Minn. 345.

Where the Grounds of the Motion Are

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Grounds Should Be Stated Specifically. — The objection or objections on which the motion is founded should be stated specifically, so that the court may readily see that the motion should be granted.¹

Apparent of Record it seems that they need not be assigned. *Shaw v. Hoffman*, 21 Mich. 151, wherein the court said: "There are, doubtless, cases where a party would not be entitled to any benefit by assignment of error for denying a motion for which no ground was stated. But they are cases where the ground would not naturally and obviously occur to the courts without explanation. But courts must always be supposed to understand the nature and extent of the issue presented by the pleadings in the cases they are trying. And if it appear that the evidence moved to be stricken out could not, in any view of the case, be pertinent to the issue, or the case set out in the pleadings, the reason for the motion must be sufficiently apparent, and it cannot be properly overruled without at least calling upon counsel to state his reasons for the motion, and the neglect of the counsel to do so under such a call." See also *A. Wight Co. v. Steinke-meyer*, 6 Mo. App. 575, holding that a supplemental motion filed in a cause whose record is before the court need not repeat facts shown by such record. But see *Ambrose v. Parrott*, 28 Kan. 700.

1. *California*. — *Poehlmann v. Kennedy*, 48 Cal. 201.

Colorado. — *Mullen v. Wine*, 9 Colo. 167; *Quimby v. Boyd*, 8 Colo. 194; *Webber v. Emerson*, 3 Colo. 248.

Connecticut. — *Hoey v. Hoey*, 36 Conn. 386.

Illinois. — *Cheney v. City Nat. Bank*, 77 Ill. 562; *Chicago v. Seben*, 165 Ill. 371.

Indiana. — *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Hadley v. Guttridge*, 58 Ind. 302; *Campbell v. Swasey*, 12 Ind. 70.

Kansas. — *Kerr v. Reece*, 27 Kan. 338; *Gilmore v. Norton*, 10 Kan. 491; *Ambrose v. Parrott*, 28 Kan. 700.

Missouri. — *Jackson v. Bowles*, 67 Mo. 609; *Pearce v. McIntyre*, 29 Mo. 423; *Robinson v. Rice*, 20 Mo. 229; *Patterson v. Hollister*, 32 Mo. 478; *O'Connor v. Koch*, 56 Mo. 253.

Nebraska. — *Stuht v. Sweesy*, 48 Neb. 767.

Tennessee. — *Wilson v. Waters*, 7 Coldw. (Tenn.) 323.

Vermont. — *Bickford v. Travelers' Ins. Co.*, 67 Vt. 418.

Sufficiency of Statement of Grounds. — "The motion of itself must show clearly what the error is which is claimed to have been committed by the court, and the court is not bound to help it out by any favorable construction or supposition." *Hoey v. Hoey*, 36 Conn. 393.

All that is required in a motion to dismiss is that the statutory grounds for it shall be distinctly brought to the attention of the court. No specific reference to the writ need be made, as in a plea in abatement. *Barnet v. Emery*, 43 Vt. 178.

As to the sufficiency of a motion to present particular questions, see generally *Louisville, etc., R. Co. v. Creek*, 130 Ind. 139; *Waterville v. Van Slyke*, 115 U. S. 290; *Wood v. Bailey*, 12 Iowa 46, wherein a motion urging in objection to a pleading that it was not sworn to was held not sufficient to raise the objection that the affidavit was by a party who did not show competence to make it.

Discretion of Court — Review on Appeal.

— In *Ambrose v. Parrott*, 28 Kan. 698, it was claimed that the complaint contained more than one cause of action, and a motion was made to require the plaintiff to state separately such alleged causes of action. It was objected that the motion was too indefinite in that it failed to point out wherein the petition in the court below stated more than one cause of action, and how many causes of action it was claimed that it did state. The motion was overruled, and on appeal the court said: "Now, we would think that, in all fairness to the trial court and to the opposite party, the motion should have been more definite and specific than the motion in this case was. We would think that a motion filed for such a purpose should in all cases point out specifically the matters which the party filing it desired the court to act upon. It should designate the matters supposed to constitute each separate and distinct cause of action so that the court might act intelligently. We think, however, the court might in its discretion act upon and sustain just such a motion as the

Grounds Not Assigned Are Waived. — Not only must a party assign a ground for his motion, but he must assign all the grounds for the relief sought which he may have, and objections known to exist and not raised at the time of the motion may be deemed waived.¹ A separate motion cannot be made for each objection.²

5. Prayer for Relief. — It is the duty of a party who asks relief by motion to point out specifically what he desires.³ But a motion praying for certain relief may sometimes be treated as a motion for relief substantially embraced therein.⁴

Motion May Have Several Objects. — A single motion may seek relief in several particulars, provided they are consistent.⁵

one which was filed in the present case. If the court, however, should overrule the motion, as was done in the present case, then the question arises, should the Supreme Court reverse the decision of the trial court simply because it overruled such an indefinite motion? Generally, we would think not. Perhaps cases might occur where we would think otherwise. But such cases would be rare. It may be claimed that the object of the present motion was obvious, that the court should have known from an inspection of the petition just how many causes the defendants claimed were stated therein, and what they were, and therefore that there was no necessity for the defendants' designating in their motion how many causes of action they supposed were stated in the plaintiff's petition or what they were. But this is not entirely clear."

1. *Alabama*. — *Street v. Street*, 113 Ala. 333.

Illinois. — *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210; *Hintz v. Graupner*, 138 Ill. 158; *Stuve v. McCord*, 52 Ill. App. 331; *Ottawa, etc., R. Co. v. McMath*, 91 Ill. 104.

New York. — *New York v. Lyons*, 1 Daly (N. Y.) 296, 24 How. Pr. (N. Y.) 280; *Desmond v. Wolf*, 1 Code Rep. (N. Y. Special Term) 49; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 115.

South Carolina. — *Hinson v. Catoe*, 10 S. Car. 311.

Wisconsin. — *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

See also *Scott v. Newsom*, 27 Ga. 125.

2. *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 115; *Desmond v. Wolf*, 1 Code Rep. (N. Y. Special Term) 49; *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201; *Riddle v. Backus*, 36 Iowa 430.

"In other words, he cannot bring

forward his objections by instalments; such a course would lead to interminable vexation, delay, and expense." *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 114.

3. *Walker v. Morse*, 33 Neb. 650.

Closely akin to this requirement is the one that the motion must specifically point out the grounds of the motion or defect moved against. See *supra*, VIII.

4. *Statement of Grounds or Reasons of Motion*.

5. See generally article PRAYERS FOR RELIEF.

For Example, a motion to set aside a judgment has been held equivalent to a motion for a new trial. *Neulander v. Rothschild*, 67 Ill. App. 288. So a motion to dismiss for want of jurisdiction may be treated as a motion in arrest of judgment. *Stetson v. Corinna*, 44 Me. 29. In legal effect a motion for judgment on the ground that a pleading is false or frivolous is a motion to strike out such pleading. *Guth v. Lubach*, 73 Wis. 131; *Kreitz v. Frost*, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 277, holding that the fact that a plaintiff moves for judgment instead of moving to strike out a false answer is no objection to granting the former relief, as the right to judgment follows the striking out a false answer. See also *Hall v. Linn*, 8 Colo. 264. But see *Tharin v. Seabrook*, 6 S. Car. 113, holding that a motion to strike out a sham or irrelevant answer or defense should not in terms demand judgment.

6. *Biggs v. Garrard*, 6 B. Mon. (Ky.) 484, 44 Am. Dec. 778; *Foster v. Kansas*, 112 U. S. 205.

"There does not appear to be any good objection to uniting in a single motion an application to have one or more defenses stricken out as sham, and an application for judgment on remaining defenses as frivolous. The

Alternative Prayers. — Or it may ask relief in different modes in the alternative.¹

Conformity to Theory of Motion. — The relief granted must be in accordance with the theory of the motion.²

Under a General Prayer for Relief upon a motion, every possible relief should not be granted, but only such as is allied to what is asked for and not entirely distinct therefrom.³

Where a Motion Is Too Broad, or where it cannot be allowed in substantially the same terms in which it is asked, it may be overruled.⁴

practice is calculated to save expense and delay; it can work no embarrassment or injustice, and I think it should be not only allowed but encouraged." *People v. McCumber*, 18 N. Y. 326.

1. *Smith v. Jones*, 2 Code Rep. (Albany Special Term) 33, holding that in such a case where the moving party is not entitled to relief in one of the modes, the costs of opposing the motion will be allowed to the opposite party.

2. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, holding that where a petition states facts which constitute but a single cause of action in one count, but contains superfluous and redundant matter that might be stricken out on motion, it is not error to overrule a motion to compel the plaintiff to elect; *Schneider v. Meyer*, 56 Mo. 475, where-in it was held that where a motion is made under a special statute for a remedy therein provided, the court cannot, under such motion, give the party some other equitable relief which is neither embraced in nor relied on by the motion. Compare the rule that judgments must be in accordance with the theory of the declaration, petition, or complaint. See article JUDGMENTS, vol. II, p. 796.

3. *Boston Nat. Bank v. Armour*, 50 Hun (N. Y.) 176, 16 Civ. Pro. Rep. (N. Y.) 147. Generally, as to the relief obtainable upon motion under a prayer for general relief, see *Bissell v. New York Cent., etc., R. Co.*, 67 Barb. (N. Y.) 385, holding that a prayer for further relief enables the court to give such relief as the facts warrant; *Ward v. Sands*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 60; *Ives v. Ives*, 80 Hun (N. Y.) 136, holding that under a motion to vacate an order of reference and for further relief, the order of reference might be modified; *Martin v. Kanouse*, 2 Abb. Pr. (N. Y. Supreme Ct.) 390; *Ridder v. Whitlock*, 12 How.

Pr. (N. Y. Supreme Ct.) 208; *Boington v. Lapham*, 14 How. Pr. (N. Y. Supreme Ct.) 360.

Incidental Relief — Illustration. — Where a party asks leave of court to bring in new parties, he necessarily includes in that request a further request for leave to make such amendments and take such steps as shall be requisite to bring into court new parties; accordingly, under an order to show cause why certain persons named should not be made parties to the action, the amendment of the summons and complaint is but a mere incident of the relief asked. *Walkinshaw v. Perzel*, 7 Robt. (N. Y.) 606.

4. *Indiana*. — *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297.

Kansas. — *Smith v. Brown*, 8 Kan. 608.

Missouri. — *Missouri Glass Co. v. Copeland Sewing Mach. Co.*, 88 Mo. 57.

Nebraska. — *Minick v. Huff*, 41 Neb. 516; *Scott v. Chope*, 33 Neb. 41; *Porter v. Sherman County Banking Co.*, 40 Neb. 274; *McDonald v. Bowman*, 40 Neb. 269; *McDuffie v. Bentley*, 27 Neb. 380; *Keens v. Gaslin*, 24 Neb. 310; *Fox v. Graves*, 46 Neb. 812.

Ohio. — *Ambush v. Ford*, 1 Cleve. L. Rep. (Ohio) 149, 4 Ohio Dec. (Reprint) 238.

Wisconsin. — *Wood v. Folmer*, 1 Pin. (Wis.) 509.

Illustrations. — If any portion of the evidence objected to is competent the court may, on motion to exclude the whole, exclude a part that is incompetent, but he is not obliged to do so. He may only respond to the motion as made. The motion must fit the case, or the court may overrule it. *Smith v. Brown*, 8 Kan. 608.

So where a motion for a new trial is made by several defendants jointly, it must be either sustained as to all or overruled as to all. *Minick v. Huff*, 41 Neb. 516; *Scott v. Chope*, 33 Neb. 41;

6. Motions Affecting Several Actions. — In actions between the same parties in the same court, when one party moves in each action at the same time and with the same object but one set of papers is necessary.¹

7. Entry on Docket. — In some jurisdictions motions must be filed or entered upon a motion docket.² But in other jurisdictions where motions are in fact oral applications, and are so regarded, it is not necessary,³ although, as has been seen, the grounds of the motion are sometimes required to be reduced to writing and filed.⁴

IX. NOTICE OF MOTION -- 1. Definition and Nature. — A notice of motion is distinct from the motion itself.⁵ A motion, as has

Porter v. Sherman County Banking Co., 40 Neb. 274; McDonald v. Bowman, 40 Neb. 269.

A motion should be so presented to the court that its request, or a particular request thereof, if it contains more than one, may be sustained or overruled. Therefore, where a motion asked that a party state whether a certain agreement referred to was in writing and that he set out a copy of the writing, and the case was not one where it was necessary to set out a copy of such writing if it existed, the motion was properly overruled. National State Bank v. Delahaye, 82 Iowa 34.

1. Hornfager v. Hornfager, 6 How. Pr. (N. Y. Supreme Ct.) 13, holding that only one rule upon the decision should be entered, and the party prevailing is entitled to the costs of only one motion. See also Parent v. Kellogg, 1 How. Pr. (N. Y. Supreme Ct.) 70; Jackson v. Sheldon, 9 Abb. Pr. (N. Y. Supreme Ct.) 127, and cases cited *supra*, VIII. 3. *Entitling Papers*.

2. Donaldson v. Dodd, 79 Ga. 763; Smith v. Equitable Morig. Co., 98 Ga. 240; Louisville, etc., R. Co. v. Renicker, 17 Ind. App. 619; Mercer v. Ringer, 40 Kan. 189, wherein it was held that a written motion sent by mail to the clerk, but not received by him until after the time for filing such a motion had expired, was not filed in time; Storey v. Child, 2 Mich. 109.

Sending Motion to Judge Not a Sufficient Filing. — Motions should be entered by the clerk or filed so that they can be called up by either party. Sending a written motion to a judge is not equivalent to filing it in his court, as the judge is not the custodian of the files or the keeper of the records. Lewis v. Firemen's Ins. Co., 67 Ill. App. 195.

Motion and Jury Dockets. — Under Act Ga., Sept. 25, 1883, requiring the clerks of the Superior Courts to keep an issue docket for civil cases triable by jury and a motion docket for motions to be decided without a jury, and the act constituting the City Court of Atlanta, making applicable to it all laws relating to practice in Superior Courts, an action in such City Court, after judgment by default, involving an issue as to whether the defendant was served, having been entered on the motion docket, should be dismissed therefrom, and should be entered on the issue docket, but should not be dismissed from the court. Harris v. Lowe, 81 Ga. 676.

In Kentucky, under Civ. Code, §§ 348, 351, 352, 444, 447, a party may either make his motion on the day for which he has noticed it and have it entered of record, or he may place it upon the motion docket; and whether he takes one course or the other, the motion is to be considered as regularly pending in court, and, like an action, may be continued without setting it for hearing on any particular day of the ensuing term; but if he takes neither course, the motion will be regarded as abandoned. Bent v. Maupin, 86 Ky. 271. See also McDowall v. Macker, Sneed (Ky.) 146; Com. v. McClelland, Hard. (Ky.) 31; Trabue v. Tilford, 3 A. K. Marsh. (Ky.) 143; Miller v. Boyd, 1 Dana (Ky.) 272; Foster v. Wade, 4 Metc. (Ky.) 253.

3. Reilly v. Wilkins, 67 Ill. App. 104. But see Lewis v. Firemen's Ins. Co., 67 Ill. App. 195.

4. See *supra*, VIII. 2. *Oral or Written*.

5. Herrlich v. McDonald, 80 Cal. 472, holding that, on appeal, the court would not presume from the giving of a notice of motion that such a motion

been seen, is an application for an order, while a notice of motion is a mere warning that an order will be applied for and is designed to enable the opposite party to appear and contest the application.¹ But a notice of motion is not process.²

2. Necessity of Notice — a. GENERAL PRINCIPLES — Statutes and Rules of Court. — The necessity of giving notice of an intended motion must be determined with reference to the statutes and rules of court in the various jurisdictions by which it is very largely regulated.³

It is a General Rule, however, founded in natural justice, and to be observed whenever no more particular rule is applicable, that a party interested in resisting the relief sought by motion has a right to notice and an opportunity to be heard.⁴ This rule must

was actually made. This fact must appear from the record.

1. See *supra*, IV. 4. *Contested or Litigated Motions*.

2. Service of Notice of Motion Not Process. — In a case by motion "there is nothing upon which the court can act until the motion is made in court and entered of record. Then, and not till then, the court has a cause before it, after which it is continued in court until it may be finally heard. Before the motion is thus made and entered of record, the defendant can take no step whatever in the matter. There is nothing to dismiss, for there is no process returned into court by which the court can recognize the case. The notice is a private paper in the hands of the party who gives it, and does not belong to the court until the motion is made and it is produced in evidence. It is true, the sheriff may serve a copy, and his return is evidence of the fact of service, but he does not deliver the paper in court, because it is a private paper and handed to the party who gives it. So he may serve notice to take depositions, and his return is evidence of the fact. But in either of these cases a private individual may serve the notice, and such service, when proved by him, is as good as if it had been served by the public officer." Green, J., in *Cheatham v. Howell*, 6 Yerg. (Tenn.) 311.

See New York Code Civ. Pro., § 802, where the statute, in reference to service of papers, says this article does not apply to the service of a summons or other process. See also *Younglove v. Steinman*, 80 Cal. 375.

3. In *Colorado*, under Code 1887, §§ 371, 372, notice must be given of all motions except those made dur-

ing the progress of the trial. *Nevitt v. Crow*, 1 Colo. App. 453; *Mallan v. Higenbotham*, 10 Colo. 264; *Thorne v. Ornauer*, 8 Colo. 353.

In New York notice of a motion to vacate an *ex parte* order is not necessary when made before the same judge who granted the original order. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439; *Oakley v. Cokalete*, 20 Misc. Rep. (N. Y. Supreme Ct.) 206; *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y. Supreme Ct.) 403; *Bruce v. Delaware, etc., Canal Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 440, holding that N. Y. Code, § 324, applies to injunctions as well as to other orders, and that a judge may vacate or modify an injunction order without notice, but that this should not be done except in urgent cases.

But where the motion is made to the court to vacate an *ex parte* order of a judge out of court, notice is necessary. *Cayuga County Bank v. Warfield*, 13 How. Pr. (N. Y. Supreme Ct.) 439; *Oakley v. Cokalete*, 20 Misc. Rep. (N. Y. Supreme Ct.) 206; *Van Kleeck v. Nichols*, 63 How. Pr. (N. Y. Supreme Ct.) 403.

4. *Alabama*. — *Baylor v. McGregor*, 1 Stew. & P. (Ala.) 158; *Stringer v. Echols*, 46 Ala. 61; *Brown v. Wheeler*, 3 Ala. 287.

California. — *Coburn v. Ames*, 57 Cal. 201; *Arata v. Tellurium Gold, etc., Min. Co.*, 65 Cal. 340; *Hefflon v. Bowers*, 72 Cal. 270.

Colorado. — *Hughes v. McCoy*, 11 Colo. 591; *Mallan v. Higenbotham*, 10 Colo. 264.

District of Columbia. — *Fitzgerald v. Fitzgerald*, 7 D. C. 243.

Illinois. — *Craig v. McKinney*, 72 Ill. 305; *Hunt v. Tinkham*, 21 Ill. 639.

yield where an irreparable injury is threatened and a notice would defeat the very object of the motion.¹ And by its terms it does not apply where the adverse party has no right or interest to resist the application.²

Motion for Discretionary Order.—Where the granting of the relief sought is purely discretionary with the court, it may be moved for *ex parte*, unless notice is expressly required by statute or rule of court.³

Iowa.—Townsend v. Wisner, 62 Iowa 672; Chicago, etc., R. Co. v. Estes, 71 Iowa 603; Keeney v. Lyon, 21 Iowa 277.

Kentucky.—Gorham v. Luckett, 6 B. Mon. (Ky.) 146.

Louisiana.—Thompson v. Mylne, 4 La. Ann. 206; Hennen v. New Orleans, etc., R. Co., 20 La. Ann. 544.

Massachusetts.—Rogers v. Ladd, 117 Mass. 334.

Michigan.—People v. Simonson, 10 Mich. 335.

Minnesota.—Daniels v. Winslow, 2 Minn. 113.

Mississippi.—Haley v. Williams, 8 Sme1. & M. (Miss.) 487.

Missouri.—George v. Middough, 62 Mo. 549; Maloney v. Hunt, 29 Mo. App. 379.

Nevada.—Pratt v. Rice, 7 Nev. 123.

New Jersey.—Den v. Fen, 17 N. J. L. 354.

New York.—Brown v. Ricketts, 2 Johns. Ch. (N. Y.) 425; Peck v. Yorks, 41 Barb. (N. Y.) 547; Isnard v. Cazeaux, 1 Paige (N. Y.) 39; Hewitt v. Howell, 8 How. Pr. (N. Y. Supreme Ct.) 346; Ostrander v. Harper, 14 How. Pr. (N. Y. Supreme Ct.) 16; Mooney v. British Commercial L. Ins. Co., 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 103; Rice v. Ehele, 55 N. Y. 518; Smith v. Green, 14 Hun (N. Y.) 529.

Pennsylvania.—Lancaster's Appeal, 111 Pa. St. 524.

Wisconsin.—Hungerford v. Cushing, 2 Wis. 411.

No court can, by a preliminary *ex parte* order or process, turn even a wrongdoer out of possession. People v. Simonson, 10 Mich. 335.

Where a statute gives a summary remedy by motion for judgment and is silent about notice, the defendant is entitled to reasonable notice. To support a judgment founded on such a motion it must appear affirmatively that notice was given; it is not sufficient that the record shows that the parties appeared by their attorneys. Brown v. Wheeler, 3 Ala. 287.

1. Where Irreparable Injury Is Threatened.—In Pratt v. Rice, 7 Nev. 123, it was held that where the nature of a motion is of a kind to prevent the performance of some act which, if performed, might be productive of irreparable injury, and if it becomes desirable that the party affected should have no previous intimation thereof, it may be granted on affidavit without notice to the opposite party; but when there is no such danger notice should be given. See also Peck v. Yorks, 41 Barb. (N. Y.) 547, holding that a judge should never vacate or modify an injunction order without notice except when from the urgency of the case it is necessary to guard against serious loss, which sometimes may be occasioned by the delay incident to serving notice.

Short Notice of Motion or None should be allowed only in exceptional cases. Androvette v. Bowne, 4 Abb. Pr. (N. Y. Supreme Ct.) 440, 15 How. Pr. (N. Y.) 75; Bruce v. Delaware, etc., Canal Co., 8 How. Pr. (N. Y. Supreme Ct.) 440; Peck v. Yorks, 41 Barb. (N. Y.) 547; Conover v. Ruckman, 33 N. J. Eq. 303.

2. In Gordon v. Sterling, 13 How. Pr. (N. Y. Supreme Ct.) 405, it was held that while it was usual to give notice of a motion under the code, § 121, to continue an action against the representatives of a deceased party, yet where the surviving defendants had no interest in the question and no right to resist the motion, notice to them was not necessary. See also Campbell v. West, 93 Cal. 653.

In Jensen v. Barbour, 12 Mont. 566, it was held that a motion to set aside a judgment by default might be withdrawn upon leave of court without notice to the adverse party, upon the ground that the party had a right to say: "I do not want this benefit for which I have been asking."

3. Matter of Patterson, 4 How. Pr. (N. Y. Supreme Ct.) 34; Isnard v. Cazeaux, 1 Paige (N. Y.) 39. See also Latimer v. Sullivan, 37 S. Car. 120

Motions of Course. — So where a statute or rule of court confers upon the party an absolute right to the relief sought, so that it may be granted of course, and at the same time such statute or rule fails to require notice, a motion for such relief may be made *ex parte*.¹ A general statute or rule of court expressly requiring motions to be given to the adverse party is not applicable to motions that cannot be contested.²

Constructive Notice by Filing Motion. — According to the practice in some jurisdictions, motions must be filed in court or entered upon a motion docket, and where this practice prevails, in the absence of some statute, rule, or express direction of the court, parties to a pending action are chargeable with notice of all motions made and filed therein.³ But after final judgment,⁴ and especially

(allowance of amendment); *Fisk v. Albany, etc.*, R. Co., 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 309 (leave to file supplemental complaint).

An Extension of Time may be applied for and granted *ex parte*. *Fitch v. Hazeltine*, 2 Paige (N. Y.) 416; *Woodruff v. Depere*, 60 Wis. 128.

1. *Lancaster's Appeal*, 111 Pa. St. 524.

Illustrations. — Under *Kentucky Code*, § 371, plaintiff has an absolute right to dismiss his action, and accordingly a motion to dismiss may be made without notice to defendant. *Northwestern Mut. L. Ins. Co. v. Barbour*, 95 Ky. 7.

Under *New York Code Civ. Pro.*, § 511, where defendant admits part of plaintiff's claim, plaintiff has a right to sever his action and take judgment for the part admitted, and a motion therefor may be made without notice. *Shaw v. Coleman*, 54 N. Y. Super. Ct. 3.

2. *Mendenhall v. Kratz*, 14 Wash. 453, *construing* Wash. Code of Pro., § 822; *Northwestern Mut. L. Ins. Co. v. Barbour*, 95 Ky. 7, *construing* Ky. Code, § 371. See also *Stanton v. Kinsey*, 151 Ill. 301, holding that a motion to set aside a judgment for the defendant for costs and to permit a nonsuit may be regarded as a motion of course, and as such not within the meaning of a rule requiring notice of contested motions; if the court so construes the rule, the presumption is in support of the construction.

3. *Illinois*. — *Roby v. Title Guarantee, etc., Co.*, 166 Ill. 336.

Iowa. — *Wagner v. Tice*, 36 Iowa 599.

North Carolina. — *Jones v. Asheville*, 114 N. Car. 620; *Stith v. Jones*, 119 N. Car. 428, *citing* *Coor v. Smith*, 107 N. Car. 430; *Wilson v. Pearson*, 102 N.

Car. 290; *Spencer v. Credle*, 102 N. Car. 68; *Hemphill v. Moore*, 104 N. Car. 379; *Stancill v. Gay*, 92 N. Car. 455; *State University v. Lassiter*, 83 N. Car. 38; *Sparrow v. Davidson College*, 77 N. Car. 35.

Ohio. — *Gardner v. Cline*, 2 West. L. M. (Ohio) 329, 2 Ohio Dec. (Reprint) 301.

Parties who are in court are bound to take notice of motions made in the case without any formal notice, unless formal notice is required by some rule of court or direction in the action; and a provision of the decree prescribing the notice to be given dispenses with the notice required by the rules of the court. *Roby v. Title Guarantee, etc., Co.*, 166 Ill. 336.

In *Oregon*, by express provision of the Code, § 524, notice of a motion is not necessary except when the Code requires it or when directed by a court or judge in pursuance of the Code. *Bush v. Geisey*, 16 Oregon 267.

The *Iowa Statute* provides: "When a party is in court he shall, without service of notice, take notice of any motion made during term of filing of the same, and notice thereof being entered in the notice book. The same shall be true also of a party constructively in court." Section 3429, *construed* in *Wagner v. Tice*, 36 Iowa 599.

4. **After Final Judgment** the parties are not presumed to be in court; therefore any motion made in the cause after that time, materially affecting the interest of the adverse party, must be on notice or the decision of it will be erroneous.

Alabama. — *Stringer v. Echols*, 46 Ala. 61; *Murray v. Tardy*, 19 Ala. 710.

Illinois. — *Morgan v. Campbell*, 54 Ill. App. 242.

after expiration of term, the parties are out of court and notice must be given of all motions that may thereafter be made.¹

b. ILLUSTRATIVE APPLICATIONS—(1) Motions Requiring Notice.—In the following classes of motions and many others not herein enumerated² it has been held that notice was necessary: viz., motions to quash for irregularities not appearing on the face of the proceedings;³ to disbar a solicitor for malpractice;⁴ to revive an action;⁵ to strike allegations from pleadings;⁶ to strike out pleadings;⁷ to extend time for pleading;⁸ to supply

Missouri.—Laughlin *v.* Fairbanks, 8 Mo. 367; Parker *v.* Johnson, 22 Mo. App. 516.

Ohio.—Gardner *v.* Cline, 2 West. L. M. (Ohio) 329, 2 Ohio Dec. (Reprint) 301.

But a substitution, on motion after judgment, of a declaration in lieu of the original which has been lost, has been considered immaterial and therefore permitted without notice to the defendant. See Wilkerson *v.* Branham, 5 Ala. 608; Williams *v.* Powell, 9 Port. (Ala.) 493.

1. *Expiration of Term*—*Illinois.*—Morgan *v.* Campbell, 54 Ill. App. 242.

Indiana.—Jenkins *v.* Corwin, 55 Ind. 22; Martindale *v.* Brown, 18 Ind. 284; Yancy *v.* Teter, 39 Ind. 305; Lake *v.* Jones, 49 Ind. 297.

Iowa.—Keeney *v.* Lyon, 21 Iowa 277.

North Carolina.—Allison *v.* Whittier, 101 N. Car. 490.

Ohio.—Hettrick *v.* Wilson, 12 Ohio St. 136.

Texas.—Harvey *v.* Carroll, 72 Tex. 63.

After Judgment but Before Expiration of Term it seems that the parties must still take notice of the motion without express notice. Yancy *v.* Teter, 39 Ind. 305; Lake *v.* Jones, 49 Ind. 297.

In Allison *v.* Whittier, 101 N. Car. 490, the court said that "when practicable, and in fairness, notice should be given; not, however, as a legal duty to the adverse party, so that he could be heard upon the question of the proposed reversal." Citing Erwin *v.* Lowery, 64 N. Car. 321.

2. **Notice Was Held Necessary** in the following cases:

Alabama.—Baylor *v.* McGregor, 1 Stew. & P. (Ala.) 158.

Colorado.—Thorne *v.* Ornauer, 8 Colo. 353.

Georgia.—Smith *v.* Equitable Mortg. Co., 98 Ga. 240; Green *v.* Driskell, 99 Ga. 624.

Illinois.—Hammer *v.* Kaufman, 39 Ill. 87; Washington Park Club *v.* Baldwin, 59 Ill. App. 61.

Louisiana.—Hennen *v.* New Orleans, etc., R. Co., 20 La. Ann. 544.

Mississippi.—Parchman *v.* Conway, 28 Miss. 85.

New Jersey.—Shaw *v.* Raritan, etc., R. Co., 32 N. J. L. 293; Stone *v.* State, 20 N. J. L. 404; Morris *v.* Geiger, 10 N. J. L. 331.

New York.—Jewell *v.* Schouten, 1 N. Y. 241; Thompson *v.* Thompson, 52 Hun (N. Y.) 117, 16 Civ. Pro. Rep. (N. Y.) 317; Matter of Budlong, 100 N. Y. 203.

North Carolina.—Allison *v.* Whittier, 101 N. Car. 492.

Ohio.—Nigh *v.* Stillwell, etc., Co., 12 Ohio Cir. Ct. Rep. 40, 5 Ohio Cir. Dec. 335.

Texas.—Coward *v.* Oram, 1 Tex. App. Civ. Cas., § 184.

Virginia.—Emerson *v.* Berkley, 4 Hen. & M. (Va.) 442.

England.—Harris *v.* Galpin, 47 J. P. 727.

3. *Downing v. Brown*, Hard. (Ky.) 189; *Payne v. Payne*, 8 B. Mon. (Ky.) 391.

4. *Saxton v. Stowell*, 11 Paige (N. Y.) 526.

5. *Smith v. Green*, 14 Hun (N. Y.) 529. See also article REVIVAL OF ACTIONS.

In *Gordon v. Sterling*, 13 How. Pr. (N. Y. Supreme Ct.) 405, it was held to be usual but not necessary to give notice of an application for an order to continue an action for partition against the representatives of a deceased party under the code, § 121. See also article PARTITION.

6. *State v. Price*, 15 Mo. 375; *Jackins v. Dickinson*, 39 S. Car. 436; *Herndon v. Campbell*, 86 Tex. 168.

7. *Elkhorn First Nat. Bank v. Wood*, 26 Wis. 500; *Eldridge v. Wightman*, 20 Fla. 687; *Arata v. Tellurium Gold*, etc., Min. Co., 65 Cal. 340, decided under a rule of court requiring notice of every motion not *ex parte*.

8. *Mallan v. Higenbotham*, 10 Colo.

a lost pleading;¹ to stay proceedings;² to dismiss appeal;³ to authorize expenditures by a receiver;⁴ to vacate or modify an order⁵ for a new trial;⁶ for inspection of books and papers;⁷ or to determine a contested right, as possession of papers.⁸

(2) *Motions Not Requiring Notice.* — The following classes of motions have been held not to require notice:⁹ viz., motions to quash for irregularities apparent on the face of the record,¹⁰ to dismiss for insufficiency,¹¹ to direct the issuance of an execution,¹² or to bring in the representatives of a deceased party.¹³ No notice need be given of a motion by an *amicus curiæ* to dismiss an action as fictitious.¹⁴

264, decided under the code, §§ 398, 399, requiring notice to be given of all motions in a case; Trenton Mut. L., etc., Ins. Co. v. Hodges, 24 N. J. L. 673; Stephens v. Moore, 4 Sandf. (N. Y.) 674, decided under the code, § 405.

1. People v. Cazalis, 27 Cal. 522, *distinguishing* and *disapproving* Benedict v. Cozzens, 4 Cal. 381. See also article LOST INSTRUMENTS AND RECORDS, vol. 13, p. 349.

In Georgia notice of a motion to establish copies of office papers alleged to be lost or destroyed is not indispensably necessary. Saunders v. Smith, 3 Ga. 121.

2. Den v. Fen, 17 N. J. L. 354; Dederick v. Hoysradt, 4 How. Pr. (N. Y. Supreme Ct.) 350; Anonymous, 5 Sandf. (N. Y.) 656; Stephens v. Moore, 4 Sandf. (N. Y.) 674. See also article SUPERSEDEAS AND STAY OF PROCEEDINGS.

3. Allen v. Allen, 149 N. Y. 280. See also article APPEALS, vol. 2, p. 1.

4. *Ex p.* Mitchell, 12 S. Car. 86. See also article RECEIVERS.

A motion for authority to issue receivers' certificates must be made on notice. State v. Port Royal, etc., R. Co., 45 S. Car. 464.

In Hungerford v. Cushing, 2 Wis. 411, it was said that while the court ought to provide for the safe custody of property which is the subject-matter of an equity suit pending, an *ex parte* order for that purpose would be irregular.

5. Byington v. Call, 36 Kan. 455.

But in New York an order made by a judge out of court may be vacated by such judge without notice. See *supra*, p. 111. See also article ORDERS.

6. Dupuis v. Thompson, 16 Fla. 69. See also article NEW TRIAL, *post*.

7. Catterlin v. Armstrong, 79 Ind. 514. See also article DISCOVERY, PRODUCTION, AND INSPECTION, vol. 6, p. 728.

A Motion to Produce a Paper, in the possession of the plaintiff, which is necessary to enable the defendants to plead, may be granted in the discretion of the court, although no notice has been given. But where the possession of a paper is desired to be used in evidence, a notice is necessary. Bronson v. Kensey, 3 McLean (U. S.) 180. See also Saunders v. Smith, 3 Ga. 121; Turner v. Joiner, 18 Ga. 368; Buchanan v. Beckham, 18 Ga. 527.

8. Clark v. Pigeon Roost Min. Co., 29 Ga. 29.

9. See also Ross v. Ross, 10 Daly (N. Y.) 314; Sturz v. Fischer, 2 N. Y. Ann. Cas. 366; State v. Morris Canal, etc., Co., 12 N. J. L. 365.

An order requiring the adverse party to appear and attend the examination of a witness is made out of court, and without notice, and may be made by any judge of the court, in any part of the state. Silver Creek Bank v. Browning, 16 Abb. Pr. (N. Y. Supreme Ct.) 272.

10. Morehead v. Prather, Sneed (Ky.) 135; M'Cormick v. Young, 3 J. J. Marsh. (Ky.) 183; Riley v. Wiley, 3 Dana (Ky.) 75.

11. Brown v. Buttz, 15 S. Car. 488, holding that a motion to dismiss for insufficiency is always in order when the case is reached on the calendar, and no formal notice need be given. See also article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

12. Com. v. Hewitt, 2 Hen. & M. (Va.) 181. See also article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303.

No notice is necessary of a motion to issue a scire facias. Pears v. Bache, 1 N. J. L. 239.

13. Campbell v. West, 93 Cal. 653. See also article REVIVAL OF ACTIONS.

14. Haley v. Eureka County Bank, 21 Nev. 127.

c. EFFECT OF FAILURE TO GIVE NOTICE — Void or Voidable. — While orders entered without notice have been held to be void,¹ it is the better opinion that when the court has jurisdiction of the case, an order granted upon a motion without notice, although notice is required, is not void,² but is merely irregular and erroneous,³ and valid until set aside.⁴

After Expiration of the Term, however, the court has lost jurisdiction of the parties, and an order made upon motion without notice is void.⁵

Overruling Motion. — Where notice is required and none is given, the motion may be properly overruled.⁶

Waiver of Notice. — Notice of motion may, however, be waived,⁷ and it is so waived by appearing and contesting the motion without objection to the want of notice,⁸ and perhaps by merely being present in court when the motion is called up and failing to object to its consideration.⁹

1. *Martin v. Beasley*, 49 Ind. 280, holding that an order against a guardian requiring him to pay certain taxes, made without any notice to him, is void. *Bush v. Geisey*, 16 Oregon 267, holding that an order to enlarge time for filing transcript, when taken *ex parte* and without notice, will be disregarded where the attention of the court is called to the matter, and the appeal will be dismissed for want of jurisdiction in the court to consider it.

2. *Pinckney v. Hagerman*, 4 Lans. (N. Y.) 374; *Tweedy v. United L. Ins. Assoc.*, 24 Civ. Pro. Rep. (N. Y. C. Pl.) 259; *Becker v. Lebanon, etc.*, St. R. Co., 4 Pa. Super. Ct. Rep. 372, 40 W. N. C. 238.

3. *Alabama.* — *Stringer v. Echols*, 46 Ala. 61.

California. — *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 354.

Georgia. — *Clark v. Pigeon Roost Min. Co.*, 29 Ga. 29.

Wisconsin. — *Hungerford v. Cushing*, 2 Wis. 411.

4. *Tweedy v. United L. Ins. Assoc.*, 24 Civ. Pro. Rep. (N. Y. C. Pl.) 259; *Pinckney v. Hagerman*, 4 Lans. (N. Y.) 374; *Becker v. Lebanon, etc.*, St. R. Co., 4 Pa. Super. Ct. Rep. 372, 40 W. N. C. (Pa.) 238.

In *Daniels v. Winslow*, 2 Minn. 113, it appearing by affidavits that the plaintiff's counsel had not had proper notice of the settlement of a bill of exceptions, the bill was stricken out.

5. *Jenkins v. Corwin*, 55 Ind. 21; *Martin v. Beasley*, 49 Ind. 280; *Harvey v. Carroll*, 72 Tex. 63, holding that an order supplying a lost bill of excep-

tions made at a term subsequent to that at which final judgment was rendered, and without notice to the adverse party or his attorney, was of no effect; that such substituted paper was not a part of the record in the case, and that it would not be considered on appeal.

6. *Dupuis v. Thompson*, 16 Fla. 69; *Byington v. Call*, 36 Kan. 455; *Jackins v. Dickinson*, 39 S. Car. 436.

7. *Fraser v. Ryan*, 4 Rich. L. (S. Car.) 460, holding that the defendant by agreement may waive the notice of motion required to be given by the sixty-seventh rule.

8. *California.* — *Reynolds v. Harris*, 14 Cal. 667; *Herman v. Santee*, 103 Cal. 519.

Kansas. — *Smith v. State*, 1 Kan. 365.

Kentucky. — *Smith v. Robinson*, 1 T. B. Mon. (Ky.) 15.

New York. — *Crane v. Stiger*, 58 N. Y. 625. See also *Ladd v. Ingham*, 3 How. Pr. (N. Y. Supreme Ct.) 90.

South Carolina. — *Bank of Charleston Nat. Banking Assoc. v. Zorn*, 14 S. Car. 444.

9. *Kimbrough v. J. K. Orr Shoe Co.*, 98 Ga. 537; *Petrie v. People*, 40 Ill. 334, holding that if a party is present in court when the motion is made by the other party, and takes no notice of such motion, he cannot complain if the court proceeds to hear the motion at once.

See also *Shotwell v. Rowell*, 30 Ga. 557, wherein the court said: "The presiding judge certifies that the counsel of Shotwell was in court when he passed the order annulling his client's

Error Cured. — So also want of notice may sometimes be cured by subsequent proceedings in the cause.¹

3. To Whom Given. — Where notice is necessary, it should be given to all parties who will be affected by the granting of the motion,² providing they have appeared in the

judgment. But he does not undertake to say that he had notice and knowledge of the proceeding; and this was indispensable. For if counsel and parties are to be held responsible for what is transacted in court, it will not do to say that they stood by at the time and did not interfere, which is flatly denied in this case. Notice should be brought home in some more abiding form than the mere recollection of the incumbent on the bench for the time being. Rights should not rest on so frail a tenure."

1. Curing Error by Motion to Vacate. — Thus where the party complaining of want of notice files a motion to vacate the previous irregular order and the latter motion is fully heard, the error is cured. *Thomas v. San Diego College Co.*, 111 Cal. 358; *Rivers v. Olmsted*, 66 Iowa 186; *Billings v. Kothe*, 49 Iowa 34. But see *contra*, *McLean v. Tompkins*, 18 Abb. Pr. (N. Y. Supreme Ct.) 24, wherein it is held that the want of notice of motion is not cured by the fact that the aggrieved party subsequently moved to vacate the order made, nor by his having taken an appeal from the order. "There is no rule that such motion or appeal is a waiver of the want of notice, nor should there be."

2. Persons Adversely Interested Should Be Notified. — *California.* — *Burr v. Navarro Mill Co.*, (Cal. 1894) 35 Pac. Rep. 990.

Illinois. — *Hammer v. Kaufman*, 39 Ill. 87.

Iowa. — *Keeney v. Lyon*, 21 Iowa 277.

Kentucky. — *Ward v. Halbert*, 1 T. B. Mon. (Ky.) 42.

Missouri. — *George v. Middough*, 62 Mo. 549; *Laughlin v. Fairbanks*, 8 Mo. 367.

Nevada. — *Pratt v. Rice*, 7 Nev. 123.

New York. — *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Isnard v. Cazeaux*, 1 Paige (N. Y.) 39; *Matter of Patterson*, 4 How. Pr. (N. Y. Supreme Ct.) 34.

Pennsylvania. — *Lancaster's Appeal*, 111 Pa. St. 524.

South Carolina. — *State v. Port Royal, etc.*, R. Co., 45 S. Car. 464.

United States. — *In re Hall, etc.*, Co., 69 Fed. Rep. 425.

Attorney-General. — Where a motion is made on behalf of a defendant in confinement, after sentence, to take up his case out of its turn, special notice to the attorney-general must be proved. *Stone v. State*, 20 N. J. L. 404.

Motion to Discharge Receiver. — In *Coburn v. Ames*, 57 Cal. 201, it was held that on a motion to discharge a receiver notice should be given to all parties, but that a failure so to notify all parties was not such an irregularity as to justify a reversal of an order of discharge. *Citing 2 Dan. Ch. Pl. and Pr. 1447.*

Application in Creditor's Suit. — A creditor applying for leave to prove his debt after master's report filed, under a decree in a creditor's suit, must give notice of the application to the solicitors of the creditors who have established their claims before the master, and have entered their appearance, as well as to the original parties in the suit. *Wilder v. Keeler*, 3 Paige (N. Y.) 164; *Pratt v. Rathbun*, 7 Paige (N. Y.) 269, *overruling* *Mason v. Codwise*, 6 Johns. Ch. (N. Y.) 183.

Change of Interests. — Where there is a change of interests, *pendente lite*, in an action of contract, the court will not allow the substitution of the purchaser's name as plaintiff upon motion of the vendor, without a notice to him. The purchaser is himself the proper party to make the motion, and he should do it upon notice both to the actual plaintiffs and the defendants. Such a substitution will be granted as a matter of course, where it cannot prejudice the defendant. When such would be the result, it will be refused or granted only on such terms as will protect the defendant from injury. *Howard v. Taylor*, 5 Duer (N. Y.) 604.

Codefendants. — Ordinarily service of a notice upon the opposite party is sufficient, but on a motion by one of several defendants to change the place of trial notice must be given to the

action or pleaded.¹

Defendants Who Do Not Appear are concluded, without the service of any other notice upon them than the primary process, by all proceedings in the action which they had reason to anticipate.²

Attorney or Party. — Where a party entitled to notice has appeared by an attorney of record the notice should be served upon such attorney and not upon the party personally.³

4. For What Day. — The day for which motions may be noticed, termed motion day, is usually fixed by rule of court and must be observed.⁴

other defendants. *Mairs v. Remsen*, 3 Code Rep. (N. Y. Supreme Ct.) 138.

Persons Not Entitled to Notice. — Persons not interested in opposing the motion need not ordinarily be notified. *Gordon v. Sterling*, 13 How. Pr. (N. Y. Supreme Ct.) 405; *Erlund v. Manning*, 160 Mass. 444; *Miller v. Cramer*, 48 S. Car. 282.

It is not necessary to serve the other defendants with notice of motion for final judgment against one defendant who has admitted the plaintiff's claim, where the cause of action is severable. *Macmillan v. Australasian Territories*, 75 L. T. 182.

It is not essential to the validity of an order granting leave to bring an action against a receiver that notice of the application for the order should be given to the parties in the case in which the receiver was appointed. Notice of such application to the receiver is sufficient. *Potter v. Bunnell*, 20 Ohio St. 150.

1. *Thayer v. Mead*, 2 Code Rep. (N. Y. Supreme Ct.) 18; *Hewitt v. Howell*, 8 How. Pr. (N. Y. Supreme Ct.) 346; *Smith v. Green*, 14 Hun (N. Y.) 529.

Withdrawal of Appearance. — In *Oregon* the Civil Code, § 520, expressly provides that notice of a motion need not be given to a defendant who has not appeared, and in *Wilson v. Blakeslee*, 16 Oregon 43, it was held that this statute dispensed with the necessity of notice to a defendant who had entered his appearance and afterwards withdrawn it as to all proceedings subsequent to such withdrawal.

2. *McLean v. Tompkins*, 18 Abb. Pr. (N. Y. Supreme Ct.) 24, holding that the substitution of one plaintiff for another, and particularly the substitution of one of the defendants as plaintiff without notice to his codefendants, is not such a proceeding as a defendant should have anticipated, and was therefore irregular.

Provisional Remedies. — But though the defendant has appeared he is not entitled to notice of an application for an order to arrest him nor for an injunction before he has answered. Provisional remedies are not ordinary proceedings. *Becker v. Hager*, 8 How. Pr. (N. Y. Supreme Ct.) 68.

3. *Kansas*. — *Byington v. Call*, 36 Kan. 455.

Massachusetts. — *Rogers v. Ladd*, 117 Mass. 334.

New Jersey. — Anonymous, 11 N. J. L. 94.

New York. — *Wilder v. Keeler*, 3 Paige (N. Y.) 164; *Pratt v. Rathbun*, 7 Paige (N. Y.) 269; *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121; *Kleecke v. Styles*, 3 Johns. (N. Y.) 250; *Haskins v. Snowden*, 2 Johns. Cas. (N. Y.) 287.

Tennessee. — *Cheatham v. Howell*, 6 Verg. (Tenn.) 311.

Wisconsin. — *Corwith v. Illinois State Bank*, 8 Wis. 376.

Attorney to Confess Judgment. — Where an attorney is retained, even though only to confess judgment, service of notice of motion to vacate satisfaction must be on him and not on the party. *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121.

New Attorney. — Where a copy of the declaration, with notice of the rule to plead, has been served on the defendant personally, an attorney whose notice of retainer is afterwards served is not entitled to new service, but the rule runs from the service on the defendant. *Kleecke v. Styles*, 3 Johns. (N. Y.) 250. To the same effect, see *Haskins v. Snowden*, 2 Johns. Cas. (N. Y.) 287.

Where Several Defendants Appear by Different Attorneys. — motion papers should be addressed to the attorneys of all. *Anderson v. Vandenburgh*, 1 How. Pr. (N. Y. Supreme Ct.) 212.

4. In the *District of Columbia*, under the fifth equity rule, contested motions should be noticed for the first day

5. Form and Sufficiency — a. SUMMARY STATEMENT OF ESSENTIALS — In General. — A notice of motion, being designed to afford the adverse party an opportunity to appear at the hearing and contest the motion, should contain all the information to which the latter is entitled to enable him to do so with effect. Accordingly the essential contents of a notice of motion may be summarized as follows:¹ The notice of motion must be in writing,²

of the term, unless a different day is assigned by the justice. *Fitzgerald v. Fitzgerald*, 7 D. C. 243.

As to *New York* practice, including that settled by the earlier cases, see *Lusher v. Walton*, 1 Cai. (N. Y.) 150, Col. & C. Cas. (N. Y.) 206; *Ogdensburgh Bank v. Paige*, 2 Code Rep. (N. Y. Supreme Ct.) 67; *Walrath v. Killer*, 2 Code Rep. (Onondaga Special Term) 129; *Anonymous*, 18 Wend. (N. Y.) 515; *Jackson v. —*, 2 Cai. (N. Y.) 259; *Pintard v. Ross*, 2 Johns. (N. Y.) 186.

In *Rogers v. Pearsall*, 21 N. Y. App. Div. 389, it was held that an enumerated motion should be stricken from the calendar, on motion under rule 40, when noticed for the second day of the term instead of the first. See *Power v. Athens*, 19 Hun (N. Y.) 165, wherein it was held that the requirement that a nonenumerated motion must be noticed for the first day of the term, unless sufficient cause be shown for the contrary, was not dispensed with by the granting of an order to show cause, but that such an order should be returnable to the first day of the term unless cause for naming a different day is shown in the affidavit for the order.

In *Pintard v. Ross*, 2 Johns. (N. Y.) 186, it was held that notice of a nonenumerated motion might be for any day in term, but that the court would not hear the motion except on a nonenumerated day.

In *Hatch v. Andrews*, 1 N. Y. Month. L. Bul. 59, it was held that on a notice for any other than the regular motion day no order can be taken by default. See also *Vernovy v. Tauney*, 3 How. Pr. (N. Y. Supreme Ct.) 359, wherein it was held that a motion noticed for a day out of an appointed term must be brought on on the day specified, and where the moving party does not appear on that day he cannot be entitled to his motion by default on a subsequent day.

Where the reason for not noticing the motion for the first day appears on the record no affidavit in excuse is

necessary. *Kane v. Scofield*, 2 Cai. (N. Y.) 368, Col. & C. Cas. (N. Y.) 414.

Sufficiency of Excuse. — Mistaking the first day of the term was held a sufficient excuse for not noticing the motion for the first day. *Bayard v. Malcom*, 3 Cai. (N. Y.) 102, Col. & C. Cas. (N. Y.) 456.

Where the subject-matter of a motion arises so late that notice cannot be given for the first day it may be given for a subsequent day at the peril of the party. *Anonymous*, 18 Wend. (N. Y.) 515.

1. A motion to correct a judgment under Ohio Rev. Stat., § 5354, must be upon notice in writing, containing the names of the parties, name of the court or judge before whom the motion was made, with the place and day of hearing and the nature and terms of the order to be applied for, served by an officer or disinterested person upon the parties to be affected thereby. *Nigh v. Stillwell, etc., Co.*, 12 Ohio Cir. Ct. Rep. 40, 5 Ohio Cir. Dec. 335.

2. *Borland v. Thornton*, 12 Cal. 440; *Mason v. Kellogg*, 38 Mich. 133; *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Hunt v. Langstroth*, 9 N. J. L. 223; *Tillou v. Hutchinson*, 15 N. J. L. 178; *Nigh v. Stillwell, etc., Co.*, 12 Ohio Cir. Ct. Rep. 40, 5 Ohio Cir. Dec. 335; *St. Michael's Church v. Philadelphia County, Bright. (Pa.)* 121, 4 Clark (Pa.) 150; *Dawson's Appeal*, 15 Pa. St. 482. But see *Com. v. Reiter*, 78 Pa. St. 161, holding that a verbal notice to counsel is sufficient unless required to be in writing.

When a statute speaks of notice of a motion it means written notice or notice in open court of which the minute is made by the clerk. *Borland v. Thornton*, 12 Cal. 440. But see *Plateau v. Lubeck*, 24 Cal. 365, wherein this case was cited and the court said: "That a notice in legal proceedings should be in writing, we deem essential to the protection of the rights of the party to be affected by it. Any other practice would, in many instances, be attended

and should be entitled with the names of the parties¹ and the matter or cause wherein the motion is to be made.² It should be addressed to all the parties or attorneys intended to be served³ and should be signed by the moving party or his attorney.⁴ It should also specify the time⁵ and place⁶ where the motion will be made, the relief sought,⁷ the grounds or reasons for such relief,⁸ and the affidavits or other papers upon which the motion will be founded.⁹

with mischievous results, and hence should be discountenanced. *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107. The statute does not provide for any other than a written notice, and we are not satisfied that a notice in open court, entered in the minutes of the clerk, in such cases, can properly serve as a substitute for the notice contemplated by the statute. If it can, then it should contain all the substantive elements of the statutory notice, and should be brought to the attention of the party entitled to notice; and all this should appear, by proper entry, in the minutes of the court." See also *Killip v. Empire Mill Co.*, 2 Nev. 34.

Notice by Telephone is necessarily verbal and therefore insufficient. *Exp. Apeler*, 35 S. Car. 417.

Parol Evidence of the Contents of a notice may be given when a party has no copy. *Tower v. Wilson*, 3 Cai. (N. Y.) 174. *Col. & C. Cas.* (N. Y.) 494.

1. Notice of a motion affecting an action, but in which no parties are named, will not bind the party upon whom it is served. *Eastman v. Moore*, 14 Iowa 586.

A notice which does not give the Christian or baptismal name of one of the parties mentioned therein is too indefinite and uncertain, and may be stricken from the files. *Henrichsen v. Mudd*, 33 Ill. 476.

See *Sandland v. Adams*, 2 How. Pr. (N. Y. Supreme Ct.) 98, wherein it was held that an affidavit of merits might be disregarded because not entitled in the suit, where the plaintiff's name was stated in the title as "Sunderland" whereas it was "Sandland."

If a notice of motion for nonsuit be titled *versus* instead of *ad sectam*, and the affidavit annexed rightly titled, the notice will be good. *Ryers v. Hillyer*, 1 Cai. (N. Y.) 112.

The practice of inverting the names in the papers on a motion by a defendant, and adding "impleaded," etc.,

after his name, if there are other defendants not moving, is obsolete, the convenience of having all the papers in a cause entitled alike being found paramount. 1 Abb. N. Pr. and Forms 153, note 1.

2. 2 Dan. Ch. Pr. 1594; *Davis v. Richards*, 2 N. Y. Month. L. Bul. 97.

The notice should be entitled in the court where the action is pending and the motion is to be made. *Clickman v. Clickman*, 1 N. Y. 611.

Thus, on a motion to remove a cause from the Court of Common Pleas into the Supreme Court, the papers should be entitled in the Court of Common Pleas. *Miller v. Dows*, 2 How. Pr. (N. Y. Supreme Ct.) 98.

3. *Anderson v. Vandenburg*, 1 How. Pr. (N. Y. Supreme Ct.) 212, wherein it was held that original motion papers should be addressed to all the attorneys opposed, otherwise those to whom they are not addressed may appear and take a rule for costs for not moving, even where the motion has been made. In this case it appeared that the attorneys on whom the notice was served, but to whom it was not addressed, were misled by the motion.

Parties in Representative Capacity.—In *Duclos v. Benner*, (Supreme Ct.) 25 N. Y. St. Rep. 413, the notice of motion was not addressed to a defendant as executor, and it was accordingly held that he was made a party to the motion proceeding only as an individual. The court cited *Landon v. Townshend*, 112 N. Y. 93.

4. See *infra*, IX. 5. f. *Signature by Party or Attorney.*

5. See *infra*, IX. 5. b. *Designating Time.*

6. See *infra*, IX. 5. c. *Designating Place.*

7. See *infra*, IX. 5. d. *Designating Relief Sought.*

8. See *infra*, IX. 5. e. *Designating Grounds for Relief.*

9. See *infra*, IX. 5. g. *Papers on Which Motion Is Based.*

Test of Sufficiency. — A notice of motion will ordinarily be deemed sufficient, notwithstanding defects in respect to some of the above enumerated essentials, provided no one was misled thereby.¹

Waiver of Objections. — Appearing and contesting a motion without preliminary objection is a waiver of any mere irregularity or formal defect in the notice.²

Amendment of Notice. — A notice cannot be amended in matters of substance after the expiration of the time limited by statute for serving notice.³

6. DESIGNATING TIME. — The notice must designate the time when the motion will be made.⁴ And it seems that the notice will be sufficient in this respect where no one is misled.⁵

1. *Harris v. Bradford*, 4 Ala. 214; *Bander v. Covill*, 4 Cow. (N. Y.) 60; *Whipple v. Williams*, 1 Mich. 115; *Board of Education v. Parsons*, 22 W. Va. 308; *Batten v. Harrison*, 3 B. & P. 1; *Wolfe v. Horton*, 3 Cal. (N. Y.) 86; *Hawley v. Donnelly*, 8 Paige (N. Y.) 415.

But where the party who founds an application upon papers wrongly entitled asks to have the proceedings of the adverse party set aside for a technical defect merely, he will be held to strict rules of practice and his application will be denied. *Hawley v. Donnelly*, 8 Paige (N. Y.) 415.

Where the notice of a motion states that the plaintiff "did" move, etc., on a day subsequent to the date of the notice, "did" will be understood to mean "will." *Harris v. Bradford*, 4 Ala. 214.

In *Jerauld County v. Williams*, 7 S. Dak. 196, a notice of a motion naming only one defendant, followed by the abbreviation "et al.," was held sufficient where no one was misled.

Error in Entitling the Papers or in the Names of Parties may be disregarded where no one was misled. *Quick v. Merrill*, 3 Cal. (N. Y.) 133; *Falker v. New York, etc., R. Co.*, 100 N. Y. 86, holding that a notice to a firm of three attorneys may be good, although the notice names only two of them, when the error could not have been prejudicial; *Hawley v. Donnelly*, 8 Paige (N. Y.) 415; *Ryers v. Hillyer*, 1 Cal. (N. Y.) 112. But see *Sandland v. Adams*, 2 How. Pr. (N. Y. Supreme Ct.) 98, wherein a misnomer of a party was held fatal.

2. *Indiana*. — *Lane v. Fox*, 8 Blackf. (Ind.) 58.

Iowa. — *Billings v. Kothe*, 49 Iowa 34. *Kansas*. — *Smith v. State*, 1 Kan. 365.

Kentucky. — *Taylor v. Hardin*, 4 B. Mon. (Ky.) 363.

Minnesota. — *Marty v. Ahl*, 5 Minn. 27.

Mississippi. — *Izod v. Addison*, 5 How. (Miss.) 432.

New York. — *Roosevelt v. Dean*, 3 Cal. (N. Y.) 105, Col. & C. Cas. (N. Y.) 460; *Crane v. Stiger*, 58 N. Y. 625.

When counsel appears at the argument of the motion and is heard, and no prejudice results from want of formal notice, no such notice is necessary. *Chicago, etc., R. Co. v. Estes*, 71 Iowa 603.

3. *Little v. Jacks*, 67 Cal. 165; *Packer v. Doray*, 98 Cal. 317. But see *Valentine v. Stewart*, 15 Cal. 396, wherein it was held that a motion may be amended by the addition of grounds therefor, even after the expiration of the time limited. This case was cited with approval and followed in *Loucks v. Edmondson*, 18 Cal. 203.

4. *Crane v. Crofoot*, 1 How. Pr. (N. Y. Supreme Ct.) 191; *Glenny v. Langdon*, 94 U. S. 604, holding that where a notice of motion to dismiss an appeal designated no time for the hearing, the cause would be reinstated.

5. That the notice was for Tuesday instead of Monday is immaterial so long as the mistake did not mislead. *Batten v. Harrison*, 3 B. & P. 1; *Wolfe v. Horton*, 3 Cal. (N. Y.) 86. So where it was for Monday instead of for Tuesday. *Bander v. Covill*, 4 Cow. (N. Y.) 60.

Date of Term. — The date on which the term of the court is to commence need not appear in the notice. *Green v. Green*, 7 Ind. 113.

The Day of the Term when the motion is to be made need not appear. *McRae v. Colclough*, 2 Ala. 74; *Welch v. Fourier*, 6 Ala. 516; *Dye v. Knox*, 1 Bibb (Ky.) 573, holding that notice on

Alternative Days. — But some one certain day must be named; different days cannot be named in the alternative.¹

"As Soon Thereafter as Counsel Can Be Heard." — After the day designated, it is usual to insert the clause "or as soon thereafter as counsel can be heard." But this clause is unnecessary,² as the motion stands over as a matter of course where it cannot be heard for the day designated.³

c. DESIGNATING PLACE. — The place or judge before whom the motion will be made should be designated in the notice.⁴

motion in a County Court without specifying any day of the term may be taken upon any day, as the law considers the whole term of that court as one day.

Notice for "Next Term." — Notice for the "next term" includes the first day of the term and is good. *Avery v. Cadogan*, 1 Cow. (N. Y.) 230. In fact the addition of a particular day for a motion which is several terms forward may be rejected as surplusage. *Jackson v. Brownson*, 4 Cow. (N. Y.) 51; *Wolfe v. Horton*, 3 Cai. (N. Y.) 86; *Crawford v. Branch Bank*, 7 Ala. 205.

A notice that a motion will be made at the "next special or adjourned term" of the District Court, to be held "on the 28th day of January, 1867," contains a sufficient designation of the term. *Blake v. Sherman*, 12 Minn. 420.

1. *Crane v. Crofoot*, 1 How. Pr. (N. Y. Supreme Ct.) 191.

2. Anonymous, 1 Johns. (N. Y.) 143.

3. Anonymous, 1 Johns. (N. Y.) 143.

Notice for Holiday. — In *White v. Rockefeller*, 45 N. J. L. 299, it was held that a notice of a motion to be made before the court upon a day specified, which was a day of general election and therefore a holiday, "or as soon thereafter as the court can attend to the same," was a good notice for the day succeeding the designated day.

In *Matter of Flushing Ave.*, 101 N. Y. 678, notice of a motion was given for the first Monday of July, which was the regular motion day, or as soon thereafter as counsel could be heard. The first Monday proved to be the Fourth of July and a legal holiday, and on the next day, July fifth, the motion was made and granted. It was held that even if the court was not regularly adjourned so as to carry the business over to the next day, the order was merely irregular and not void, and the defect was waived by unreasonable delay in moving to vacate the order.

Motions Standing Over. — "All such motions that are not heard on the day for which they are noticed, in consequence of the inability of the court to hear the same, stand over as a matter of course until the next day, unless a different disposition should be made by the direction of the judge or the consent of the parties. The fact that a calendar of motions is not made at chambers is no reason why this practice should not obtain. The calendar is employed in the Saturday chambers of the court to apprise the judge of the titles of the actions, and to arrange the order in which the causes should be heard or tried. It is not at all essential to the continuance of the cause before him; and when he adjourns, all matters before the court on that day on notice and not heard stand over without further order, whether he has or has not a calendar, until the day to which he adjourns." *Clerke, J., in Mathis v. Vail*, 10 How. Pr. (N. Y. Supreme Ct.) 458.

When New Notice Is Necessary. — In *Fischer v. Hanna*, 8 Colo. App. 471, it was held that when a motion is not acted upon at the time designated in the notice, but goes over indefinitely, it is error to act upon it in the absence of the adverse party without further notice. In this case the notice was for January 16, "or as soon thereafter as counsel could be heard." No further action was taken until May 23, when the motion was sustained without further notice. This was held to be error. The court cited *Mallan v. Higgenbotham*, 10 Colo. 264.

4. If notice of the place and time at which a motion by an administrator for the sale of the lands of the deceased was to be made has not been given to the persons interested, the sale is void. *Chicago, etc., R. Co. v. Cook*, 43 Kan. 83, following *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.

Designation of Place — Sufficiency. — "While it is the better practice to spec-

But where the motion is to be to a court, simply naming the court and term will be sufficient, as it is notorious where the different terms of court are held.¹

d. DESIGNATING RELIEF SOUGHT — *Prayer for Special Relief.* — A notice of motion must specify the object of the motion or the relief that will be asked.² And the party moving is confined to the object specified in his notice or relief necessarily incident thereto.³ On the other hand, costs of the motion will not be

if distinctly that the application will be made to the court when such is intended, yet, when an application to the court for action within the exclusive jurisdiction of a court is described as an application to the judge of the proper court, in the absence of special circumstances creating an exception we should hold it sufficient." *Yale v. Edgerton*, 11 Minn. 271.

Although the judge's chambers are mentioned as the place of hearing, this does not tend to characterize the business to be transacted as what is technically known as chamber business, for the court may properly be held therein and the language may well be considered as designating merely the place of holding the court. *Yale v. Edgerton*, 11 Minn. 271.

An irregularity in noticing for hearing, at the special term at chambers of the Supreme Court in New York city (where the justice sitting at chambers also holds, in the same room, the special term for nonenumerated motions), a motion for judgment on the pleadings which should be noticed for and heard at the special term for nonenumerated motions, does not vitiate a judgment entered on an order granted on such motion, when the motion was, as matter of fact, heard in the proper court. *Bates v. United L. Ins. Assoc.*, 68 Hun (N. Y.) 144, *affirmed* in 142 N. Y. 677.

In *People v. Sessions*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 192, the case of an order which should have been made at chambers, the extreme view was taken that whereas a special term must be held by a single judge, and as the judge who, in fact, held it when the motion was made was the identical one specified in the notice of motion, before whom at special term it would be made, the addition to the name of the judge of the clause "at the next special term," etc., might be rejected as surplusage.

The words "or one of the justices" inserted after "before me," in an

order to show cause, were held to be surplusage. *Rogers v. Baere*, 1 N. Y. Month. L. Bul. 45.

Notice of Motion for Confirmation of a referee's report, where the venue of the action is in New York county, is not defective in stating that the motion will be made to one of the judges of the court at chambers, instead of stating that the application will be made to the court, because Code Civ. Pro., § 770, providing that "in the first judicial district, a motion which elsewhere must be made in court may be made to a judge out of court, except for a new trial on the merits," makes application for confirmation to a judge at chambers as regular as if made to the judge while holding a special term of court. *Robertson v. Robertson*, 9 Daly (N. Y.) 44.

1. *Bodwell v. Wilcox*, 2 Cai. (N. Y.) 104, Col. & C. Cas. (N. Y.) 367; *Brown v. State*, 8 Heisk. (Tenn.) 871.

2. *Indiana*. — *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

Michigan. — *Parsons v. Copland*, 5 Mich. 143.

Minnesota. — *Barker v. Walbridge*, 14 Minn. 469.

Missouri. — *Robinson v. Rice*, 20 Mo. 229.

New York. — *Alexander v. Esten*, 1 Cai. (N. Y.) 152.

Ohio. — *Nigh v. Stillwell, etc., Co.*, 12 Ohio Cir. Ct. Rep. 40, 5 Ohio Cir. Dec. 335.

West Virginia. — *Board of Education v. Parsons*, 22 W. Va. 314.

See also *supra*, VIII. 5. *Prayer for Relief*.

A Notice of Motion Is Sufficiently Specific if it be so plain that the defendant cannot mistake its object, however wanting it may be in technical accuracy. *Board of Education v. Parsons*, 22 W. Va. 308.

3. *Ford v. Com.*, Litt. Sel. Cas. (Ky.) 3; *Payne v. Payne*, 8 B. Mon. (Ky.) 392; *Alexander v. Esten*, 1 Cai. (N. Y.) 152, holding that a judgment cannot be set aside on a motion merely to set

allowed where the notice of motion asks for more than the party is entitled to.¹

Prayer for General Relief. — It is usual to insert in the notice, after the clause specifying the particular relief sought, a general clause stating that such other and further relief will also be asked as to the court shall seem meet and proper.² Under a notice containing such a clause, the court may grant any relief compatible with the case presented.³ But this rule should not be applied so as to

aside execution; *De Walt v. Kinard*, 19 S. Car. 294, holding that it is error to grant relief beyond the terms of the notice.

Incidental Relief. — On a motion to set aside the taxation of costs, the court may, when both parties appear, not only set aside the taxation but vacate the judgment entered for the costs, although this relief be not asked for in the notice of motion, as it is incidental to the vacating of the taxation. *Jones v. Cook*, 11 Hun (N. Y.) 230. See also *Bailey v. Ryder*, 1 Barb. (N. Y.) 74, holding that upon a notice of motion for the settlement of issues at law a party may apply for the award of issues also.

1. *Bates v. Loomis*, 5 Wend. (N. Y.) 78, holding that this is true notwithstanding the moving party waives such other relief. On the contrary, costs will be given against him. *Smith v. Jones*, 2 Code Rep. (Albany Special Term) 33; *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28.

Alternative Notice. — Where the notice of motion asks two things in the alternative, one of which the party is not entitled to, the costs of opposing the motion will be allowed to the adverse party. *Smith v. Jones*, 2 Code Rep. (Albany Special Term) 33.

2. **Discretion of Court.** — If a party has mistaken the practice and moved for an order to which he is not entitled, it must, in general, be discretionary with the court whether, under the words "and for such other and further order," it will grant other relief or not; and the order denying such relief is not appealable to the Court of Appeals. *Van Slyke v. Hyatt*, 46 N. Y. 259.

Alternative Notice. — "Such other and further order in the premises as to the court may seem just" is, in substance, an alternative notice, and that of the most indefinite kind. It says that if the moving party cannot have what he specifies he will ask in its place whatever the court may think proper to

give instead. *Clark v. Clark*, 11 Abb. N. Cas. (Brooklyn City Ct.) 333.

3. *California.* — *People v. Turner*, 1 Cal. 152.

Minnesota. — *Landis v. Olds*, 9 Minn. 90.

New York. — *Rogers v. Toole*, 11 Paige (N. Y.) 212; *Barstow v. Randall*, 5 Hill (N. Y.) 518; *Jackson v. Stiles*, 1 Cow. (N. Y.) 135; *Bissell v. New York Cent., etc., R. Co.*, 67 Barb. (N. Y.) 385; *Martin v. Kanouse*, 9 Abb. Pr. (N. Y. Supreme Ct.) 370, note; *Ferguson v. Jones*, 12 Wend. (N. Y.) 241; *Stearns v. Kenyon*, 5 Hill (N. Y.) 519; *Van Slyke v. Hyatt*, 46 N. Y. 259.

Relief Obtainable Under Notice of General Prayer. — Under a notice of motion to dissolve an injunction, and for further relief, the court may order a new defendant to be joined in the action. *Martin v. Kanouse*, 2 Abb. Pr. (N. Y. Supreme Ct.) 390. See also *Walkinshaw v. Perzel*, 7 Robt. (N. Y.) 606, 32 How. Pr. (N. Y.) 310.

Under a prayer for general relief on a notice of motion to amend for irregular proceedings, such proceedings may be ordered to be stricken out. *Boylan v. McAvoy*, 29 How. Pr. (N. Y. Supreme Ct.) 278.

The complaint may be set aside on a motion to set aside a summons for varying from the complaint under the prayer for other and further relief. *Ridder v. Whitlock*, 12 How. Pr. (N. Y. Supreme Ct.) 208; *Boington v. Lapham*, 14 How. Pr. (N. Y. Supreme Ct.) 360.

For further illustrations see, generally, *Blake v. Eldred*, 18 How. Pr. (N. Y. Supreme Ct.) 240; *Mott v. Burnett*, 2 E. D. Smith (N. Y.) 50; *Hecker v. Mitchell*, 5 Abb. Pr. (N. Y. Super. Ct.) 453; *Kreitz v. Frost*, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 277; *Fosdick v. Groff*, 22 How. Pr. (N. Y. Supreme Ct.) 158; *Beatty v. O'Connor*, 106 Ind. 81.

Relief Not Obtainable Under General Prayer. — A motion to vacate an order of arrest and for further relief does not

operate as a surprise in any respect upon the opposite party or to deprive him of the privilege of being heard in argument and by proof as to the further relief to be granted.¹

Where No One Opposes the Motion only the thing specifically asked for will be granted, although the notice contains a general prayer; but where the motion is opposed relief will be given under the general or alternative prayer, subject to the rules already stated.²

2. DESIGNATING GROUNDS FOR RELIEF. — The notice of motion should specify with particularity the precise grounds upon which the moving party will base his right to the relief sought, and a noncompliance with this rule is a sufficient ground for denying the motion.³

embrace a motion to reduce the bail; the questions are entirely distinct and depend on different facts. *Smith v. Spalding*, 3 Robt. (N. Y.) 615, 30 How. Pr. (N. Y.) 339.

Under a notice of motion that the answer be stricken out as frivolous "or for such other or further order," etc., the plaintiff cannot demand judgment. To effect this the word "judgment" or "relief" should have been used instead of "order." *Darrow v. Miller*, 5 How. Pr. (N. Y. Supreme Ct.) 247, 3 Code Rep. (N. Y.) 241.

Leave to renew cannot be granted under the general prayer as a legitimate object of the principal motion where there are no facts in the moving papers on which to found this particular relief. *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 113. And see generally article PRAYERS FOR RELIEF.

1. *Landis v. Olds*, 9 Minn. 90.

2. *Rogers v. Toole*, 11 Paige (N. Y.) 212.

Costs. — Under a general clause asking for other and further relief, the party cannot, on default, take costs of the motion where there was no notice of an intended application. *Northrop v. Van Dusen*, 5 How. Pr. (N. Y. Supreme Ct.) 134, 3 Code Rep. (N. Y.) 140, following *Crippen v. Ingersoll*, 10 Wend. (N. Y.) 603. See also *Ward v. Sands*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 60; *Potter v. Smith*, 9 How. Pr. (N. Y. Supreme Ct.) 262; *McLean v. Hoyt*, 56 How. Pr. (N. Y. Supreme Ct.) 351; *Tracy v. Humphrey*, 1 Code Rep. N. S. (N. Y. Supreme Ct.) 197.

But the fact that the notice does not ask for costs does not make it error to grant them if the motion is opposed, though the common practice under such circumstances is to refuse them. *Jones v. Cook*, 11 Hun (N. Y.) 230.

3. *California*. — *Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmondson*, 18 Cal. 203; *Quivey v. Gambert*, 32 Cal. 326; *Cottle v. Leitch*, 43 Cal. 320; *Donnelly v. Struven*, 63 Cal. 183; *Packer v. Doray*, 98 Cal. 315.

Indiana. — *Barnard v. Graham*, 14 Ind. 322.

Montana. — *State v. Fry*, 10 Mont. 407.

New York. — *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657; *Brower v. Brooks*, 1 Barb. (N. Y.) 423, 3 How. Pr. (N. Y.) 243; *Hanna v. Curtis*, 1 Barb. Ch. (N. Y.) 263; *Ellis v. Jones*, 6 How. Pr. (N. Y. Supreme Ct.) 296; *Wilson v. Wetmore*, 1 Hill (N. Y.) 216; *Boyd v. Weeks*, 6 Hill (N. Y.) 71; *Lewis v. Graham*, 16 Abb. Pr. (N. Y. Supreme Ct.) 126; *Bishop v. Empire Transp. Co.*, 37 N. Y. Super. Ct. 12; *Lalor v. Fisher*, 2 Robt. (N. Y.) 669; *Perkins v. Mead*, 22 How. Pr. (N. Y. Supreme Ct.) 476; *Selover v. Forbes*, 22 How. Pr. (N. Y. Supreme Ct.) 477; *Barker v. Cook*, 40 Barb. (N. Y.) 254, 25 How. Pr. (N. Y.) 190; *Gurnee v. Hoxie*, 29 Barb. (N. Y.) 547; *Park v. Park*, 80 N. Y. 156; *Baker v. Stephens*, 10 Abb. Pr. N. S. (N. Y. C. Pl.) 1; *Lambert v. Perry*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 274, 15 N. Y. St. Rep. 964; *Hicks v. Brennan*, 10 Abb. Pr. (N. Y. Supreme Ct.) 304; *Marquat v. Mulvy*, 9 How. Pr. (N. Y. Supreme Ct.) 460; *Bailey v. Lane*, 13 Abb. Pr. (N. Y. Supreme Ct.) 354, 21 How. Pr. (N. Y.) 475.

Wisconsin. — *Corwith v. Illinois State Bank*, 8 Wis. 376.

A party who has noticed a motion cannot inject into it, by service of a new affidavit, without leave, before the day of hearing, a new ground of relief. *Lambert v. Perry*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 274, 15 N. Y. St. Rep. 964.

Ground Obvious from Relief Demanded. — But where it is sufficiently obvious from the relief sought that there could be but one ground for granting such a motion, the court may treat the demand for relief as a sufficient indication of the ground.¹

The Object of the Rule is obviously to prevent a surprise upon the opposite party.²

Limitation to Grounds Stated. — And accordingly upon the hearing the party will be confined to the grounds stated in his notice.³

Sufficiency of Designation. — Under a statute requiring the notice of motion to state particularly the error relied upon, a notice that the defendant will move for a new trial upon the grounds to be set forth in the motion is insufficient. *State v. Fry*, 10 Mont. 407.

General notice of a motion to dissolve an injunction for want of equity is sufficient; but if there be special ground not touching the equity, it should be stated. *Morris Canal, etc., Co. v. Bartlett*, 3 N. J. Eq. 9; *Brown v. Winans*, 11 N. J. Eq. 267.

A notice of motion for a new trial which merely states that the motion will be asked because the evidence is insufficient to justify the verdict is not sufficiently specific. The notice should have specified the particulars in which such evidence is insufficient. *Froman v. Patterson*, 10 Mont. 107.

Under a statute authorizing an attachment to be discharged on the ground that the writ was improperly issued, a motion for that purpose must specify the particular points of irregularity upon which the motion will be made. *Freeborn v. Glazer*, 10 Cal. 337, cited and followed in *Loucks v. Edmondson*, 18 Cal. 204, and in *Donnelly v. Strueven*, 63 Cal. 183. Speaking of the statute, the court said: "It is only a provision that whenever the writ is improperly issued, that fact will authorize the application for its discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed, or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party will rely. If the point be stated, it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so." See also *Barnard v. Graham*, 14 Ind. 322, wherein it was held that stating the grounds of a motion for a new trial in the words of the statute was not

sufficiently specific. But see *Hicks v. Brennan*, 10 Abb. Pr. (N. Y. Supreme Ct.) 304, wherein notice of a motion to set aside a judgment on the ground that it was improperly entered was held to refer sufficiently to the objection that the judgment was entered without authority. See also *Marquat v. Mulvy*, 9 How. Pr. (N. Y. Supreme Ct.) 460; *Lewis v. Graham*, 16 Abb. Pr. (N. Y. Supreme Ct.) 126.

Under the two hundred and tenth rule, the reasons to be stated in the notice of motion to strike out need not be more particular when the objection is to a bill or to an answer by way of cross-bill than would be required on demurrer; or, where it is to an answer, than would be required in exceptions to an answer. *Westervelt v. Ackerson*, 35 N. J. Eq. 43.

Two Grounds. — The joinder of two distinct grounds in the notice of motion is not an objection available on demurrer. *M'Mahan v. Kyle*, 9 Port. (Ala.) 507. See also *Womack v. Nichols*, 39 Miss. 320.

1. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

2. "If the point be stated, it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so." *Freeborn v. Glazer*, 10 Cal. 339.

3. An order granting a motion on a ground not mentioned in the notice should be reversed on appeal. *Barker v. Cook*, 40 Barb. (N. Y.) 254, 25 How. Pr. (N. Y.) 190, 16 Abb. Pr. (N. Y.) 83.

On a motion to vacate a notice on the ground of irregularity merely, the mover is not entitled to appeal to the favor of the court on the merits. *Asinari v. Volkening*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 454.

Several Grounds. — Where there are several grounds on which a motion may be granted, those upon which the moving party means to rely must be distinctly stated, either in the notice or in the affidavits that accompany it, and

Under a Strict Construction of the Rule it has been held that the grounds of the motion must be stated in the notice itself, and that it is not sufficient if they are stated in the accompanying affidavit but not in the notice.¹

In New York it seems that the rule only applies in cases where the motion is based upon mere irregularities as distinguished from substantial defects.² And the rule has been stated to be that where in answer to a motion the opposite party would have a right to explain by affidavit the matters which constitute the foundation of the motion, the motion papers must apprise him of the grounds upon which the moving party relies; but where the

to the grounds thus stated the party will be confined upon the hearing. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657; *New York v. Lyons*, 24 How. Pr. (N. Y. C. Pl.) 280.

1. *Montrait v. Hutchins*, 49 How. Pr. (N. Y. Supreme Ct.) 105, cited with approval in *Garner v. Mangam*, 46 N. Y. Super. Ct. 365, wherein it was held that upon a motion to set aside an order for irregularity the order to show cause must, under rule 37, specify the irregularity even if it appear in the affidavit. See also *Coit v. Lambeer*, 2 Code Rep. (N. Y. Supreme Ct.) 79; *Lewis v. Graham*, 16 Abb. Pr. (N. Y. Supreme Ct.) 126, wherein *Sutherland, J.*, said that a failure of the order to show cause to specify the grounds of irregularity relied upon was, in itself, sufficient ground for denying the motion. But see *contra*, *Burns v. Robbins*, 1 Code Rep. (N. Y. C. Pl.) 62.

In *Livermore v. Bainbridge*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 227, it was held that an order will not be reversed on appeal because the ground of motion was not sufficiently pointed out in the notice of motion, if the ground of motion was fully stated in the moving affidavits, and distinctly sought to be met by the opposing affidavits, and was actually discussed in the court below. See also *Brower v. Brooks*, 1 Barb. (N. Y.) 423; *Ellis v. Jones*, 6 How. Pr. (N. Y. Supreme Ct.) 296; *Hanna v. Curtis*, 1 Barb. Ch. (N. Y.) 263.

In *Wilson v. Wetmore*, 1 Hill (N. Y.) 216, it was held that a party moving to quash a writ on the ground of some defect therein must point out the defect either in his affidavit or notice of motion, and that it is not enough that the papers on which he moves contain a copy of the writ in which the defect appears.

2. *Mojarrieta v. Saenz*, 80 N. Y. 547; *Emerson v. Auburn*, etc., R. Co., 13 Hun (N. Y.) 150; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100; *Hough v. Stover*, 2 Cai. (N. Y.) 221, wherein it was held that an application in arrest of judgment was a non-enumerated motion, and that the motion need not specify the reasons, because, as they are on the face of the record, they must necessarily appear to the adverse party. Such a motion would now be classed as an enumerated motion. See Hun's Court Rules, Rule 38. See also the New York cases cited in the preceding notes of this section.

What Are Not Irregularities Within Rule. — The entry of judgment against a minor, *Peck v. Coler*, 20 Hun (N. Y.) 534; or by confession upon an insufficient statement, *Winnebrenner v. Edgerton*, 8 Abb. Pr. (N. Y. Supreme Ct.) 419, 30 Barb. (N. Y.) 185, 17 How. Pr. (N. Y.) 363; a motion to open a sale on the ground of surprise, *Kellogg v. Howell*, 62 Barb. (N. Y.) 280; the issuing of an execution in violation of a stay of proceedings, *Jackson v. Smith*, 16 Abb. Pr. (N. Y. C. Pl.) 201, 25 How. Pr. (N. Y.) 476; entering judgment by default after service of an answer, *Decker v. Kitchen*, 21 Hun (N. Y.) 332; a motion to vacate an order for insufficiency of affidavit on which it was founded, *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100; a motion to vacate for want of due service, *Emerson v. Auburn*, etc., R. Co., 13 Hun (N. Y.) 150, are all cases of substantial grievances, and not mere irregularities within the meaning of the rule. See also *Graham v. Pinckney*, 7 Robt. (N. Y.) 147; *Skinner v. Noyes*, 7 Robt. (N. Y.) 228; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *Blake v. Locy*, 6 How. Pr. (N. Y. Supreme Ct.) 108.

opposite party has no right to explain or answer by affidavit, or to amend or to perfect his proceedings on terms, the papers need not disclose the ground of motion.¹

f. SIGNATURE BY PARTY OR ATTORNEY. — The notice should be signed by a party or attorney entitled to move.² But as such a signature to a notice of motion, without qualification, amounts to a general appearance,³ if the appearance is meant to be for the specific purpose only of making the motion, such limitation should be stated in the notice.⁴

g. PAPERS ON WHICH MOTION IS BASED. — The Notice Should Specify the papers or affidavits upon which it will be founded.⁵

A Copy of the Affidavits or Other Papers upon which the motion is to be founded should be served with the notice of motion.⁶

1. *Brower v. Brooks*, 1 Barb. (N. Y.) 424; *Hanna v. Curtis*, 1 Barb. Ch. (N. Y.) 263.

2. *Buckman v. Carnley*, 9 How. Pr. (N. Y. C. Pl.) 180; *Potter v. Tuttle*, 2 Wend. (N. Y.) 254.

A Printed Signature will be sufficient. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *Brainerd v. Heydrick*, 32 How. Pr. (N. Y. Supreme Ct.) 97.

A Signature by Counsel Instead of by Attorney was held sufficient, where the attorney could not be found, in *Bogert v. Bancroft*, 3 Cai. (N. Y.) 127, Col. & C. Cas. (N. Y.) 466.

A Notice Signed by a Party Personally instead of by his attorney may be disregarded where he has appeared by attorney, notwithstanding the statute speaks of notice by "either party." *Halsey v. Carter*, 6 Robt. (N. Y.) 535.

3. *Kelsey v. Covert*, 15 How. Pr. (N. Y. Supreme Ct.) 92; *Baxter v. Arnold*, 9 How. Pr. (N. Y. Supreme Ct.) 445; *Ayres v. Western R. Corp.*, 48 Barb. (N. Y.) 132. See also article APPEARANCES, vol. 2, p. 637.

But it has been held that the signature of motion papers, though it may be a sufficient appearance to waive irregularities, is not sufficient under the code to entitle a defendant to notice of further proceedings. *Douglas v. Haberstro*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 230.

4. *Baxter v. Arnold*, 9 How. Pr. (N. Y. Supreme Ct.) 445.

5. *Corwith v. Illinois State Bank*, 8 Wis. 376.

On notice of a motion to dissolve an injunction given before answer filed, an answer filed after the motion, though it be filed before the day fixed by the notice for the hearing of the motion, cannot be read in support of it. There

must be a new notice. A party has a right to expect that the motion will be grounded on the case as it existed at the time of the notice. *Cattel v. Nelson*, 7 N. J. Eq. 122.

But in *California* it was held that though a notice of a motion to dissolve an injunction states that the motion will be "based upon the papers, pleadings, and records in said cause, and upon affidavits hereafter to be filed," the court may hear evidence outside of that mentioned in the notice, if necessary. *Younglove v. Steinman*, 80 Cal. 375.

6. *District of Columbia*. — *Fitzgerald v. Fitzgerald*, 7 D. C. 243.

New York. — *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425; *Card v. Fitzroy*, Col. & C. Cas. (N. Y.) 69; *Grover v. Green*, Col. & C. Cas. (N. Y.) 190; *Sutherland v. Bradner*, 34 Hun (N. Y.) 519; *Stern v. Knapp*, 52 N. Y. Super. Ct. 14; *Steuben County Bank v. Alberger*, 75 N. Y. 179; *Smith v. Seattle*, etc., R. Co., (Supreme Ct.) 19 N. Y. Supp. 742, holding that in case of non-compliance with this rule the motion should not be granted if objection is made at the hearing, even though the adverse party did not ask for the papers.

Wisconsin. — *Corwith v. Illinois State Bank*, 8 Wis. 376.

A notice of a motion stating that the motion will be based upon the records in the case does not comply with a rule of court which requires the motion and the papers or records on which it is founded to be served upon the attorney. *Corwith v. Illinois State Bank*, 8 Wis. 376.

The Necessity of Serving Papers Is Not Obviated by reason of the fact that the adverse party obtained them for him-

Copy of Pleadings and Proceedings. — In motions that are to be heard upon the pleadings and proceedings in the case, it is never necessary to serve copies upon any of the parties to the suit.¹ It is only where a motion is made against a person who is not a party to the suit that it is necessary to serve a copy of the pleadings and other proceedings.²

Papers Already Served upon the party to the suit need not be served again, but it will be sufficient to refer to them in the notice.³

Supplemental Papers and Affidavits may be served and relied upon provided they are filed in time. In other words, all the motion papers need not be served at the same time, but the last papers served must be served the required length of time before the day mentioned in the notice of motion.⁴

Sufficiency of Copy Served. — A party has a right to presume that the copies of the papers served upon him are true copies of the originals; where they are essentially defective the motion cannot be heard.⁵ But a variance between the copy of a paper served

self, the reason being that the papers presented to the court by the moving party and those presented by the adverse party should be folioed in order that the parties may refer to them in such a manner as not to require the court to search through the whole mass to ascertain to what reference was had. *Rogers v. Pearsall*, 21 N. Y. App. Div. 389, decided under rule 40 of the Supreme Court.

1. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182, holding that a motion to vacate an order for an injunction made upon service of a notice merely, entitled in the action, and stating that the motion would be founded on "a copy of the injunction and papers served therewith on the defendant," was sufficient. See also *Van Benthuyssen v. Stevens*, 14 How. Pr. (N. Y. Supreme Ct.) 70.

"It is very desirable, as far as possible, to dispense with the service of papers not necessary for the adverse party in respect to motions which arise on pleadings or otherwise." *Ripley v. Burgess*, 2 Hill (N. Y.) 360.

2. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182, *citing* *Morley v. Green*, 11 Paige (N. Y.) 240, 42 Am. Dec. 112, in which latter case it was held that upon the hearing of a motion against a third person who is not a party to the suit, the pleadings and other proceedings in the cause cannot be used if they have not been served on such person with the notice of motion.

3. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182, wherein a notice referring to "a copy of the injunction and papers served therewith on the defendant," but not setting them out, was held sufficient. See also *Van Benthuyssen v. Stephens*, 14 How. Pr. (N. Y. Supreme Ct.) 70, wherein motion papers were sent by mail but too late to constitute good service under the rule governing service by mail. After they were actually received, timely personal notice of the motion was served, stating that it would be upon the papers previously served by mail. This was held sufficient.

4. **Copies of Supplemental Affidavits** for a motion must be served the same length of time before the day mentioned in the notice of motion as is necessary for the service of the copies of the principal affidavits. An excuse for not obtaining affidavits for a motion till it is too late for noticing the motion for the first day of the term will warrant a notice for a subsequent day in term, but not a short notice. *Wilcox v. Howland*, 6 Cow. (N. Y.) 576.

5. *Chesebro v. Chesebro*, 21 Mich. 506. See also *Littlejohn v. Munn*, 3 Paige (N. Y.) 280; *Johnson v. Casey*, 3 Robt. (N. Y.) 710.

Interlineations and Erasures. — Where the motion papers are badly defaced with interlineations and erasures, the motion is properly denied. *Henry v. Bow*, 20 How. Pr. (N. Y. Supreme Ct.) 215; *Johnson v. Casey*, 28 How. Pr. (N. Y. Super. Ct.) 492, 3 Robt. (N. Y.) 710.

and the original is not fatal unless calculated to mislead or prejudice the party served.¹

Returning Papers for Irregularity. — Where the papers are objected to for irregularity they must be returned to the party serving them or his attorney, and if not returned the irregularity is waived and the motion may be heard.²

Rules of Court. — This whole matter of the service of motion papers is largely regulated by rules of court.³

1. *Union Furnace Co. v. Shepherd*, 2 Hill (N. Y.) 413; *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 708.

Where the papers upon which an order is granted are perfect, the fact that the copies which are served upon the opposite party are defective is not ground for setting aside the order. *Havana Bank v. Moore*, 5 Hun (N. Y.) 624.

Such defects may be disregarded on the hearing. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 702.

Serving Signature to Affidavit and Jurat — Necessity. — In *Barker v. Cook*, 40 Barb. (N. Y.) 254, it was held erroneous to vacate an order merely because the copy of the affidavit served contained no signatures of the affiant or of the officer before whom the affidavit was sworn to. The court said: "The copy affidavit served was not subscribed by the party, nor did it purport to show that the original paper was signed by any affiant; nor was the jurat signed by any officer authorized to administer oaths, nor did it purport that the original was signed by any such officer. If it was necessary to the validity of the order that these names should appear from the copy to have been signed to the original, then the order of arrest was correctly vacated; otherwise not." In *Graham v. McCoun*, 5 How. Pr. (N. Y. Supreme Ct.) 353, Justice Willard reviewed the practice as to the necessity of serving the signatures of the affiant and officer to an affidavit, and he came to the conclusion that in cases where the opposite party had an opportunity to inspect the original, and it was properly signed, it was not necessary to annex such signatures to the copy, nor that the copy should purport that the original was so signed; but where such opportunity was not given, as in the verification of pleas in abatement under the former, and of pleadings under the new practice, the

papers served must contain the signatures or they may be disregarded. The cases cited by the learned justice sustain his views of the practice. It follows that the affidavit in this case is not one which must contain the names." See also *Livingston v. Cheetham*, 2 Johns. (N. Y.) 479, holding that the copy served need not contain the name of the magistrate before whom it was sworn.

2. *Taylor v. New York*, 11 Abb. Pr. (N. Y. Supreme Ct.) 255, decided under rule 20, in force in 1860. See also Hun's Court Rules, rule 19, now in force. In this case it was held that papers returned on account of irregularity should be returned to the attorney named in the papers. If there is no attorney named the return should be made to the party. When a technical objection of this kind is made both parties are required to pay strict observance to the rule.

Specifying Objections. — In *Chemung Canal Bank v. Judson*, 10 How. Pr. (N. Y. Supreme Ct.) 133, it was said that where a party returns a paper as irregular he must state his objections to it explicitly, and a mere statement that the service is irregular and not in compliance with certain sections of the code will not be sufficient. The reason for this rule was stated, in *Broadway Bank v. Danforth*, 7 How. Pr. (N. Y. Supreme Ct.) 264, to be to enable the opposite party to correct the irregularity, if it admits of correction, and thus save the rights of suitors without subjecting them to the expense of an application to the court. It was said that the same principle requiring a party moving against proceedings for irregularity to point it out, *a fortiori* required a party to do so where he intended to treat a paper as irregular without appealing to the court.

3. See Fifth Equity Rule in D. C. Eq., quoted in *Fitzgerald v. Fitzgerald*, 7 D. C. 243. See also Hun's Court Rules, rule 40 (N. Y.). See also Gallt

6. Service of Notice — a. TIME OF — Before Commencement of Action. — A notice of motion should not ordinarily be served before the commencement of the action.¹

Limitation of Time. — Sometimes it is provided by statute or rule of court that notice of certain motions must be given within a certain time limit. The effect of this is to limit the time within which such motions can be made.²

The Length of Notice required to be given of the various motions that may be made in a cause is largely regulated by statutes or rules of court which must be consulted and observed.³

v. Finch, 24 How. Pr. (N. Y. Supreme Ct.) 193.

1. *Kattenstroph v. Astor Bank*, 2 Duer (N. Y.) 632, holding that a motion for the appointment of a receiver will be denied as irregular when the order to show cause is served before the commencement of the suit. See also *National German American Bank v. St. Anthony Park North Real-Estate Imp. Co.*, 61 Minn. 359, wherein it was held that a notice of motion filed by a creditor simultaneously with his becoming a party to an action under an order of court was not made before becoming a party and the service of notice was therefore valid.

Notice may be served before the filing of the papers on which the motion will be based. *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263.

2. **Notice Must Be Given Within Time Limited by Statute or Rule.** — For example, in *New York*, under General Rules of Practice, rule 22, motions to strike out of any pleading matter alleged to be irrelevant, redundant, or scandalous, or motions to correct the pleading on account of its being so indefinite or uncertain that the precise meaning or application is not apparent, must be noticed within twenty days from the service of the pleading attacked. *New York Ice Co. v. Northwestern Ins. Co.*, 21 How. Pr. (N. Y. Supreme Ct.) 234; *Roosa v. Saugerties, etc.*, *Turnpike Road Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 237; *Barber v. Bennett*, 4 Sandf. (N. Y.) 705; *Walker v. Granite Bank*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 406; *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657; *Gibson v. Gibson*, 68 Hun (N. Y.) 381, holding that a retention of the notice by the attorney on whom it was served does not waive the failure to serve the notice within twenty days; *Siriani v. Deutsch*, 12 Misc. Rep. (N. Y. Super. Ct.) 213, holding that the mo-

tion will be denied for noncompliance with this rule. See generally *Polhemus v. Carpenter*, 42 Cal. 375; *State v. Fry*, 10 Mont. 407; *Harte v. Casteller*, 38 Neb. 571; *Omaha F. Ins. Co. v. Maxwell, etc., Co.*, 38 Neb. 358; *Rockford Ins. Co. v. Maxwell, etc., Co.*, 38 Neb. 362. See also *supra*, VI. *Time of Moving.*

An Order Extending the Time for giving notice of a motion made after the time for giving notice has expired is in excess of jurisdiction and is void. *Clark v. Crane*, 57 Cal. 629.

Compliance with Statute. — Filing and serving notice of a motion within the time fixed by statute requiring the person to "appear in court and move" satisfies the statute, though the motion is not brought on for hearing in open court until after the time has expired. *Conklin v. Johnson*, 34 Iowa 266.

3. In the following cases notice of the specified length was held sufficient under the statutes and rules of practice under which they were decided:

Fifteen Days. — *Hanks v. Lyons*, 92 Va. 30 (Va. Code, § 321).

Ten Days. — *Branch v. Walker*, 92 N. Car. 89 (N. Car. Code, § 595); *Harper v. Sugg*, 111 N. Car. 324 (N. Car. Code, § 595); *Bush v. Geisey*, 16 Oregon 267 (Hill's Ore. Code, § 524).

Eight Days. — N. Y. Code Civ. Pro., § 780; N. Y. Code Civ. Pro., § 402; Hun's Court Rules, rule 40; *Rogers v. McElhone*, 20 How. Pr. (N. Y. Supreme Ct.) 441; *Merritt v. Slocum*, 6 How. Pr. (N. Y. Supreme Ct.) 350; *Androvette v. Bowne*, 15 How. Pr. (N. Y. Supreme Ct.) 75; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 434; *People v. Nichols*, 79 N. Y. 582. But see *Parker v. Linden*, 59 Hun (N. Y.) 359.

Six Days. — *Pierie v. Berg*, 7 S. Dak. 578; *New York v. Connecticut*, 4 Dall. (U. S.) 1.

Order Shortening Notice. — Often the court is empowered to shorten the notice in special cases. This is usually done by granting an order to show cause why the relief sought should not be granted, returnable at a designated day.¹ But a short notice should be allowed only in special and exceptional cases.²

Where There Is No Statute or Rule of court fixing the length of notice to be given, reasonable notice only is required, and what is reasonable notice is to be determined upon the circumstances of each case.³

Five Days. — *Singleton v. Thornton*, (Supreme Ct.) 9 N. Y. St. Rep. 600 (under Code Civ. Pro., § 537).

Four Days. — *Consequa v. Fanning*, 2 Johns. Ch. (N. Y.) 481; *Latta v. Griffith*, 57 Ind. 329.

Two Days. — *Fitzgerald v. Fitzgerald*, 7 D. C. 243; *Trenton Mut. L., etc., Ins. Co. v. Hodges*, 24 N. J. L. 673 (under Rev. Stat. 881, § 216); *Den v. Fen*, 17 N. J. L. 354 (under Rev. Stat. 881, § 216); *Hoffman v. Lowell*, 58 N. J. L. 553 (under Rev. Stat. 881, § 216); *Forrest v. Davies*, 26 W. R. 534; *Daubney v. Shuttleworth*, 1 Exch. Div. 53, 45 L. J. Exch. Div. 177, 34 L. T. N. S. 357, 24 W. R. 321.

One Day. — *Lowry v. Jenkins*, 3 Bibb (Ky.) 314.

1. See generally article ORDERS.

Michigan. — *McCaslin v. Camp*, 26 Mich. 392.

New York. — N. Y. Code Civ. Pro., § 402; N. Y. Code Civ. Pro., § 780; *Rogers v. McElhone*, 20 How. Pr. (N. Y. Supreme Ct.) 441; *Merritt v. Slocum*, 6 How. Pr. (N. Y. Supreme Ct.) 350; *Androvette v. Bowne*, 15 How. Pr. (N. Y. Supreme Ct.) 75; *Sixth Ave R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 434; *People v. Nichols*, 79 N. Y. 582; *Van Arsdale v. King*, (Supreme Ct.) 33 N. Y. Supp. 858; *Citizens' Sav. Bank v. Bauer*, 49 Hun (N. Y.) 238, 14 Civ. Pro. Rep. (N. Y.) 340.

North Carolina. — *Harper v. Sugg*, 111 N. Car. 324 (under Code, § 595); *Branch v. Walker*, 92 N. Car. 89 (under Code, § 595).

Oregon. — *Bush v. Geisey*, 16 Oregon 267.

South Dakota. — *Pierie v. Berg*, 7 S. Dak. 578.

England. — *Dawson v. Beeson*, 22 Ch. Div. 504, 52 L. J. Ch. 563, 48 L. T. 407, 31 W. R. 537; *Conacher v. Conacher*, 29 W. R. 230.

2. *Androvette v. Bowne*, 4 Abb. Pr. (N. Y. Supreme Ct.) 440, 15 How. Pr. (N. Y.) 75; *Bruce v. Delaware, etc.,*

Canal Co., 8 How. Pr. (N. Y. Supreme Ct.) 440.

3. **Illinois.** — *Berry v. Wilkinson*, 2 Ill. 164.

Indiana. — *Bash v. Christian*, 84 Ind. 180.

Kentucky. — *Lowry v. Jenkins*, 3 Bibb (Ky.) 314.

Michigan. — *McCaslin v. Camp*, 26 Mich. 390; *Stringer v. Dean*, 61 Mich. 196.

Virginia. — *Ballard v. Whitlock*, 18 Gratt. (Va.) 235.

United States. — *Caldwell v. Walters*, 4 Cranch (C. C.) 577.

What Constitutes Reasonable Notice. — The length of time necessary to constitute reasonable notice will, in some degree, depend upon the peculiar circumstances of each particular case, and must be left necessarily to the legal discretion of the judge or court to which the application is made. *Berry v. Wilkinson*, 2 Ill. 164.

Thus, three days' notice left at the office of complainant's solicitor, in his absence from town, has been held to be reasonable notice of a motion to dissolve an injunction. *Caldwell v. Walters*, 4 Cranch (C. C.) 577.

Where the grounds of the motion were founded on the record one day was held sufficient. *Lowry v. Jenkins*, 3 Bibb (Ky.) 314.

A notice on September 14 for hearing on September 18 was held sufficient in case of a motion to quash a writ of attachment. *Stringer v. Dean*, 61 Mich. 196.

In *McCaslin v. Camp*, 26 Mich. 390, the court said: "The rules of court contain no provisions concerning the time of notice on special motions. * * *

The general, established practice recognizes four days as the usual time for all except a few peculiar motions, if any notice is to be given at all. A longer notice is needed where the service is for a distant point." In this case the court further said that in applications

Effect of Too Short Notice. — An order granted on notice which is too short is premature and erroneous,¹ but it seems not void.² And if the court in its discretion permits the motion to be made at a later day than the one designated in the notice,³ thereby affording ample time to enable the adverse party to prepare to oppose the motion, the order is not even erroneous.⁴

Waiver of Objection to Short Notice. — Where short notice of a motion is given, the party served should appear and object on the day the motion is made, or he will be deemed to have waived the objection.⁵

An Admission of Due Service waives all objections to the length of service.⁶

Computation of Time. — In computing the length of time⁷ intervening Sundays should be included.⁸ Where the length of time depends on the distance at which the notice is to be served, the usual route of travel governs the computation of time.⁹

6. MODE AND PROOF OF. — The manner in which a notice of motion should be served is regulated almost exclusively by statutes in the various states, and as these rules are common to a

for leave to appeal, an order to show cause is the better practice, so that the court can see that the hearing shall be put forward long enough to give the judgment creditor ample time to prepare to show cause against the motion; that where the judgment is to be disturbed, the utmost fairness should be required of the party complaining of it.

1. *Bustard v. Gates*, 4 Dana (Ky.) 431; *Rogers v. McElhone*, 12 Abb. Pr. (N. Y. Supreme Ct.) 292, 20 How. Pr. (N. Y.) 441; *Harper v. Sugg*, 111 N. Car. 324.

2. *Bustard v. Gates*, 4 Dana (Ky.) 431.

3. **Allowing Motion to Be Made at Later Day.** — Where notice of a motion has not been given in sufficient time owing to a *bona fide* mistake, the court may in its discretion allow the party in default to show the reason of the mistake by affidavit and allow the motion to be made on a later day. *Smith v. Smackmen Ins. Co.*, 32 W. R. 184.

4. *Fisk v. Thorp*, 51 Neb. 1.

5. *Main v. Pope*, 16 How. Pr. (N. Y. Supreme Ct.) 271.

Reasonable Notice Will Be Presumed to Have Been Given a defendant of a motion, when it appears that he had notice and made no objection at the time that it was not reasonable. *Ballard v. Whitlock*, 18 Gratt. (Va.) 235.

6. *Talman v. Barnes*, 12 Wend. (N. Y.) 227, holding that where a party by

writing admits due service of notice of a motion, he is precluded from objecting the want of full notice, although it be affirmatively shown that he had only seven days' notice where a longer notice was required.

7. **Two Clear Days.** — A notice served on the 20th of December that a motion will be made on the 22d is bad under a rule requiring two clear days' notice. *Daubney v. Shuttleworth*, 1 Exch. Div. 53, 45 L. J. Exch. Div. 177, 34 L. T. N. S. 357, 24 W. R. 321.

The same is true of a notice on the 19th for a hearing on the 21st. *Forrest v. Davies*, 26 W. R. 534.

8. *Corey v. Hiliker*, 15 Mich. 314. But see *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28, wherein it is said that where the time is less than a week, the Sunday intervening should be excluded in the computation of the time for service, and it was accordingly held in this case that a notice on Saturday for a hearing on Monday was not a sufficient two days' notice. See also *Clerk's Sav. Bank v. Thomas*, 2 Mo. App. 367, wherein it is said that in cases pending in court a nonjudicial day, that is, a day on which no record can be kept, is not to be counted as a day in calculating time for filing motions.

9. *Raymond v. Hinckson*, 15 Mich. 517, wherein it was held that the distance *via* railroad, not the actual distance, must govern.

great variety of notices and papers required to be served in a cause, their detailed discussion is relegated to the general article dealing with the service of process and papers; the same considerations apply to proof of service.¹

X. COUNTERMANDING, WITHDRAWAL, AND ABANDONMENT — Right to Countermand. — A notice of motion can be withdrawn or countermanded on payment of the costs of the motion.² But it cannot be so countermanded as to deprive the other party of the right to attend and have the motion dismissed with costs.³

Notice and Leave of Court. — Notice to the adverse party is not necessary where the motion is withdrawn by leave of court.⁴

Waiver. — Failure to make a motion at the time named in the notice is a waiver of the right to make it under that notice.⁵ So also where the moving party, before the determination of the motion, proceeds in the action in a manner inconsistent with the object of the motion, the latter is waived.⁶

1. See article SERVICE OF PROCESS AND PAPERS.

2. *Walkenshaw v. Perzel*, 32 How. Pr. (N. Y. Super. Ct.) 310, 7 Robt. (N. Y.) 606.

Where a Motion Embraces Two Distinct Matters, as for leave to add parties defendant and for an injunction and receiver, the first part may be withdrawn, leaving the motion as to the second part still pending, without payment of costs of the motion. *Walkenshaw v. Perzel*, 32 How. Pr. (N. Y. Super. Ct.) 310, 7 Robt. (N. Y.) 606.

3. *Bates v. Jaines*, 1 Duer (N. Y.) 668. **Where the Object of a Motion Is Effected Without Bringing It On**, the party will not be charged with costs if he countermands the notice. *Lisher v. Parmelee*, 1 Wend. (N. Y.) 22.

4. *Jensen v. Barbour*, 12 Mont. 566, wherein the court said: "The making of this motion of March 21st was the asking by defendant for something which would be favorable to him; that is, to relieve him from default judgment. The granting of that motion was the granting to him of that which would be of benefit to him. If he choose to withdraw his application for this benefit, if he says, 'I do not want this benefit for which I have been asking,' it would seem that he might do this without notifying the other party, when there is nothing in the statute requiring him so to do. His withdrawal of this motion left the other party just where he was before the motion was made. In the absence of any reason being shown why such notice

should have been given, we shall hold that it was not required."

Where a Previous Motion Is Pending a second motion for the same relief will not be permitted in the absence of leave to withdraw the first motion or the payment of costs thereof, and a statement in the notice of the second motion that the first motion is withdrawn is unavailing. *Hoover v. Rochester Printing Co.*, 2 N. Y. App. Div. 11.

5. *Elliott County v. Kitchen*, 14 Bush (Ky.) 289. See also *Foster v. Wade*, 4 Metc. (Ky.) 253.

After a Motion Has Been Made the moving party is not permitted to abandon it by not having it entered, without notice to the other party. *Stille v. Wood*, 1 N. J. L. 187.

6. **Waiver by Inconsistent Proceedings.** — *Goch v. Marsh*, 8 How. Pr. (N. Y. Supreme Ct.) 439, wherein it was held that a defendant, by answering, waives notice of a motion previously served to strike out irrelevant matter in the complaint.

So also the serving of an order extending one's own time to answer waives his previous notice of a motion to correct the complaint. *Restorff v. Ehrich*, 1 N. Y. Month. L. Bul. 33.

When parties appear to a motion and agree to set the hearing of it for a certain day, and then go to trial on the merits without objection, they will be considered to have waived all previous irregularities. *Com. v. Marks*, 2 Duv. (Ky.) 387.

What Proceedings Do Not Waive or Abandon a Motion. — The right to move

XI. OPPOSING PAPERS—1. In General.—No statement, either verbal or written, is required in answer to a motion.¹

Silence Is a Complete Answer.—Nothing is required of the opposing party but to overcome, if he can, by competent evidence, the case made by the moving party.²

Special Pleading on interlocutory motions is generally discounted.³

Issues Framed Without Pleadings.—Issues arising upon motions may be framed by the court and tried without formal pleadings.⁴

Counter-affidavits to oppose a motion are discussed in a succeeding section.⁵

2. Cross or Counter Motions.—A party against whom a notice of motion has been served may give a counter-notice that, if the motion against him pursuant to the notice prevails, he will ask such relief on his part as would be appropriate in that contingency.⁶

for a new trial is not waived by a withdrawal of the motion pending a motion for judgment *non obstante veredicto*, as the two motions do not lie together and the motion for judgment comes first. *Stein v. Chicago, etc., R. Co.*, 41 Ill. App. 38.

An appeal from an order denying a motion to vacate an attachment will not be dismissed because the appellant moved to reduce the amount for which the attachment was granted, as the two remedies are not inconsistent. *Sulzbacher v. Cawthra*, 14 Misc. Rep. (N. Y. C. Pl.) 544.

A motion to quash a defective delivery bond is not waived by suing out execution on the bond, it amounting only to an admission of law which was not binding. *Morehead v. Prather, Sneed* (Ky.) 135.

A motion to dismiss the action on the ground that the plaintiff has not filed a declaration or bill of particulars is not waived by subsequently filing an answer expressly stating that the defendant does not waive the motion. *Brow v. Norton*, 167 Mass. 472.

1. *Babcock v. Huntington*, 2 Day (Conn.) 398; *Moore v. Coates*, 35 Ohio St. 183.

Answer Ore Tenus.—A written answer to a motion in arrest is unnecessary. *Lewis v. Hawley*, 2 Day (Conn.) 495; *Raymond v. Bell*, 18 Conn. 90. It may be answered *ore tenus*. *Babcock v. Huntington*, 2 Day (Conn.) 392.

Papers to Oppose a Motion, if Wrongly Entitled, cannot be relied on to raise the same objection to the moving papers. *Atwater v. Williams*, 2 How. Pr. (N. Y. Supreme Ct.) 274.

2. *Moore v. Coates*, 35 Ohio St. 183.

3. *Raymond v. Bell*, 18 Conn. 90; *Lewis v. Hawley*, 2 Day (Conn.) 495, wherein the court said: "To go into special pleadings on a motion in arrest is an aberration from correct practice, attended with much inconvenience and absurdity. It is never done in Westminster Hall, nor in the neighboring states. Nor is the practice universal in our courts. There are sixteen motions in arrest reported in Kirby, and not to one of them is there an answer." See also *Babcock v. Huntington*, 2 Day (Conn.) 398, wherein the court said: "A train of special pleadings upon a motion would be a novelty in judicial proceedings."

Demurrer to Motion.—In *Edwards v. Dykeman*, 95 Ind. 509, it was held that a motion is not the subject of a demurrer.

4. *Turner v. St. Clair Tunnel Co.*, 102 Mich. 574. See also *Pogue v. Lusk*, 6 J. J. Marsh. (Ky.) 579; *Couchman v. Maupin*, 78 Ky. 33; *Martin v. Donaldson*, 5 Ky. L. Rep. 253; *Howard v. Onan*, 4 Ky. L. Rep. 445. But see *Watson v. Gabby*, 18 B. Mon. (Ky.) 658.

5. See *infra*, XII. 6. *Counter-affidavits*.

6. *Clark v. Clark*, 11 Abb. N. Cas. (Brooklyn City Ct.) 333, wherein the judgment debtor moved to vacate an order appointing a receiver on the ground that no personal notice had been served upon him of the motion for such appointment, and for other irregularities. After receiving the order to show cause, the plaintiff served a counter-notice that, in the event of the

It is irregular, however, to grant affirmative relief to a party opposing a motion upon matters appearing in the opposing papers which the moving party has had no opportunity to answer.¹

A Dismissal of the Principal Motion does not necessarily put the cross-motion out of court.²

Order. — Both motions may be disposed of by one order.³

XII. AFFIDAVITS AND PROOFS — 1. Nature of Evidence and Proofs Admissible — Support of Motion. — Where a motion is founded upon extrinsic facts and not solely upon matters apparent upon the face of the record or proceeding, it must of course be supported by evidence or proofs.⁴

The Ordinary Rules of Evidence are not wholly applicable to hearings upon motions, and many matters not strictly evidence are receivable.⁵

original order being vacated upon the hearing of the motion, he would move anew for the appointment of a receiver. It was held that such counter-notice was proper, and the appointment of a second receiver, upon vacating the appointment of the first, was authorized.

Necessity of Cross-motion. — Upon a motion to set aside irregular proceedings it is the settled practice to allow trifling mistakes to be amended without requiring a cross-motion. *Jones v. Williams*, 4 Hill (N. Y.) 34.

Where the original papers have not been transmitted with the record of the proceedings and a motion is made to dismiss the cause, a cross-motion should be interposed for a rule upon the clerk to certify and transmit the papers. *Wight v. Kirkpatrick*, 5 Ill. 339.

1. *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232.

Remitting Party to New Motion. — On a motion to set aside summons and complaint for the reason that the action was commenced without leave of court required by law, such leave should not be granted *nunc pro tunc*, but the plaintiff should be left to move anew for leave. *Finch v. Carpenter*, 5 Abb. Pr. (N. Y. Supreme Ct.) 225.

2. A motion was made in divorce proceedings to modify an order therein for the custody of a child; a cross-motion was made to revoke the order. The first motion was dismissed. The refusal of the court to dismiss the cross-motion was held not to be error, as the dismissal of the first motion did not put the second motion out of court. *Ryce v. Ryce*, 52 Ind. 64.

3. *Lemke v. Daegling*, 52 Wis. 498, wherein it was held that a motion by one party to confirm the report of a referee who tried the case and a motion by the other party to set aside such report may both be disposed of by an order modifying the report.

4. See *infra*, XII. 5. *Affidavits in Support of*.

5. **Strict Rules of Evidence Inapplicable.** — For example, where the facts involved in a suit occurred at a distance, statements contained in alleged letters of third persons to one of the parties, although not strictly evidence, were received with other testimony to sustain a motion for a provisional remedy. *Merritt v. Thompson*, 3 E. D. Smith (N. Y.) 283. So, also, where a referee stated facts to a party in respect to an irregularity in his report, but declined to make affidavit to such facts unless they should be denied by the adverse party, and the former moved against the irregularity upon affidavits stating merely such information, such affidavits were held sufficient proof of the facts to put the other party to a denial. *Shearman v. Justice*, 22 How. Pr. (N. Y. Supreme Ct.) 241.

Hearsay Evidence is no more admissible at hearings on applications for interlocutory remedies than at final hearings. *Early v. Oliver*, 63 Ga. 11. But as to affidavits upon information and belief, see *infra*, XII. 5. *a. Necessity*; XII. 5. *b. Sufficiency*.

The Parol Evidence Rule Applies. — See *Peet v. Cowenhoven*, 14 Abb. Pr. (N. Y. Supreme Ct.) 56, wherein it was held that the court will not, upon a motion, allow parol evidence to enlarge the operation of a written agreement

Affidavits. — Thus, mere affidavits, which are perhaps usually wholly *ex parte*, may be read in support of a motion.¹

Depositions taken on insufficient notice may be treated as affidavits and used.²

Admissions in pleadings may be considered, though not in evidence.³

A Copy of a Paper served in the cause purporting to be signed by the opposite attorney is admissible in support of a motion without an affidavit that it is a true copy.⁴

Judge's Own Knowledge. — The judge may act upon his own knowledge.⁵

Oral or Written Evidence. — The evidence to be used on the hearing of a motion should be embodied in affidavits,⁶ and, ordinarily,

between the parties to an action so as to discharge the lien of a judgment upon real estate belonging to a person against whom the judgment was recovered.

Admissibility as Dependent Upon Form of Motion. — Upon the hearing of a motion to dismiss a writ on the ground of abuse of process, oral testimony and affidavits are admissible to prove such abuse, although the motion alleges that it appears by inspection of the writ. *Gardner v. Webber*, 16 Pick. (Mass.) 251.

1. See *infra*, XII. 2. *Taking Affidavits.* See also XII. 5. *Affidavits in Support of.*

The Affidavit of an Incompetent Witness is admissible upon a motion. *Megarge v. Megarge*, 2 N. Y. Wkly. Dig. 352, holding that on motion to set aside a judgment of divorce on the ground of fraud and imposition, the defendant's affidavit is competent even though she be incompetent as a witness on trial of the action.

Impeaching Credit of Affiant. — The credibility of a party deponent may be impeached by proof of fraudulent intent to remove without paying the debt sued for. *Brodsky v. Ihms*, 16 Abb. Pr. (N. Y. C. Pl.) 251. Or by affidavits impeaching the character for truth and veracity. *Francis v. Church*, Clarke Ch. (N. Y.) 475, holding that such affidavits must be taken into account in deciding the motion but cannot warrant the rejection of the affidavit of the person impeached. Where there is a conflict, deponents whose credit is impeached ought not to have the same influence as if unimpeached. But see *Merritt v. Baker*, 11 How. Pr. (N. Y. Supreme Ct.) 456, wherein it was said that if affidavits as

to the credibility of a deponent should ever be received on a motion, there should also be an opportunity to produce counter-affidavits.

2. *Hanna v. Barrett*, 30 Kan. 446, holding that the depositions are the written declarations of the witnesses and fulfil the statutory definition of affidavits, irrespective of any question of notice.

3. **The Counts of a Declaration** may be considered on a motion so far as they make against the plaintiff, and especially may a direct inconsistency between amended counts and original counts be considered; while not in evidence, such pleadings are in the case and before the court and may be regarded as in the nature of admissions. *West Chicago St. R. Co. v. Loewe*, 58 Ill. App. 606. But see *Barlow v. Pease*, 5 Hun (N. Y.) 564, wherein an essential allegation in a complaint, although good as an averment in a pleading, was held incompetent to prove the fact averred upon a motion to dismiss because of the nonexistence of such fact.

4. *Ripley v. Burgess*, 2 Hill (N. Y.) 360. See also *Thompson v. Hewitt*, 6 Hill (N. Y.) 254, wherein it was held that upon a motion a copy of an instrument, such as an insolvent discharge annexed to the affidavit and referred to therein as a copy, is evidence.

5. *Elliott v. Plattor*, 43 Ohio St. 198. And especially in regard to things which in their nature are better known to himself than they could be to others. *Southern California Motor Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316.

6. *Carr v. Commercial Bank*, 18 Wis. 255. See also *Fowler v. Colton*, 1 Pin. (Wis.) 331.

oral testimony will not be received.¹ The court may, however, in its discretion, permit a witness to be called and examined and cross-examined, orally, at the hearing; it is not compelled to rely solely upon affidavits.²

2. Taking Affidavits—*a*. IN GENERAL.—Notice of taking affidavits in support of a motion is not necessary.³ Indeed, the *ex parte* character of the statement is an essential element of the definition of an affidavit,⁴ and constitutes the main distinction between affidavits and depositions.⁵ Affidavits taken for another purpose or for use upon a different motion may be used again upon a similar application.⁶ There is no positive rule that no affidavit can be twice used.⁷ Affidavits of merits, however, are

1. Carr v. Commercial Bank, 18 Wis. 255.

2. State v. Stackhouse, 24 Kan. 445; Tyler v. Safford, 24 Kan. 532; Gardner v. Webber, 16 Pick. (Mass.) 251; State v. Egan, 62 Minn. 280, holding that whether or not a motion will be heard on oral evidence is discretionary with the court, and it will be so heard only in exceptional cases.

For a note on power of the court when affidavits are conflicting to require oral examination, see Anderson v. Horn, 23 Abb. N. Cas. (N. Y. City Ct.) 475.

Compelling Party to Appear and Testify.—In Meyer v. Lent, 16 Barb. (N. Y.) 533, it was held that where a party has made an affidavit in his own favor upon a motion he may be compelled to attend before the court, to explain or be cross-examined; and on his refusal to answer any questions the court may strike out his testimony. On appeal this was reversed, and it was held that a judge before whom a motion is heard, at special term, cannot direct the responding party to appear before him and be examined orally touching the matters of fact involved in the controversy, and, upon his refusing to submit to such examination, determine the motion against him therefor; if the affidavits upon a motion are not sufficiently definite and certain, the court should order a reference to try the question. Meyer v. Lent, 7 Abb. Pr. (N. Y. Ct. App.) 225.

3. Hanha v. Barrett, 39 Kan. 446. In New Jersey it was held in Parker v. Sussex Bank, 8 N. J. L. 160, that where the motion was grantable of course, no notice of taking the affidavit was necessary, but *aliter* where the application was not of course. It was accordingly held that an affidavit taken without notice to the adverse party can-

not be read in support of a motion to change the venue. The chief justice said: "Where the plaintiff or defendant is to state facts in his affidavit which cannot be rebutted, a notice of taking it is not necessary; but where the motion is a special one and is to be examined upon special facts which may be inquired into, there a notice is necessary."

In Crane v. Condit, 16 N. J. L. 349, it was held that notice of taking affidavits is necessary only where a rule to show cause has been granted. See also Halsey v. Van Wagenen, 16 N. J. L. 350.

In Cooper v. Galbraith, 24 N. J. L. 219, it was held that an *ex parte* affidavit is received to show a *prima facie* case that will induce the court to grant a rule, but that it is not competent at the hearing to prove any facts in support of such rule; those exclusively within the knowledge of the party can be proved only by his depositions taken upon notice.

4. See article AFFIDAVITS, vol. 1, p. 309.

5. Atchison v. Bartholow, 4 Kan. 124; State v. Henning, 3 S. Dak. 492; Stimpson v. Brooks, 3 Blatchf. (U. S.) 456.

6. Scholes v. Murray Iron Works Co., 44 Iowa 190; Langston v. Wetherell, 14 M. & W. 104.

The test of admissibility of an affidavit is whether or not perjury can be assigned upon it. Langston v. Wetherell, 14 M. & W. 104, cited with approval in Mojarrrieta v. Saenz, 80 N. Y. 551.

7. Mojarrrieta v. Saenz, 80 N. Y. 547, holding that it does not affect the jurisdiction of the court in granting a second attachment in an action that the same affidavit was used which was used in obtaining the first. The court said that

governed by a stricter rule of practice, and may be used only once, and for the purpose for which they were made.¹ A rule to take affidavits should specify the purpose for which the affidavits are to be taken.² Affidavits should not be taken before an attorney in the case,³ and if so taken, should be rejected.⁴

b. COMPULSORY AFFIDAVITS—(1) *Power to Compel*.—In the absence of a statute making provision therefor, a court has no power to compel the making of an affidavit for use upon the hearing of a motion.⁵

Statutory Provisions.—Such a statute exists in *New York*. It provides that where it is necessary for a party intending to make or oppose a motion to have the affidavit of a person not a party to use upon the motion, the court may, in its discretion, make an order appointing a referee to take the deposition of such person.⁶

it seems proper thus to use the affidavit a second time, but if not it is a mere matter of practice, a departure from which by the court does not deprive it of jurisdiction. The court distinguished *M'Coy v. Hyde*, 8 Cow. (N. Y.) 68; *Cutler v. Biggs*, 2 Hill (N. Y.) 409; *Robinson v. Sinclair*, 1 How. Pr. (N. Y. Supreme Ct.) 106.

An Affidavit Made in Another Suit may be used in support of a motion. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 70, 2 Abb. Pr. N. S. (N. Y.) 47, 32 How. Pr. (N. Y.) 97, cited with approval in *Mojarrieta v. Saenz*, 80 N. Y. 551.

In *Langston v. Wetherell*, 14 M. & W. 104, it was held, after consultation and with the concurrence of the whole court, that upon application to a judge to hold a defendant to bail, the plaintiff might use affidavits made and used shortly before, on a similar application against the same defendant, by a different plaintiff. In reply to the suggestion that the facts alleged, though true at the time the affidavit was made, might not be true at the time of the subsequent application, the court said that the same objection might be raised against any affidavit used a month after it was sworn to.

In *Colver v. Van Valen*, 6 How. Pr. (N. Y. Supreme Ct.) 102, it was held that where a plaintiff's affidavit for an attachment was insufficient, but the court used another affidavit of a different plaintiff, made for the same purpose and at the same time with the one decided to be insufficient, the attachment was properly issued in favor of the plaintiff whose affidavit was declared insufficient. The court said that "the idea that an affidavit from once

using becomes inoperative forever thereafter seems to me to be more fanciful than sound."

1. *Mojarrieta v. Saenz*, 80 N. Y. 552; *Cutler v. Biggs*, 2 Hill (N. Y.) 409; *Robinson v. Sinclair*, 1 How. Pr. (N. Y. Supreme Ct.) 106.

See generally article AFFIDAVITS OF MERITS OR DEFENSE, vol. I, p. 338.

2. *Scott v. Beatty*, 23 N. J. L. 256.

3. *McCaslin v. Camp*, 26 Mich. 393.

4. *Anderson v. Sloan*, 1 Colo. 33.

5. *Dudley v. McCord*, 65 Iowa 671; *Bacon v. Magee*, 7 Cow. (N. Y.) 515; *Cockey v. Hurd*, 45 How. Pr. (N. Y. Super. Ct.) 70, wherein it was said that prior to the Revised Statutes the practice was either to trust to voluntary affidavits or to award a feigned issue.

6. N. Y. Code Civ. Pro., § 885.

For the provisions of earlier statutes on the same subject see Code of Procedure, § 401, subdiv. 7, as amended by Laws of 1862, p. 858, c. 460, § 32, 2 Rev. Stat. N. Y. 554, §§ 24, 25.

See generally, for decisions under the statute, N. Y. Code Civ. Pro., § 885; *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.), 100; *Rogers v. Durant*, 56 N. Y. 669; *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 73; *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124; *Ramsey v. Gould*, 39 How. Pr. (N. Y. Supreme Ct.) 62, 57 Barb. (N. Y.) 398; *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469; *Williams v. Western Union Tel. Co.*, 3 Civ. Pro. Rep. (N. Y. Super. Ct.) 448; *Stubbs v. Stubbs*,

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A similar statute exists in the *Dakotas*.¹

Rights of Parties Under Statute. — No one but a party is entitled to the benefits of this statute.² And, on the other hand, only one not a party to the suit can be compelled to make an affidavit under this provision.³

Ex Parte Motions. — A person will not be compelled to make an affidavit to be used on *ex parte* motions.⁴

The Statute Is Not Applicable to special proceedings, but only to actions.⁵ It does not apply to criminal cases.⁶

(Supreme Ct.) 7 N. Y. St. Rep. 282; *People v. Paton*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 172; *Kelly v. Weber*, 4 N. Y. Month. L. Bul. 3; *Spratt v. Huntington*, 2 Hun (N. Y.) 341; *Hodgskin v. Atlantic, etc., R. Co.*, 3 Daly (N. Y.) 70; *Cockey v. Hurd*, 45 How. Pr. (N. Y. Super. Ct.) 70; *Hudson River West Shore R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 191; *De Hart v. Hatch*, 4 Thomp. & C. (N. Y.) 11; *Spratt v. Huntington*, 4 Thomp. & C. (N. Y.) 551; *Knoeppel v. Kings County F. Ins. Co.*, 47 How. Pr. (N. Y. Super. Ct.) 412.

History and Object of Statute. — See *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124; *Cockey v. Hurd*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 183, 45 How. Pr. (N. Y.) 70, 36 N. Y. Super. Ct. 42.

1. *Dakota Comp. Laws* (1887), § 5324. See also *Pierie v. Berg*, 7 S. Dak. 578.

2. *Atty.-Gen. v. Continental L. Ins. Co.*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 214, 66 How. Pr. (N. Y.) 51. See also *Crane v. Evans*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 444, 12 Civ. Pro. Rep. (N. Y.) 445.

Who Is a "Party." — A relator in mandamus proceedings is a party within the meaning of the statute. *People v. Paton*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 172.

But in an action by the attorney-general to dissolve an insurance company, a policy holder is not a party within the meaning of this statute so as to be entitled to take a deposition to use on a motion to set aside fraudulent compromises made by the receiver. *Atty.-Gen. v. Continental L. Ins. Co.*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 214, 66 How. Pr. (N. Y.) 51.

3. *People v. Paton*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 172; *King v. Leighton*, 58 N. Y. 383; *Stubbs v. Stubbs*, (Supreme Ct.) 7 N. Y. St. Rep. 282 (*distinguishing McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469, as a case where the irregularity had been waived); *Sheridan v. New York*, 68 N. Y. 30; *Ervin v.*

Oregon R., etc., Co., 35 Hun (N. Y.) 544. See also *Crane v. Evans*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 444, 12 Civ. Pro. Rep. (N. Y.) 445.

This restriction is embodied in express terms in the statute as it now stands. See Code Civ. Pro., N. Y., § 885.

Under the former statute (Code of Procedure, § 401, subdiv. 7), the statute in terms authorized the compulsory taking of "the affidavit of any person who refuses to make the same." In a few cases this was construed as authorizing the court to compel a party to make an affidavit for use upon a motion. *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; *Cockey v. Hurd*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 183, 45 How. Pr. (N. Y.) 70; *Hudson River West Shore R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 191.

But these cases were soon overruled, and it was well established that even under the statute as it then stood, a party could not be compelled to make an affidavit. See *Hodgskin v. Atlantic, etc., R. Co.*, 3 Daly (N. Y.) 72; *Palmer v. Adams*, 22 How. Pr. (N. Y. Super. Ct.) 375; *Keeler v. Dusenbury*, 1 Duer (N. Y.) 660; *Huelin v. Ridner*, 6 Abb. Pr. (N. Y. Supreme Ct.) 19; *King v. Leighton*, 58 N. Y. 383; *Knoeppel v. Kings County F. Ins. Co.*, 47 How. Pr. (N. Y. Super. Ct.) 412; *Spratt v. Huntington*, 2 Hun (N. Y.) 341, 4 Thomp. & C. (N. Y.) 551; *Burnett v. Snyder*, 41 N. Y. Super. Ct. 342.

4. *De Hart v. Hatch*, 4 Thomp. & C. (N. Y.) 11. But see *Allen v. Meyer*, 73 N. Y. 1, wherein an application for an attachment was held to be a motion within section 401 of the code, and that under the provisions of that section the deposition of a witness may be compelled to be used upon the application.

5. *People v. Paton*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 172.

6. *People v. Squire*, 4 N. Y. Crim. Rep. 582.

(2) *Proceedings to Compel*—(a) *Preliminary Essentials*—*Refusal of Voluntary Affidavit*.—The refusal of the witness to make a voluntary affidavit is a condition precedent to the making of an order for a compulsory affidavit.¹

Drafting and Submitting Affidavit.—The proper course when an affidavit is desired is, ordinarily, to draft an affidavit and submit it to the witness to be verified before applying for an order.²

Waiver.—But the objection that no affidavit has been prepared and submitted may be waived; and it is waived if, when asked to make the affidavit, the witness does not require a draft to be submitted but makes a general refusal to testify.³

(b) *Application for Order*.—*No Notice to the Adverse Party* of an application for an order to take a compulsory affidavit is necessary,⁴ and such party cannot resist the proceedings for the order.⁵ The

1. *Pierie v. Berg*, 7 S. Dak. 578; *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; *Moses v. Banker*, 34 How. Pr. (N. Y. Super. Ct.) 212, 7 Robt. (N. Y.) 131; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100.

In *Williams v. Western Union Tel. Co.*, 3 Civ. Pro. Rep. (N. Y. Super. Ct.) 448, an order was vacated on affidavits denying the refusal.

Repeated Qualified Refusals.—Repeated refusal to make an affidavit until after consulting with counsel is a sufficient refusal to sustain an order for a compulsory affidavit. *Rogers v. Durant*, 2 Thomp. & C. (N. Y.) 676. Appeal dismissed in 56 N. Y. 669.

After a Witness Has Made a Voluntary Affidavit at the request of a party, to be used on a motion, a commission should not be granted to take his testimony under the statute, for it may be presumed that it would be useless. *Ryers v. Hedges*, 1 Hill (N. Y.) 646.

Waiver of Objection.—After a witness has appeared before the referee and has been partially examined without making objection, it is too late for him to move to vacate the order appointing the referee upon the ground that he did not refuse to make an affidavit. *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 74.

2. *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100.

To Establish a Refusal, the applicant must know what sort of an affidavit is necessary, and that it can be made by the person in question; and the applicant, before moving, should draw and present to him such an affidavit, with a

request that he should sign and swear to it, unless he refuses to make any affidavit whatever. *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279.

"I do not mean to say that this form is necessary as a matter of jurisdiction before the order can be granted, but I think it the right rule of practice which should govern this proceeding, and that generally that course should be pursued." *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

A Refusal to Answer Oral Questions to be taken down by a stenographer and afterwards sworn to is not such a refusal as will justify an order for a compulsory affidavit. The witness has a right to require the submission of a written form of affidavit. *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 281.

Inaccuracies in Affidavit Submitted.—No court would hesitate to grant the order where it appeared that the witness not only refused to make the affidavit tendered him, but, though claiming that it was inaccurate in some particulars, declined to correct it. *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

3. *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279.

4. *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 74; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 102. "The order may be made upon or without notice." N. Y. Code Civ. Pro., § 885.

5. *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469, 3 Thomp. & C. (N. Y.) 451.

order is exclusively a matter between the moving party and the witness.¹

Objections at Hearing. — Objection to the contents of the affidavit or to the mode of procuring it can be made only when the affidavit is sought to be used.²

Supporting Affidavits. — The application must be supported by affidavits showing that the applicant intends to make or oppose a motion,³ that it is necessary for such purpose to have the affidavit of the person named,⁴ and that such person has refused to make the affidavit voluntarily.⁵ The affidavit should also specify the subject on which the witness was requested to depose; and the facts claimed to be within the knowledge of such witness bearing upon the merits of the motion.⁶

A Fishing Examination is not allowable; the moving party must know what the proposed witness will testify to.⁷

citing Brooks v. Schultz, 5 Robt. (N. Y.) 656.

1. Erie R. Co. v. Champlain, 35 How. Pr. (N. Y. Supreme Ct.) 74. See also *infra*, XII. 2. b. (3) *Vacating Order*.

2. McCue v. Tribune Assoc., 1 Hun (N. Y.) 469, 3 Thomp. & C. (N. Y.) 451; Brooks v. Schultz, 5 Robt. (N. Y.) 656.

3. Erie R. Co. v. Gould, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; Moses v. Banker, 34 How. Pr. (N. Y. Super. Ct.) 212, 7 Robt. (N. Y.) 131.

4. Moses v. Banker, 34 How. Pr. (N. Y. Super. Ct.) 212, 7 Robt. (N. Y.) 131; Erie R. Co. v. Gould, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; Matter of Bannister, 1 N. Y. Month. L. Bul. 46; Fisk v. Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

Such necessity must be made to appear by a statement of facts and circumstances. Cockey v. Hurd, 45 How. Pr. (N. Y. Super. Ct.) 70, 14 Abb. Pr. N. S. (N. Y.) 183.

An affidavit merely stating that it will be necessary to have the affidavit, without stating any facts supposed to be within the knowledge of the proposed witness, is insufficient. Dauchy v. Miller, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 102.

5. Williams v. Western Union Tel. Co., 3 Civ. Pro. Rep. (N. Y. Super. Ct.) 448; Erie R. Co. v. Gould, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; Moses v. Banker, 34 How. Pr. (N. Y. Super. Ct.) 212, 7 Robt. (N. Y.) 131; Pierie v. Berg, 7 S. Dak. 578.

6. Dauchy v. Miller, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100; Erie R. Co. v. Gould, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279.

In Williams v. Western Union Tel. Co., 3 Civ. Pro. Rep. (N. Y. Super. Ct.) 448, an order was vacated on affidavits denying a refusal, where the original affidavit did not show what facts the witness was requested to depose to or that they were believed to be within his knowledge. See also Pierie v. Berg, 7 S. Dak. 578, wherein it was held not to be error to deny the application for an order to take a compulsory affidavit where it did not appear that the witness possessed knowledge of the material facts.

7. Fisk v. Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430; Erie R. Co. v. Gould, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 282; Dauchy v. Miller, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 102. This results from the requirement of an affidavit that the witness is "necessary." To allege this involves knowledge in advance of the facts to which the witness will testify. Fisk v. Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

The Dakota statute, which is substantially a copy of the New York statute, was given the same construction in Pierie v. Berg, 7 S. Dak. 578, *citing* Fisk v. Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

The examination under this statute is not a substitute for discovery. Fisk v. Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 433.

"It Would Be a Safe and Convenient Practice for a party to prepare the required affidavit and submit it to the witness and request him to verify the same; and in case of refusal, to make the proposed affidavit a part of the

(e) **Order.** — An order to compel the taking of an affidavit is discretionary with the court.¹ A general examination with cross-examination cannot be ordered.²

(3) **Vacating Order.** — The person whose affidavit is sought to be compelled may move to vacate the order.³ But the adverse party cannot make such a motion,⁴ except where he is the person whose affidavit is ordered to be taken.⁵

Specifying Irregularity. — A motion to vacate the order for irregularity must specify the irregularity.⁶

papers upon which the order is applied for. Of course, such practice is not indispensable; but in this or some other form the court should be informed wherein the examination of the witness is material and necessary to the motion intended to be made. The view thus taken I deem in harmony with the adjudications upon this subject." *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100 [*citing* *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; *Hudson River, West Shore R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 191].

1. *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 102; *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 432; *Hudson River West Shore R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 191.

2. *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279; *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100.

3. *Spratt v. Huntington*, 2 Hun (N. Y.) 341; *Williams v. Western Union Tel. Co.*, 3 Civ. Pro. Rep. (N. Y. Super. Ct.) 448; *Ramsey v. Gould*, 39 How. Pr. (N. Y. Supreme Ct.) 62, 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S. (N. Y.) 174.

"Such Motions, However, Are Not to Be Encouraged, and should be granted only in cases where it clearly appears either that the order is unauthorized, or that legitimate use of the process of the court is not the object for which the order was obtained." *Moses v. Banker*, 7 Robt. (N. Y.) 131.

4. *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469, wherein the court said: "There is no mode by which a party can interfere to prevent the procuring of an *ex parte* affidavit by his adversary." See also *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 73.

In *Ramsey v. Gould*, 39 How. Pr. (N. Y. Supreme Ct.) 73, 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S. (N. Y.) 174, it was

held that "the order is a matter exclusively between the party that obtains it and the party whose deposition is desired, and that such person only can move to have it vacated; that the party obtaining it should not be embarrassed by any motion of the adverse party to set it aside." This view is supported by the case of *Brooks v. Schultz*, 5 Robt. (N. Y.) 656, 3 Abb. Pr. N. S. (N. Y.) 124, to the extent that the adverse party must show that he is injured by the irregularity complained of before he can move to have the order of examination set aside.

Contrary View. — In *Moses v. Banker*, 7 Robt. (N. Y.) 134, it was held that the adverse party has a right to move to vacate the order. But this decision was placed upon the ground that the adversary has a right to attend the examination and cross-examine the witness, and that as such attendance subjects him to trouble and expense he therefore has a sufficient interest to entitle him to move to vacate the order. But, as will be seen, the rule has become settled that a party has no such right to attend and cross-examine (see *infra*, XII. 2. b. (4) *Proceedings Under Order*), and the grounds of this decision accordingly fail.

5. *Spratt v. Huntington*, 2 Hun (N. Y.) 341, wherein the ground of the motion to vacate was that it directed the examination of a "party." It was further held in this case that the contempt of the plaintiff in disobeying it did not preclude him from moving to vacate it.

6. *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124. This is in accordance with the ordinary rule. See *supra*, p. 117.

What Is Not an Irregularity Within Rule. — "The objection to this motion, that the moving papers do not point out particularly the irregularity complained of, cannot prevail, for the reason that the order is assailed upon

Waiver. — After a witness has appeared before the referee, and has been partially examined without making objection, it is too late for him to move to vacate the order appointing the referee upon the ground that he did not refuse to make an affidavit,¹ or upon the ground of the insufficiency of the affidavit on which it was granted.²

(4) *Proceedings Under Order.* — The person to be cross-examined may be subpoenaed and compelled to attend as upon the trial.³ The whole proceeding is *ex parte*,⁴ and the adverse party has no right to appear and cross-examine the witness,⁵ but the referee may ask fair questions.⁶ The witness is not entitled to the benefit of counsel.⁷ No examination of books and papers is allowed.⁸ The deposition, when taken, must be deliv-

the ground that the affidavit was insufficient to justify the granting of said order, which is matter of substance, and aimed at the sufficiency of the entire proceeding, and not a technical irregularity. The order must be vacated." *Dauchy v. Miller*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 100.

1. *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 74.

2. *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469, 3 *Thomp. & C.* (N. Y.) 451, citing *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 74.

3. N. Y. Code Civ. Pro., § 888.

Place of Taking Affidavit. — "Where a person to be examined, as prescribed in this article, is a resident of the state, he shall not be required to attend in any county other than that in which he resides or where he has an office for the regular transaction of business in person. Where he is not a resident, he shall not be required to attend in any other county than that wherein he is served with a subpoena, unless for special reasons, stated in the affidavit, the order otherwise directs." N. Y. Code Civ. Pro., § 886, construed in *Gustaf v. American Steamship Co.*, 31 Hun (N. Y.) 95, wherein it was held that the fact that the action is brought and is to be tried in such other county does not authorize the court to require him to go out of the county of his residence. See also *McCoskry's Estate*, 10 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 178.

4. **Ex Parte Character of Proceeding.** — *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 469, wherein the court said: "The affidavit is *ex parte*, and may or may not be used in the case. If there is anything in the contents, or in the mode of procuring the affidavit, to which the

defendant can lawfully object, his objection must be made when the affidavit is sought to be used against him." Citing *Brooks v. Schultz*, 5 Robt. (N. Y.) 656.

See also *Keenan v. O'Brien*, (Supreme Ct.) 2 N. Y. Supp. 242, wherein the court said: "The whole proceeding is *ex parte*, and is made none the less so because the aid of the court has been invoked to require a person to make an affidavit who would not voluntarily do so. *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124, is not a controlling authority. That case is also reported in the regular reports of the Superior Court, 5 Robt. (N. Y.) 656; and the opinion of another judge who sat in the case there given is in conflict with that reported in 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124. The defendants are not deprived of any right. They can procure from the person examined any affidavit that may be necessary to explain or supplement what he states, and, if he refuses, they can compel him to make one without any interference on the part of the plaintiff."

5. *Erie R. Co. v. Champlain*, 35 How. Pr. (N. Y. Supreme Ct.) 74; *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 281.

Contra. — *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124 [criticised in *Keenan v. O'Brien*, (Supreme Ct.) 2 N. Y. Supp. 242]; *Moses v. Banker*, 7 Robt. (N. Y.) 134.

6. *Brooks v. Schultz*, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 124.

7. *Reynolds v. Parks*, 2 Dem. (N. Y.) 399; *Keenan v. O'Brien*, (Supreme Ct.) 2 N. Y. Supp. 242.

8. *Fisk v. Chicago, etc., R. Co.*, 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 430.

ered to the attorney for the party who procured the order; unless the order provides for a different disposition thereof.¹

(5) *Effect of Subsequent Tender of Affidavit.* — After a witness has refused to make affidavit and an examination has been ordered under the statute, the court should not arrest it upon the ground that an affidavit has subsequently been tendered unless it very clearly appears that such affidavit is full and frank.²

(6) *Use of Affidavit.* — A party taking an affidavit under an order therefor is not obliged to use it.³

3. *Filing and Serving Affidavits.* — Affidavits upon which a motion is to be founded are part of the motion papers, and copies of them should be served with the notice of motion.⁴ Affidavits which have not been served cannot be used in support of the motion.⁵ Sometimes the object of serving affidavits with the notice is attained by requiring them to be filed so that the opposite party may have an opportunity to meet them before the hearing,⁶ though it has been held that there is no absolute rule

1. N. Y. Code Civ. Pro., § 885.

2. "The whole matter rests in the discretion of the court, and therefore, after a refusal, or even after the examination has commenced, I think the court might deny an application or vacate an order, if one had been granted, to oblige the person to make the deposition. Whether the court would or would not do so must depend upon the circumstances of each particular case, but I see no reason why, if there does not appear to have been any bad faith, and a sufficient affidavit be tendered, the court should not arrest the proceeding at any stage of it; but this should never be done unless it be clear that the affidavit is full and frank upon all the points within the deponent's knowledge 'necessary' for the party, and to which the witness's affidavit has been requested." *Fisk v. Chicago, etc.*, R. Co., 3 Abb. Pr. N. S. (N. Y. Supreme Ct.) 433.

3. *McCue v. Tribune Assoc.*, 1 Hun (N. Y.) 470; *Brooks v. Schultz*, 5 Robt. (N. Y.) 656; *Erie R. Co. v. Gould*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 279.

4. *Fitzroy v. Card*, 1 Johns. Cas. (N. Y.) 30, Col. & C. Cas. (N. Y.) 69; *Grover v. Green*, 1 Cal. (N. Y.) 115, Col. & C. Cas. (N. Y.) 190; *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425; *Chesebro v. Chesebro*, 21 Mich. 506; *Corwith v. Illinois State Bank*, 8 Wis. 376. But see *Smith v. Hoyt*, 14 Wis. 252.

A motion may be overruled for failure to comply with this rule. *Scales v. Labar*, 51 Ill. 232.

See also *supra*, *Papers on Which Motion Is Based*, p. 139.

5. *Campbell v. Grove*, 2 Johns. Cas. (N. Y.) 105; Col. & C. Cas. (N. Y.) 115. See *Deas v. Smith*, 1 Cal. (N. Y.) 172; Col. & C. Cas. (N. Y.) 221; *Frost v. Flint*, 2 How. Pr. (N. Y. Supreme Ct.) 74; *Bennett v. Pratt*, 2 How. Pr. (N. Y. Supreme Ct.) 77.

6. *Lester v. Elwert*, 25 Oregon 102. But see *Vernam v. Holbrook*, 5 How. Pr. (N. Y. Supreme Ct.) 3, wherein it was held that if, on a motion to set aside an order for a defect in the affidavits, it appears that a sufficient affidavit was used on the hearing of the motion, though it was not filed, the order should not be set aside.

"The Customary Rule in Practice requires that affidavits or other proofs in support of a motion must be filed with it; otherwise, leave must be obtained at the time to file them within a specified time afterwards. If no such leave be given, the motion must be disposed of as it stands, with its accompanying proofs, at the time of filing." *Vallé v. Picton*, 16 Mo. App. 178.

Where a Party Refuses to File Affidavits or to show them to the adverse party, the court may properly refuse to allow them read upon the hearing of the motion. *Hubble v. Osborn*, 31 Ind. 249. See also *Hayward v. Goldsbury*, 63 Iowa 436, wherein the court refused to permit the filing of an affidavit in support of a motion where the counsel refused to file it before the hearing, and sat during the hearing with the affidavit in his pocket.

requiring affidavits to be filed before the hearing.¹ A failure to file or serve affidavits in time may be waived.² As affidavits read on the hearing of a motion are papers in the cause, if they have not been previously filed they should be filed at or after the hearing.³

4. Suppressing Affidavits. — Irrelevant or Scandalous Matter in an affidavit may be stricken out,⁴ though it has been said to be the better practice not to strike out the objectionable part, but to suppress the entire affidavit when it is offered to be read.⁵

1. *Jones v. Swepson*, 94 N. Car. 700, wherein the court said: "As affidavits are *ex parte* and no opportunity is afforded for cross-examination; there is a propriety in affording counsel an opportunity for examining such as may be offered against him, before trial, so that he may controvert the new matter by adversary evidence, and when this is not done it may present a case of surprise, authorizing the arrest of further proceedings until the new evidence can be met. We know of no rule regulating the hearing of motions such as the present which requires the filing of affidavits before the trial is entered upon, and their rejection when they are not. There is, of course, a discretion reposed in the judge which may warrant his rejection of testimony in this *ex parte* form when inopportunistically offered out of the regular course of proceeding, just as he may, under such circumstances, permit it. We do not abridge his exercise of discretion in these cases. The present case is not of this kind. Notice of the affidavit was given in advance, and it does not appear that the plaintiff or his counsel were refused an opportunity of seeing it, or even that they wished to know what it contained. No unfair advantage was taken, and the plaintiff assented to the hearing with the knowledge that the affidavit would be offered." See also *Makepeace v. Lukens*, 27 Ind. 435, wherein it was held that affidavits in support of a motion for a *nunc pro tunc* entry need not be filed before the motion.

In *In re King's Trade Mark*, (1892) 2 Ch. 462, it was held that an affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the court, provided it does not interfere with the date of the order, as where the filing is on the same day.

Discretion of Court. — Permitting affidavits in support of a motion to be filed out of time rests largely in the discretion of the trial court, and its action in granting or refusing such permission will not be reviewed unless it is shown that such discretion was abused. *Henry v. Diviney*, 101 Mo. 378; *Jones v. Swepson*, 94 N. Car. 700.

2. *Hagan v. Casey*, 30 Wis. 553, holding that the objection that the plaintiff's affidavit for a trial *de novo* was not served or filed at the proper time was waived by the parties going to trial.

3. *Clemens v. Horton*, 13 W. N. C. (Pa.) 504; *In re King's Trade Mark*, (1892) 2 Ch. 462.

Effect of Failure to File. — The affidavit upon which a rule to show cause is had should be filed upon entering the rule; if not filed, or if lost by the fault of the party or his attorney, its contents cannot be shown, and the rule will be discharged as improvidently granted. *Cooper v. Galbraith*, 24 N. J. L. 219.

In *New York*, by rule of court, when an order is required to be entered the motion papers on which it was based must be filed with the clerk, or the order may be vacated for irregularity. General Rules of Practice, rule 3. See also article ORDERS.

4. *People v. Albany, etc.*, R. Co., 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 122, 57 Barb. (N. Y.) 221; *Powell v. Kane*, 5 Paige (N. Y.) 265.

This may be done although the other party has read counter-affidavits as to the same subject. *People v. Albany, etc.*, R. Co., 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 122.

5. *Opdyke v. Marble*, 18 Abb. Pr. (N. Y. Supreme Ct.) 266, 375, affirming and holding that it is the better practice not to entertain the motion to suppress until the affidavit is offered to be read. See also *People v. Church*, 2 Lans. (N. Y.) 459.

Compulsory Affidavit. — It seems that the court will not suppress a compulsory affidavit for irregularities in taking it.¹

5. Affidavits in Support of — *a. NECESSITY.* — Where the right to the relief sought is based upon facts not apparent of record, the existence of such facts must be proved by affidavits or other competent evidence.² And conversely, where the motion is grounded solely upon matters apparent upon the face of the record or proceeding, it need not be thus supported.³

Ex Parte Motions are usually required to be supported by an affidavit.⁴

Facts Proved by the Opposing Party may be considered in support of a motion.⁵

b. SUFFICIENCY. — **The Formal Sufficiency** of affidavits in support of motions is governed by general rules applicable to all affidavits. These rules have been exhaustively discussed in another article,

1. **The Remedy Is by Objecting** to the affidavit when offered, as no injury is done to the adverse party until then, and *non constat* that the affidavit will be offered. *Brooks v. Schultz*, 5 Robt. (N. Y.) 656.

2. *California.* — *Francis v. Cox*, 33 Cal. 323.

Colorado. — *Sopris v. Truax*, 1 Colo. 89.
District of Columbia. — *Fitzgerald v. Fitzgerald*, 7 D. C. 243.

Indiana. — *Etter v. Anderson*, 84 Ind. 333; *Toledo, etc., R. Co. v. Gates*, 32 Ind. 238.

Iowa. — *Shellenberger v. Ward*, 8 Iowa 425.

Michigan. — *Stringer v. Dean*, 61 Mich. 196; *Haywood v. Johnson*, 41 Mich. 605; *Storey v. Child*, 2 Mich. 107.

Missouri. — *Adler v. Lang*, 26 Mo. App. 226.

New Jersey. — *Trenton Mut. L., etc., Ins. Co. v. Hodges*, 24 N. J. L. 673.

New York. — *Brooklyn Oil Works v. Brown*, 38 How. Pr. (N. Y. Super. Ct.) 451, 7 Abb. Pr. N. S. (N. Y.) 382; *Connors v. Titus*, 10 Hun (N. Y.) 235; *Fowler v. Burns*, 7 Bosw. (N. Y.) 647; *Hunt v. Wallis*, 6 Paige (N. Y.) 371; *Dix v. Palmer*, 5 How. Pr. (N. Y. Supreme Ct.) 233; *Van Horne v. Montgomery*, 5 How. Pr. (N. Y. Supreme Ct.) 238; *Kelly's Application*, 10 Abb. Pr. (N. Y. C. Pl.) 208.

Wisconsin. — *Hungerford v. Cushing*, 8 Wis. 320.

United States. — *U. S. v. Coolidge*, 2 Gall. (U. S.) 364.

England. — *Williams v. Williams*, (1896) Prob. 153, 65 L. J. P. 98.

The mere statement of a fact in a motion is not such proof of its existence as

to authorize the court to act upon it. *Rosenstein v. State*, 9 Ind. App. 290.

Such facts must at least be sworn to or supported by authentic documentary evidence. *Coker v. Hayes*, 16 Fla. 368.

"When a Party Intends to Produce Viva Voce Testimony in court, upon the hearing of a cause, which is sometimes done (but without a cross-examination) to prove the execution of deeds, and the handwriting of letters, or the signatures thereto, and the like, he should apply before that time for an order for that purpose, upon an affidavit, giving a proper description of what is intended to be proved, as well as notice to the adverse party of the motion." *Emerson v. Berkley*, 4 Hen. & M. (Va.) 442.

In *New York*, by express provision of Code, section 405, if an order extending the time to answer or demur is made without an affidavit of merits, it may be absolutely disregarded. *Ellis v. Van Ness*, 14 How. Pr. (N. Y. Supreme Ct.) 313.

3. *Bash v. Christian*, 84 Ind. 180; *Darrow v. Miller*, 5 How. Pr. (N. Y. Supreme Ct.) 247, holding that a motion to strike out a pleading as frivolous and for judgment need not be verified nor supported by affidavit, as it must be granted or refused solely upon what appears in the pleadings.

4. *Cooper v. Galbraith*, 24 N. J. L. 219.

5. *Richards v. White*, 7 Minn. 345, holding that where the matters which the moving party must establish are made out by the answer or proof of his opponent, but not by his own papers, he may take advantage of the point thus made for him.

and hence will not be repeated here.¹

The **Sufficiency of Affidavits** in support of particular motions is likewise beyond the scope of this article.² This subject will be found treated in articles dealing specially with such motions.³

Ex Parte Motions.—In *New York*, under rule of court, the affidavit in support of an *ex parte* motion must state whether any previous application for the same order has been made.⁴

1. See article **AFFIDAVITS**, vol. 1, p. 309. See also the following cases which are instances of affidavits upon motions:

Entitling Affidavits—Michigan.—*Whipple v. Williams*, 1 Mich. 115.

New York.—*People v. Tioga C. Pl.*, 1 Wend. (N. Y.) 291; *Haight v. Turner*, 2 Johns. (N. Y.) 371; *People v. Dikeman*, 7 How. Pr. (N. Y. Supreme Ct.) 124; *Nichols v. Cowles*, 3 Cow. (N. Y.) 345; *Whitney v. Warner*, 2 Cow. (N. Y.) 499; *Pell v. Jadwin*, 3 Johns. (N. Y.) 448; *Phelps v. Hall*, 5 Johns. (N. Y.) 367; *Anonymous*, 4 Hill (N. Y.) 597; *Irroy v. Nathan*, 4 E. D. Smith (N. Y.) 68; *People v. Chrystal*, 8 Barb. (N. Y.) 545; *Milliken v. Selye*, 3 Den. (N. Y.) 54; *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 658; *Vernam v. Holbrook*, 5 How. Pr. (N. Y. Supreme Ct.) 3.

Wisconsin.—*Filer, etc., Co. v. Sohns*, 63 Wis. 118.

Signature and Jurat—Minnesota.—*Knight v. Elliott*, 22 Minn. 551.

New York.—*Livingston v. Cheetham*, 2 Johns. (N. Y.) 479; *Union Furnace Co. v. Shepherd*, 2 Hill (N. Y.) 413; *Barker v. Cook*, 16 Abb. Pr. (N. Y. Supreme Ct.) 83; *Graham v. McCoun*, 5 How. Pr. (N. Y. Supreme Ct.) 353; *Haff v. Spicer*, 3 Cal. (N. Y.) 190; *Jackson v. Virgil*, 3 Johns. (N. Y.) 540.

But see *Chase v. Edwards*, 2 Wend. (N. Y.) 283.

Date of Affidavit.—*Exp. Emmerson*, 33 New Bruns. 340, holding that an affidavit purporting to have been sworn to on a day after an order granted thereon was made is bad and the order a nullity.

2. Affidavits in Special Cases—Sufficiency—California.—*Francis v. Cox*, 33 Cal. 323; *Parrott v. Den*, 34 Cal. 79. *Indiana.*—*Nutting v. Losance*, 27 Ind. 37; *Toledo, etc., R. Co. v. Gates*, 32 Ind. 238.

Kentucky.—*Steele v. Com.*, 3 Dana (Ky.) 84.

Minnesota.—*Washington County v. McCoy*, 1 Minn. 100.

New York.—*Brooklyn Oil Works v.*

Brown, 38 How. Pr. (N. Y. Super. Ct.) 451, 7 Abb. Pr. N. S. (N. Y.) 382; *Peck v. Powers*, 25 Hun (N. Y.) 65; *Orvis v. Dana*, 1 Abb. N. Cas. (N. Y. C. Pl.) 268; *Smith v. Jones*, 4 Robt. (N. Y.) 655.

Wisconsin.—*Amory v. Amory*, 26 Wis. 152; *Sutton v. Wegner*, 72 Wis. 294.

3. For example, see article **ALIMONY**, vol. 1, p. 424, for a discussion of affidavits in support of a motion for alimony. In the same way see articles **AMENDMENTS**, vol. 1, pp. 637, 654, 680; **ATTACHMENT**, vol. 3, p. 3; **BAIL AND RECOGNIZANCE**, vol. 3, p. 164; **CERTIORARI**, vol. 4, p. 158; **CHANGE OF VENUE**, vol. 4, p. 431 *et seq.*; **CONTINUANCES**, vol. 4, p. 873; **DEFAULTS**, vol. 6, p. 54, etc., etc.

4. *Wooster v. Bateman*, 4 Misc. Rep. (N. Y. Super. Ct.) 431; *Bean v. Tonnelle*, 24 Hun (N. Y.) 353; *Diossy v. West*, 1 N. Y. Month. L. Bul. 23; *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141; *Sudlow v. Mead*, (Supreme Ct.) 3 N. Y. Supp. 321.

Effect of Noncompliance with Rule.—Failure to comply with this rule is ground for vacating the order made on such application. General Rule of Supreme Court, Rule 25; *Gouraud v. Trust*, 17 Hun (N. Y.) 578. But the court is not compelled to refuse the order or to vacate it after it has been granted; it is simply discretionary with the court to do so. *Wooster v. Bateman*, 4 Misc. Rep. (N. Y. Super. Ct.) 431; *Bean v. Tonnelle*, 24 Hun (N. Y.) 353.

Waiving or Curing Defect.—The motion may be cured by amendment so as to defeat a motion to vacate the order on that account. *Kroszinski v. Wolkoweiz*, 1 N. Y. Month. L. Bul. 90; *Spring v. Gourlay*, 1 N. Y. Month. L. Bul. 49.

Or the irregularity may be waived by failure to raise the objection until much labor and expense has been incurred. *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

A Verified Pleading may be deemed a sufficient affidavit and used upon a motion.¹

Motions Affecting Several Actions. — A rule making the same order in several causes may be moved for on a single affidavit entitled in all the causes.²

Amendment. — Affidavits in support of a motion may be amended by leave of court so long as the motion remains undetermined.³

Who May Make. — Ordinarily any one having knowledge of the facts may make the affidavit.⁴

Affidavits on Information and Belief. — As a general rule, affidavits must state facts positively.⁵ But where, from the circumstances of the case, facts cannot be so stated, they may be stated upon information and belief.⁶ Affidavits on information and belief should name the informant, or the source of information,⁷ and show the reason why an affidavit of a person having positive per-

1. When Pleadings May Be Used as Affidavits. — A complaint and answer are pleadings, and whether verified or not perform offices as such. But they are none the less affidavits and entitled to be used as such when their allegations are in such form and are so verified that by a verification the truth of the allegations is positively affirmed. *Fowler v. Burns*, 7 Bosw. (N. Y.) 637.

2. *Barrack v. Newton*, 1 Q. B. 525, 41 E. C. L. 655.

But Two Rules Moved for Under Similar Circumstances should be founded on distinct and separate affidavits, for as an indictment for perjury could not be sustained on the affidavits referred to in the second cause already sworn in the first, the court will refuse to act on them. *Reg. v. Mizen*, 1 Dowl. N. S. 865, 6 Jur. 857.

3. *Goings v. Chapman*, 18 Ind. 194.

4. The attorney himself and not his clerk should ordinarily make an affidavit which is the foundation of a motion in court. *Chase v. Edwards*, 2 Wend. (N. Y.) 283. But see *Knudson v. Matuska, etc., Furniture Co.*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 152, 7 Civ. Pro. Rep. (N. Y.) 86.

Under the attachment act requiring plaintiff to show that he is entitled to the sum stated over and above all counterclaims known to him, he must personally make the affidavit, or the affiant must show that the plaintiff has no knowledge upon the subject for the reason that the entire transaction was with the affiant. *Lampkin v. Douglass*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 342.

5. *Knudson v. Matuska, etc., Furniture Co.*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 154; *St. Amant v. De Beixcedon*, 3 Sandf. (N. Y.) 703; *Whitlock v. Roth*, 10 Barb. (N. Y.) 78.

6. *Knudson v. Matuska, etc., Furniture Co.*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 154; *Bennett v. Edwards*, 27 Hun (N. Y.) 352; *Whitlock v. Roth*, 10 Barb. (N. Y.) 78; *Zellenkoff v. Collins*, 23 Hun (N. Y.) 156; *Shearman v. Justice*, 22 How. Pr. (N. Y. Supreme Ct.) 241.

Failure to Deny or Explain Allegations Upon Information and Belief — Effect. — Where allegations made upon information and belief are not denied or explained by the adverse party, notwithstanding an opportunity to do so, they are to be taken as true. *Excise Com'rs v. Purdy*, 13 Abb. Pr. (N. Y. Supreme Ct.) 434, 22 How. Pr. (N. Y. Supreme Ct.) 312; *Union Bank v. Mott*, 9 Abb. Pr. (N. Y. Supreme Ct.) 106, 17 How. Pr. (N. Y.) 353, *affirming* 8 Abb. Pr. (N. Y.) 150 and 16 How. Pr. (N. Y.) 525.

7. *Fay v. Bowen*, 1 N. Y. Month. L. Bul. 41; *Baker v. Cobb*, 1 N. Y. Month. L. Bul. 2; *Whitlock v. Roth*, 10 Barb. (N. Y.) 78; *Knudson v. Matuska, etc., Furniture Co.*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 154; *Shearman v. Justice*, 22 How. Pr. (N. Y. Supreme Ct.) 241.

Where an injunction has been granted upon a complaint upon information and belief, which was verified by a foreign consul and which is not denied, affidavits which are the sources of the information may, in furtherance of justice, be read upon a motion to

sonal knowledge of the facts is not produced.¹ The facts which induce the belief should be stated.²

Waiver of Objections. — An objection that a foreign affidavit is not properly certified may be waived if not taken at the time when it is read.³

c. ADDITIONAL OR REBUTTING AFFIDAVITS. — Where the party opposing a motion introduces affidavits setting up new matter to avoid allegations in affidavits of the moving party, the latter may introduce new affidavits to contradict such averments of new matter,⁴ but he will not be allowed to introduce affidavits setting up new matter in avoidance of the allegations of his opponent.⁵ Where, however, the opposing affidavits do not set up new matter, additional affidavits merely in corroboration of the affidavits previously filed or served in support of the motion are not admissible.⁶

vacate the injunction upon the papers on which it was granted. *Zellenkoff v. Collins*, 23 Hun (N. Y.) 156.

1. *Fay v. Bowen*, 1 N. Y. Month. L. Bul. 41; *St. Amant v. De Beixcedon*, 3 Sandf. (N. Y.) 703; *Knudson v. Matuska*, etc., *Furniture Co.*, 1 How. Pr. N. S. (N. Y. Supreme Ct.) 154; *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Whitlock v. Roth*, 10 Barb. (N. Y.) 78; *Baker v. Cobb*, 1 N. Y. Month. L. Bul. 2.

Showing that Best Evidence Obtainable Has Been Produced. — "In general, there is no difficulty in obtaining the affidavits of the persons who give the information, on which the plaintiff desires to proceed; and when such affidavits cannot be obtained from the peculiar circumstances of the case, those circumstances must be stated, with all the grounds of suspicion, so as to satisfy the judge that the facts exist on which the attachment is sought, and that the plaintiff has produced the best evidence in his power to establish them." *St. Amant v. De Beixcedon*, 3 Sandf. (N. Y.) 703.

2. *Melville v. Brown*, 16 N. J. L. 363, holding a mere allegation of belief to be insufficient.

Illustration. — An affidavit in support of a motion to dismiss on the ground of want of authority in the attorney to begin the suit, which states only the affiant's belief, does not tend to overcome the presumption arising from the professional obligation of the attorney and such motion may be summarily overruled. Specific facts must be stated from which the court itself may be induced to doubt the attorney's authority to appear. *Vallé v. Picton*,

16 Mo. App. 178, citing *Keith v. Wilson*, 6 Mo. 439. Compare *Excise Com'rs v. Purdy*, 13 Abb. Pr. (N. Y. Supreme Ct.) 434, 22 How. Pr. (N. Y.) 312; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237.

3. *Mix v. Andes Ins. Co.*, 74 N. Y. 53, 30 Am. Rep. 260.

4. *Shearman v. Hart*, 14 Abb. Pr. (N. Y. C. Pl.) 358; *Powell v. Clark*, 5 Abb. Pr. (N. Y. C. Pl.) 70; *Childs v. Fox*, 18 Abb. Pr. (N. Y. Super. Ct.) 112.

Impeaching and Sustaining Credit of Affiant. — Rebutting affidavits may be introduced by the moving party to establish the general reputation of an affiant whose character has been impeached by the opposing affidavits. *Clark v. Frost*, 3 Cai. (N. Y.) 125; *Merritt v. Baker*, 11 How. Pr. (N. Y. Supreme Ct.) 456. *Contra*, *Callen v. Kearny*, 2 Cow. (N. Y.) 529.

5. *Shearman v. Hart*, 14 Abb. Pr. (N. Y. C. Pl.) 358.

6. *Jacobs v. Miller*, 10 Hun (N. Y.) 230; *Powell v. Clark*, 5 Abb. Pr. (N. Y. C. Pl.) 70; *Childs v. Fox*, 18 Abb. Pr. (N. Y. Super. Ct.) 112; *Campbell v. Grove*, 2 Johns. Cas. (N. Y.) 105, Col. & C. Cas. (N. Y.) 115; *Deas v. Smith*, 1 Cai. (N. Y.) 172; *Clark v. Frost*, 3 Cai. (N. Y.) 125, Col. & C. Cas. (N. Y.) 464; *Callen v. Kearny*, 2 Cow. (N. Y.) 529.

Practice Where New Matter Was Unknown. — An affidavit containing new matter cannot be read in support of a motion though the facts in it were not known till the day of bringing on the motion; the parties should serve copies and move at a later day. *Bergen v.*

After submission of the motion, additional affidavits or evidence are not admissible, except by leave of court and upon notice to the other side.¹

Waiver. — Failure to object to the reading of additional affidavits is a waiver thereof, and such objection cannot be taken for the first time on appeal.²

6. Counter-affidavits. — Counter-affidavits are generally admissible to contradict or avoid the facts urged in support of the motion,³ especially where the motion is addressed to the discretion of the court.⁴ But an affidavit of merits accompanying a motion cannot be met by counter-affidavits.⁵

Boerum, 2 Cal. (N. Y.) 256; Clark v. Frost, 3 Cal. (N. Y.) 125; Ferguson v. Commonwealth Rubber Co., 4 N. Y. App. Div. 611.

Supplemental affidavits cannot be received unless copies have been served the same length of time before the day of moving as though the motion were founded upon them. Wilcox v. Howland, 6 Cow. (N. Y.) 576. And see *supra*, IX. 5. g. *Papers on Which Motion Is Based*.

1. Dunwell v. Warden, 6 Minn. 287; Hughes County v. Ward, 81 Fed. Rep. 314.

Refusal of Leave to File Affidavits in support of a motion is proper where such affidavits are not presented until after the motion has been overruled. Yunker v. Marshall, 65 Ill. App. 667.

The Decision May Be Suspended to Allow the Filing of New Affidavits, and where, after the decision, leave is granted to file additional affidavits, such action amounts to a suspension of the decision upon the motion, and the new affidavits may properly be considered. Winet v. Berryhill, 55 Iowa 411.

2. Pach v. Orr, 15 Civ. Pro. Rep. (Buffalo Super. Ct.) 176, 17 N. Y. St. Rep. 367.

3. *Illinois*. — Hefling v. Van Zandt, 162 Ill. 162, reversing 60 Ill. App. 662.

New Jersey. — Kean v. Colt, 5 N. J. Eq. 365.

New York. — St. Amant v. De Beixcedon, 3 Sandf. (N. Y.) 703; Morgan v. Avery, 2 Code Rep. (N. Y. Supreme Ct.) 92; Watkinson v. Loughton, 4 Johns. (N. Y.) 307; Hart v. Faulkener, 5 Johns. (N. Y.) 362; Merritt v. Lambert, 10 Paige (N. Y.) 352; Fowler v. Burns, 7 Bosw. (N. Y.) 637; Quin v. Riley, 3 Johns. (N. Y.) 249. And see Campbell v. Grove, 2 Johns. Cas. (N. Y.) 105, Col. & C. Cas. (N. Y.) 115.

Tennessee. — Wilson v. Waters, 7 Coldw. (Tenn.) 323.

Counter-affidavits may be read as to the sufficiency of an excuse for not moving at the earliest opportunity. Quin v. Riley, 3 Johns. (N. Y.) 249.

When Counter-affidavits Are Not Admissible. — Counter-affidavits are not admissible upon a motion for a new trial. Chicago v. Edson, 43 Ill. App. 417; Hefling v. Van Zandt, 162 Ill. 162, reversing 60 Ill. App. 662.

Under N. Y. Code, § 226, where a defendant does not use an affidavit on his behalf in support of a motion to dissolve an injunction, the plaintiff is precluded from opposing his motion by new affidavits. Fowler v. Burns, 7 Bosw. (N. Y.) 637.

Extending Time to Prepare Counter-affidavits is a favor which the court will not grant unless some reason is offered showing why the affidavit could not be prepared in time; because the period of service ordered by the rules of court is otherwise presumed sufficient to enable the party to be ready. Jackson v. Ferguson, 3 Cal. (N. Y.) 127.

4. State v. Stokely, 16 Minn. 282, wherein it was held that inasmuch as the granting of a motion for a change of venue was a matter resting in the sound discretion of the trial court, counter affidavits were properly receivable upon the question even against defendant's objection, and the decision of the trial court will not be reviewed unless an abuse of discretion is shown.

5. Francis v. Cox, 33 Cal. 323; Anonymous, 1 Johns. (N. Y.) 313; Philips v. Blagge, 3 Johns. (N. Y.) 141; Hanford v. McNair, 2 Wend. (N. Y.) 286.

On an Application to Be Discharged, on filing common bail, counter-affidavits are admissible in the discretion of the judge, but where plaintiff swears positively to a debt, it would be improper to receive them. Welsh v. Hill, 2 Johns. (N. Y.) 100.

Service. — Counter-affidavits may be read in opposition to a motion without having been served.¹

Formalities. — But in general the same formality is required in opposing affidavits as is required in the moving affidavits.²

Information and Belief. — Counter-affidavits on information and belief are insufficient where the adversary has no opportunity to answer them.³

XIII. HEARING AND DETERMINATION — 1. **Hearing** — *a.* **TIME OF** — (1) *In General* — **Day Noticed.** — A motion noticed for a particular day should be made on that day and either tried or continued to some subsequent day unless prevented by some unavoidable accident.⁴

Where a Court Is Not Held on the first day of a term a notice given that a motion will be made on that day stands adjourned and

But a positive affidavit of indebtedness may be avoided by showing an insolvent discharge. *Jordan v. Jordan*, 6 Wend. (N. Y.) 524.

1. *Lathrop v. Hicks*, 2 Dougl. (Mich.) 223.

A rule of court requiring affidavits supporting a motion to be served one day before the hearing does not embrace affidavits of the adverse party. *Turner v. Hahn*, 1 Colo. 24.

2. *Brodhead v. Stanton*, 2 How. Pr. (N. Y. Supreme Ct.) 278.

Evasive Affidavit. — An affidavit to resist a motion, on the ground that the party has not possession of the papers, is not sufficient if it is evasive in not showing how he parted with possession. *Hicks v. Charlick*, 10 Abb. Pr. (N. Y. Supreme Ct.) 129.

3. *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496; *Melville v. Brown*, 16 N. J. L. 363.

4. *Com. v. McClelland*, Hard. (Ky.) 31; *Foster v. Wade*, 4 Metc. (Ky.) 252; *Allen v. Beekman*, 42 Wis. 185; *Vernovy v. Tauney*, 3 How. Pr. (N. Y. Supreme Ct.) 359.

A motion to suppress testimony, after a notice from the adverse party to bring it on before the hearing in chief, should be brought on before that time, or it will not be entertained. *Partridge v. Stocker*, 36 Vt. 108.

Failure to Move on the Day Noticed May Operate as an Abandonment of the motion. *Foster v. Wade*, 4 Metc. (Ky.) 252, holding that the motion must be either made in court or entered on the motion docket on the day specified, or the motion will be considered as abandoned and a judgment subsequently rendered thereon a nullity.

If the counsel does not either bring on or save his motion, on the day for which notice has been given (provided, of course, he has had an opportunity of being heard), the motion is said to be abandoned, and the other side is entitled to the costs of the motion. *Daniell's Ch. Pr.* 1602.

Taking Up at Later Day. — Where a motion is noticed for a certain day in a term and is not then called up nor postponed by order of court to a subsequent day, it cannot afterwards be taken up without consent of the parties. *Ireland v. Spalding*, 11 Mich. 455.

Where a motion is noticed for a day out of an appointed term, it must be brought on upon that day, and if it is not, a default cannot be taken on a subsequent day. *Vernovy v. Tauney*, 3 How. Pr. (N. Y. Supreme Ct.) 359.

What Record Must Show. — In *Tennessee*, in all summary proceedings by motion where notice is necessary, it must appear of record that the motion was made on the day specified in the notice. *Cheatham v. Howell*, 6 Yerg. (Tenn.) 311; *Gwin v. Vanzant*, 7 Yerg. (Tenn.) 143.

In Kentucky a motion should be made or entered upon the motion docket upon the return day of the notice. *Bent v. Maupin*, 86 Ky. 271. If the notice is not so entered it will be null. *Miller v. Boyd*, 1 Dana (Ky.) 272. But if the parties appeared and no objection was taken to the irregularity of the notice, it is not error that a notice of the motion was not entered in court on the day it was returnable. *Taylor v. Hardin*, 4 B. Mon. (Ky.) 363.

may be taken up on the first day on which a court is formed.¹

"Or as Soon Thereafter as Counsel Can Be Heard." — Under a notice that a motion will be made upon a certain day, or as soon thereafter as counsel can be heard,² the motion must be brought on within a reasonable time.³

Objections to the Time of Hearing a motion are waived where the party is in court at the hearing, but fails to interpose an objection.⁴

Statutes and Rules of Court. — The hearing of motions is largely regulated in the various states by statutes and rules of court which must be consulted in each instance.⁵ Frequently a regular

1. *Com. v. McClelland*, Hard. (Ky.) 31. But see *Rogers v. Toole*, 11 Paige (N. Y.) 212, wherein defendant had obtained an order to show cause upon a regular motion day, but by stipulation the time for showing cause was extended twenty days, at the expiration of which time no court was held or appointed to be held at the place specified in the order to show cause. It was held irregular for the defendant on the next motion day thereafter to take an order by default.

Term Changed by Law. — Where notice is given that a motion will be made for the first Monday of May and the day of holding court was afterwards changed to the second Monday in May, the notice will be sufficient, and the party to whom the notice is given must take notice of the change. *Price v. White*, 27 Mo. 275.

Adjournment of Court. — So where the court adjourns unexpectedly before the day named, the motion may be made and heard on the first succeeding motion day without a new notice. *Platt v. Robinson*, 10 Wis. 128; *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28.

Where causes over which the moving party has no control, and of which, when they occur, the opposite party is bound equally with him to take notice (such as the adjournment of the court), intervene between the time of giving notice of a motion and the time named for the hearing, rendering it impossible to proceed at that time, the moving party may proceed under the notice already given, upon the next motion day when he can be heard. *Allen v. Beckman*, 42 Wis. 185.

2. A motion may be brought on upon any day of the term after that for which it is noticed, although the notice does not contain the words "or as soon thereafter as counsel can be heard."

Anonymous, 1 Johns. (N. Y.) 143. See also *supra*, IX. 5. *b. Designating Time*.

3. *Stephens v. Kaga*, 142 Ind. 523, wherein it was held that the moving party under a notice of motion to be made at chambers, on a day and at an hour specified, or as soon thereafter as counsel can be heard, must proceed within such reasonable time after the time fixed in the notice and within the convenience of the judge as will enable his adversary to be present and be heard without attending through protracted periods of delay and uncertainty.

4. *Petrie v. People*, 40 Ill. 334, holding that if a party is present in court when a motion is made by the other party and takes no notice of such motion he cannot complain if the court proceeds to hear the motion at once.

In *Marty v. Ahl*, 5 Minn. 27, defendant's attorney procured an order, in the nature of an order to show cause, fixing the time and place for hearing such motion. The hour designated was one o'clock P. M. The copy served stated it as ten o'clock, and a notice of hearing was also served for one o'clock. The hearing was at one o'clock. Defendant's attorney was present but took no part. The motion was granted. It was held that by being present and hearing the papers read without objection he waived the objection to the discrepancy as to the hour of hearing.

5. A motion being in substance to vacate the verdict, was properly heard when made, although designated a motion on the minutes for a new trial. *Dent v. Bryce*, 16 S. Car. 14.

In Missouri the statute (Rev. Stat., § 3558) provides that "motions in a cause filed in term shall be filed at least one day before they can be argued or determined." This provision is for the protection of the adverse party to

motion day and motion docket is provided in accordance with which motions are called, heard and determined.¹

(2) *Continuance or Adjournment* — *Discretionary Power to Postpone.* — The court has power to postpone or continue the hearing of a motion to such time as best suits the convenience of both court and counsel,² and its discretion in this regard will not be reviewed

the motion, and when he does not claim the benefit of it the party filing cannot. *State v. Underwood*, 76 Mo. 630. The statute is not of universal application, nor is it absolute or inflexible; the statute designs to furnish only a general rule which must yield when the necessities of the case are so great as to demand it. *Curtis v. Curtis*, 54 Mo. 351; *Corpenny v. Sedalia*, 57 Mo. 88. A clearly frivolous motion may be overruled immediately notwithstanding the statute. *Vallé v. Picton*, 16 Mo. App. 178.

A motion to reopen a case after it has been submitted but not decided, is not a motion for a new trial and is not erroneously sustained on the same day of the filing when the adverse counsel is present and resubmits the cause on the testimony previously heard, notwithstanding the above statute. *Nelson v. Betts*, 30 Mo. App. 10.

In Minnesota, where a motion is made before a judge in vacation, the judge must appoint a day for the hearing. *Pub. Stat. Minn.*, c. 61, § 44; *Marty v. Ahl*, 5 Minn. 27, holding that the appointment by the judge of the time of hearing at the place designated in the notice is essential to the protection of the opposing party whether heard on notice or order to show cause.

The making of such order is the exercise of a chamber power by the judge acting as judge and not as the court in vacation, and the signature "By the Court" appended to such order is of no effect whatever. *Marty v. Ahl*, 5 Minn. 27.

In Texas the Act of May 13, 1846, § 54, prohibits the taking up of a motion that finally disposes of a case before the case is regularly called in the progress of the disposing of the suits on the docket, but a motion to dissolve an injunction is not of this character and may be taken up and disposed of at any time. *Huston v. Berry*, 3 Tex. 235, followed in *Rosenfield v. Gilmore*, 32 Tex. 659. To same effect see *Smith v. Ryan*, 20 Tex. 665, wherein it was held that under the statute a motion

for an interlocutory order may be taken up at any time the cause is reached in calling the motion docket or at the calling of the cause for trial.

1. See *supra*, IX. 4. *For What Day.*

Hearing on Other than Motion Day. — A court has power, however, on sufficient excuse shown to hear the motion on a day other than the regular motion day. *Pintard v. Ross*, 2 Johns. (N. Y.) 186; *Fink v. Bryden*, 3 Johns. (N. Y.) 244; *Jackson v. —*, 2 Cai. (N. Y.) 259; *Lusher v. Walton*, 1 Cai. (N. Y.) 150; *Bayard v. Malcom*, 3 Cai. (N. Y.) 102; *Kane v. Scofield*, 2 Cai. (N. Y.) 368; *Hatch v. Andrews*, 1 N. Y. Month. L. Bul. 59; *Vernovy v. Tauney*, 3 How. Pr. (N. Y. Supreme Ct.) 359; *Whipple v. Williams*, 4 How. Pr. (N. Y.) 28; *Ogdensburgh Bank v. Paige*, 2 Code Rep. (N. Y. Supreme Ct.) 67; *Quin v. Riley*, 3 Johns. (N. Y.) 249.

In District of Columbia under the Fifth Equity Rule a motion not grantable of course can only be heard on the first day of the special term, unless all the parties in interest appear and waive the requirement of the rule, or a different day be fixed by order of one of the justices. And if a motion is heard on any other day, the order ought to recite that the parties in interest appeared at the hearing, or that an order was made by the court allowing the party to make the motion; otherwise the order granting the motion will be void. *Fitzgerald v. Fitzgerald*, 7 D. C. 240.

2. *Turner v. Cates*, 90 Ga. 731; *Gurney v. Steffens*, 56 Kan. 295.

Discretion of Court. — Where, after a motion for a new trial is granted and the cause continued, the defendant presents a motion for a change of venue, it is within the discretion of the court to hear the motion at that term or postpone its consideration to the term at which the cause stands continued. *Coit v. Elliott*, 28 Ark. 294.

When Continuance Refused. — The court will not postpone a motion to give time to prepare affidavits, except where some reason is shown for not being prepared. *Jackson v. Ferguson*,

on appeal except in cases where such discretion is abused.¹

Motions Which Cannot Be Heard owing to the pressure of business or the adjournment of court, stand over as a matter of course.²

Saving the Motion. — In chancery practice, if a counsel is unable to make a motion on the day for which notice has been given, he is entitled, as a matter of right, to "save the motion," that is, adjourn it to the next motion day.³

(3) **Precedence Between Motions.** — In the absence of any statute or rule of court regulating the matter, where two or more motions are pending at the same time, it is within the discretion of the court which one it will hear and determine first.⁴ And its exercise of such discretion is not reviewable on appeal.⁵ There is, however, a natural order depending upon the nature and urgency of the motion which should ordinarily be observed.⁶ Sometimes the whole matter is regulated by statute.⁷ The

³ Cai. (N. Y.) 127, Col. & C. Cas. (N. Y.) 467.

Length of Continuance. — The court may continue the hearing until after the time for moving originally has expired. *Spencer v. Branham*, 109 Cal. 336, holding that where a motion has been made to set aside a default within the time limited, the court may continue the hearing for argument or further evidence without loss of jurisdiction. See also *Kansas Pac. R. Co. v. Twombly*, 2 Colo. 559, holding that a motion for a new trial may be continued to the following term.

Continuance After Announcing Decision. — The court may continue the hearing upon a motion even after announcing his decision thereon upon the application of the party against whom the decision was made. *Hanna v. Barrett*, 39 Kan. 446.

¹ *Turner v. Cates*, 90 Ga. 731.

The Court Does Not Abuse Its Discretion in postponing, with a view to economy of its time, a hearing of numerous motions pending therein for executions against stockholders of a corporation, who have filed a petition in the same court to vacate, as to them, the judgment against the corporation, until such time as further orders shall be made in an injunction proceeding to restrain the proceedings on the motions, which injunction was granted by the probate judge in the absence of the district judge. *Gurney v. Steffens*, 56 Kan. 295.

² *Mathis v. Vail*, 10 How. Pr. (N. Y. Supreme Ct.) 458; *Mound City Mut. L. Ins. Co. v. Twining*, 19 Kan. 349.

Where, from pressure of business, a

motion cannot be heard within the first four days of term, and the case is inserted in the list of enlarged motions, notice of that fact should be given to the opposite party, or he will be entitled to the costs of proceeding to sign judgment. *Emblin v. Dartnell*, 1 D. & L. 1000, 13 L. J. Exch. 255.

³ 2 *Daniell's Ch. Pl. & Pr.* 1597, *Citing In re Banwen Iron Co.*, 17 Jur. 127.

⁴ *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412; *Clark v. Shaw*, 101 Ind. 563; *Jacquay v. Hartzell*, 1 Ind. App. 500.

⁵ See cases cited in preceding note.

6. Natural Precedence Between Motions

— **Illustrations.** — The right to a motion for a new trial is not waived by a withdrawal of the motion pending a motion for judgment *non obstante veredicto*, as two motions do not lie together, and the motion for judgment comes first. *Stein v. Chicago, etc., R. Co.*, 41 Ill. App. 38. Compare *Harker v. Smith*, 3 Cinc. Wkly. L. Bul. 54, 7 Ohio Dec. (Reprint) 435, wherein it was held that where a party against whom a verdict is rendered moves both for a new trial and for judgment *non obstante veredicto*, the former motion is to be heard first, and, if granted, the other motion is surrendered.

A motion to discharge a prisoner from custody has priority over all other motions. *Ashton v. Shorrock*, 43 L. T. 530, 29 W. R. 117.

A motion to dismiss a writ of error takes precedence of one to remove the cause to the United States court. *Edgerton v. Webb*, 41 Ga. 417.

⁷ See N. Y. Code Civ. Pro., §§ 789-

grounds of preference should appear from the motion papers.¹

b. PLACE OF. — The place of moving is *prima facie* the place for the hearing.² But after the motion is made, the court may, for cause shown, transfer the hearing to another place or another judge.³

c. RIGHT TO OPEN AND CLOSE. — The party making the motion has the right to open and close.⁴

d. BURDEN OF PROOF. — The burden of proof lies upon the party holding the affirmative of the issue. If the opposing party admits the principal allegations of the moving party, and sets up new matter in avoidance, the burden of proof devolves upon him.⁵

e. ARGUMENT OF MOTION. — The argument of a motion may be controlled by the sound discretion of the court.⁶ The right to open and close has already been discussed.⁷

f. CONSOLIDATION OF MOTIONS. — Two or more motions may be consolidated where it will promote the convenience of court and suitors.⁸

g. TRIAL OF ISSUES. — The court may, and ordinarily should,

795; *Kibbe v. Stoddard*, 3 Cal. (N. Y.) 129; Anonymous, 2 Cal. (N. Y.) 377, Col. & C. Cas. (N. Y.) 419; *Cummings v. Woolley*, 16 Abb. Pr. (N. Y. Supreme Ct.) 297, note.

1. *Kibbe v. Stoddard*, 3 Cal. (N. Y.) 129, holding that otherwise the motion will not have priority.

2. See *supra*, VII. *Place of Moving*.

3. *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 240, N. Y. Code Civ. Pro., § 771.

Motion to Change Place of Hearing. — A motion by the opposing party to require the original motion to be made and heard at a different place from that named in the notice will not lie. If there be a reason why the motion should not be heard where it is noticed, that is the place to present the reason. *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 239.

4. *New York, etc., R. Co. v. New York*, 1 Hilt. (N. Y.) 562; *Tarbel v. White River Bank*, 24 Vt. 655. And see generally, article OPEN AND CLOSE.

5. *Shearman v. Hart*, 14 Abb. Pr. (N. Y. C. Pl.) 358; *Whitton v. Whitton*, 64 Ill. App. 53, holding that upon a motion to open a judgment by confession the burden of proof is upon the party making the motion.

Opportunity to Present Evidence. — Where a party at the trial of a motion did not introduce all the evidence it was possible for him to introduce. hav-

ing been misled by a statement of the judge and the decision is adverse to him, an opportunity should be given him to offer the omitted evidence. *Hanna v. Barrett*, 39 Kan. 446.

6. Whether or not a party shall be allowed to argue a point on a motion depends on the discretion of the court. *Gibson v. Crehore*, 5 Pick. (Mass.) 146.

The N. Car. Code, § 30, allowing an attorney in a civil or criminal action to address the court for such time as he deems necessary for a proper presentation of his case, applies only to trials and not to hearings upon motions. *State v. Jones*, 117 N. Car. 768.

7. See *supra*, XIII. 1. *c.* *Right to Open and Close*.

8. *State v. Moore*, 57 Tex. 307; *Auerbach v. Marks*, 94 Wis. 668.

Inherent Power to Consolidate. — "No legal or practical objection is perceived to the consolidation of the several motions into one. The power to consolidate actions or motions, in a proper case, is inherent in the court, to prevent a multiplicity of actions, to the distress of litigants and the fruitless consumption of the time of the courts. The practical effect of such consolidation is to change the mode of trial or hearing, so that several cases or motions are disposed of by one trial or hearing." *Auerbach v. Marks*, 94 Wis. 668.

try and determine all the issues both of law and fact arising upon the motion.¹

Feigned Issues. — But in cases of doubt and difficulty, where the court is called upon to weigh contradictory testimony and determine the credibility of witnesses, it may award a feigned issue to be tried by a jury.²

1. *Georgia*. — *Lewis v. Armstrong*, 64 Ga. 645.

Illinois. — *Cauley v. East St. Louis Electric St. R. Co.*, 58 Ill. App. 151.

Kansas. — *Hottenstein v. Conrad*, 9 Kan. 435.

Kentucky. — *Ireland v. Pugh*, 4 Ky. L. Rep. 252; *Johnson v. Thompson*, 4 Bibb (Ky.) 294.

Iowa. — *Lease v. Franklin*, 84 Iowa 413.

Mississippi. — *Hopton v. Swan*, 50 Miss. 550.

New York. — *McKinstry v. Thurston*, 12 Wend. (N. Y.) 222.

North Carolina. — *State v. Jones*, 117 N. Car. 768; *Hettrick v. Page*, 82 N. Car. 65.

Pennsylvania. — *Banning v. Taylor*, 24 Pa. St. 289.

Province of Court and Jury. — A motion for possession by an execution purchaser should be decided by the court; but where the court by peremptory instruction did decide the question the law was substantially complied with. *Ireland v. Pugh*, 4 Ky. L. Rep. 252.

It is not error to refuse to submit questions of fact arising upon an interlocutory motion to a jury. *Hettrick v. Page*, 82 N. Car. 65. But see *Stringer v. Dean*, 61 Mich. 202, wherein the court said: "But if the plaintiff desires to contest the facts relied upon in the affidavits to quash the proceedings, he has an undoubted right to the framing of an issue unless he waives it, and to try the question before a jury if he chooses to do so." See also *Haywood v. Johnson*, 41 Mich. 605.

Conclusiveness of Finding. — Whatever fact a court may inquire into on a motion, it can also determine, and its determination establishes the fact for all purposes of the motion. *Hottenstein v. Conrad*, 9 Kan. 435.

The finding of the court upon conflicting affidavits is conclusive, unless the court erred in weighing the evidence. *Cauley v. East St. Louis Electric St. R. Co.*, 58 Ill. App. 151.

Conflict of Evidence — Rule of Decision. — Where every material fact contained

in an affidavit to set aside an award of arbitrators on the ground of fraud is denied by the parties charged, the facts alleged must be regarded as not proven and the application must be denied. *Tilton v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 84. See also *Hernandez v. Carnobelli*, 10 How. Pr. (N. Y. Super. Ct.) 449. But see *Barron v. Sanford*, 14 How. Pr. (N. Y. Supreme Ct.) 443, wherein the court said that it seemed hardly safe or proper to dispose of these motions upon this ground — that is, a simple denial of the ground upon which the arrest is ordered. The safest and best course in such cases is to refer the affidavits to a referee, and require the parties to submit to an oral cross-examination in respect to the frauds stated in the affidavits, with leave to either party to call and examine other witnesses on the question, that the court may ascertain the truth. See also *Butler v. McIlvaine*, 31 How. Pr. (N. Y. Super. Ct.) 379; *Shearman v. Hart*, 14 Abb. Pr. (N. Y. C. Pl.) 358.

In *Verastegni v. Luzunarez*, 12 N. Y. Wkly. Dig. 489, it was held that on a motion to vacate an order, where the papers present conflicting states of facts, weight is to be given to the one most in accord with the probabilities of human action as observed in actual transactions.

Sworn Allegations Not Denied are considered established. *California Title Ins., etc., Co. v. Consolidated Piedmont Cable Co.*, 117 Cal. 237.

A Clear Case Must Be Shown to justify setting aside proceedings for irregularity. *Potter v. Tuttle*, 2 Wend. (N. Y.) 254.

2. *Hopton v. Swan*, 50 Miss. 550; *McKinstry v. Thurston*, 12 Wend. (N. Y.) 222; *Meyer v. Lent*, 16 Barb. (N. Y.) 539; *Hallman v. Gottshall*, 13 Montg. Co. Rep. (Pa.) 161; *Spafford v. Janesville*, 15 Wis. 474; *Cooley v. Gregory*, 16 Wis. 303; *McDonald v. Falvey*, 18 Wis. 571. See generally, article ISSUES TO THE JURY, vol. 12, p. 599.

Where the sum in controversy is too

Reference. — The court has power to direct a reference to ascertain and report the facts involved in an issue arising upon a motion for the further information of the court.¹ But such a reference should not be ordered except in extreme cases where large interests are involved and it is impossible to reach a conclusion upon the papers before the court.² The finding of the referee is not conclusive, but the court may either adopt and act upon it or disregard it and draw its own conclusions from the evidence.³

2. Determination — *a.* CHARACTER OF ACT. — The decision of a motion is a judicial act.⁴

b. NECESSITY OF. — Motions must be determined, and a failure to do so has been held to constitute error.⁵

c. TIME OF. — The time of deciding motions is sometimes regulated by statutes or rules of court.⁶ Ordinarily motions should

small to justify the expense a feigned issue will not be awarded even where the affidavits are contradictory. *Brower v. Feeter*, 1 Wend. (N. Y.) 18.

1. *Davies v. Davies*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 170; *Meyer v. Lent*, 16 Barb. (N. Y.) 539; *Barron v. Sanford*, 14 How. Pr. (N. Y. Supreme Ct.) 443; *Dwight v. St. John*, 25 N. Y. 205; *People v. St. Louis, etc.*, R. Co., 44 Hun (N. Y.) 552; *Marshall v. Meech*, 51 N. Y. 140; *Vilas v. Plattsburgh, etc.*, R. Co., 123 N. Y. 440; *Dovale v. Ackermann*, (Supreme Ct.) 27 N. Y. St. Rep. 895; *Stubbs v. Ripley*, 39 Hun (N. Y.) 620; *Continental Store Service Co. v. Clark*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 183; *Demelt v. Leonard*, 19 How. Pr. (N. Y. Supreme Ct.) 140, 11 Abb. Pr. (N. Y.) 252; *Pendleton v. Weed*, 17 N. Y. 72; *Stelle v. Palmer*, 7 Abb. Pr. (N. Y. Super. Ct.) 181; *Burnett v. Snyder*, 41 N. Y. Super. Ct. 342; *Gillespie v. Mulholland*, 12 Misc. Rep. (N. Y. C. Pl.) 44; *Barber v. Case*, 12 How. Pr. (N. Y. Supreme Ct.) 351; *Aldinger v. Pugh*, 57 Hun (N. Y.) 181, 19 Civ. Pro. Rep. (N. Y.) 91; *People v. Alexander*, 3 Hun (N. Y.) 211; *Patten v. Bullard*, (Supreme Ct.) 3 N. Y. St. Rep. 735.

In New York the power to order a reference is expressly conferred by statute. N. Y. Code Civ. Pro., § 1015. For the former statute see N. Y. Code, § 271, subd. 3. But in *People v. St. Louis, etc.*, R. Co., 44 Hun (N. Y.) 552, the court said: "We have no doubt of the right of the court without regard to the provisions of the Code to order a reference to take proofs

on matters upon which is desired fuller information before proceeding." *Citing Dwight v. St. John*, 25 N. Y. 205, wherein the reference was held to be within the terms of the statute, but the court said *obiter* that even without such statute the court always had the right to order such a reference.

2. *Woodward v. Musgrave*, 4 N. Y. Ann. Cas. 136, giving as a reason for the rule that "the expenses of such references are always great." See also, to same effect, *Martin v. Hodges*, 45 Hun (N. Y.) 38.

3. *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572.

4. *State v. Wolever*, 127 Ind. 306, holding that the judge's immunity from liability for his judicial acts extended to all the consequences legitimately flowing from his decision of a motion for a change of venue.

5. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, holding that where plaintiff moved to strike out one defense from an answer and to require another defense to be made more definite and certain, the failure to determine the motion to make more definite and certain was a material error. But see *infra*, XIII. 2. *d.* (2) *Implied Determination*.

Presumption. — Where no ruling appears to be made upon a motion the presumption is, unless it otherwise appears, that the motion was waived. *Cook v. Smith*, 50 Iowa 700.

6. **Effect of Noncompliance with Statute or Rule.** — The determination of a motion within twenty-four hours after it is filed and contrary to a rule of court, though irregular, affords no ground of

be disposed of before entering into the trial upon the merits.¹ But preliminary objections may be reserved and disposed of with the merits.² The court may take a motion under advisement from one term to another.³

d. MODE OF—(1) Express Determination.—The express and formal determination of a motion is made by the entry of an order granting or denying a part or all of the relief sought.⁴ The requisites and incidents of orders will form the subject-matter of a succeeding article to which reference is made.⁵

Conditional Granting of Order.—Motions may be granted condition-

complaint where no injury is done. *Roush v. Fort*, 3 Mont. 175.

The N. Y. Code, § 401, subd. 8, requiring a judge before whom a motion is made to obtain, modify, or set aside an order for an injunction, order of arrest, or warrant of attachment, to render and make known his decision on such motion within twenty days after the day the same was submitted to him for decision, is simply directory, and its non-observance furnishes no reason for vacating and setting aside his decision made after the twenty days had expired. *Hupfel v. Schoemig*, 34 N. Y. Super. Ct. 476; *Watson v. Coe*, (Supreme Ct.) 5 N. Y. Supp. 614.

1. *Erwin v. Austin*, 1 Tex. App. Civ. Cas., § 1037.

2. The case is heard at large without prejudice to the preliminary objection and the whole is disposed of together without hearing two arguments. *Lowber v. New York*, 5 Abb. Pr. (N. Y. Supreme Ct.) 325, note.

3. *Anderson v. O'Laughlin*, 1 Mont. 81.

4. *Necessity of Order in Writing.*—Special motions must be determined by an order in writing. A mere oral decision is of no avail without an order making it a record, nor should the affidavits of parties or of counsel as to what was decided be relied upon. *Smith v. Spalding*, 30 How. Pr. (N. Y. Super. Ct.) 339.

Form of Entry.—Where an order granting a motion is in the words, 'It seems to the court that the said motion be sustained,' it is sufficient and equivalent to the more correct form 'It seems to the court that the said motion should be sustained.' *Butler v. Thompson*, 2 Fla. 9, citing *Edwards v. Union Bank*, 1 Fla. 158.

Distinction Between Granting and Refusing a Motion.—'The forty-sixth rule of practice declares that 'Every motion

for any rule or order shall be submitted to the court in writing, by the counsel who makes it, and if granted by the court, shall be delivered to the clerk.' If not granted, there appears to be no provision for filing, or for making the motion a part of the record. Doubtless the court might refuse to entertain even a collateral motion not reduced to writing. But if it does entertain and overrule a motion, we are not prepared to say that any writing is necessary—especially to motions which, if granted at all, are to be granted of course; and such is the character of the one with which we are now concerned. There is no intimation that the court refused to grant it because it was not presented in writing. Certainly, when a motion is granted, the order must be in writing, whether the motion is in writing or not; but we think a court may refuse a collateral order or judgment applied for, without expressing the refusal in writing. We think courts constantly refuse motions, and make no record of the refusal. Take, as examples, motions for nonsuit, motions to dismiss declarations or pleas, and motions to suppress interrogatories. What is done by a court of record must be registered; but what it refuses to do is often not matter of record. The very motion on which we are now ruling, that is, the motion to dismiss the writ of error, was made in parol, and disposed of without any entry upon our minutes. Yet the twenty-third rule of this court is in almost the exact language of the forty-sixth rule of the superior court quoted above. When such a motion is granted, the proper order is recorded; but when it is overruled, the minutes are silent concerning it, and, usually, the whole matter is left in parol.' *Gunnels v. Deavours*, 59 Ga. 197.

5. See article ORDERS.

ally,¹ and when they are addressed to the discretion of the court terms may be imposed.²

(2) *Implied Determination.*—The determination of a motion is not always express, but may be implied.³ Thus the entry of an order inconsistent with granting the relief sought is a denial or the motion.⁴ So, also, the entry of final judgment in a cause is in effect an overruling of all motions pending prior thereto in the case.⁵

(3) *Pro Forma Determination.*—The *pro forma* determination of motions by the trial court should not be encouraged.⁶

1. Making Conditional Order Absolute.

—Where a motion is granted conditionally upon the failure of the opposing party to do a certain act, if the act is not performed, the proper practice is for the moving party to show by affidavit such failure to perform, and thereupon to apply *ex parte* for an order granting the motion absolutely. *Stewart v. Berge*, 4 Daly (N. Y.) 477.

2. Review of Discretion in Imposing Terms.

—The discretion exercised by the court at general term in imposing a stipulation not to sue for false imprisonment, etc., as a condition for vacating an order of arrest, is not to be reviewed by the court below, or in another proceeding at a subsequent general term. *Edgerton v. Ford*, 11 Abb. Pr. (N. Y. Supreme Ct.) 415.

3. Implied Determination—Illustration.

—Where the record shows a motion by defendant for a rule on plaintiff to give security for costs, and, three days afterwards, a motion by plaintiff for leave to prosecute as a poor person, and no formal disposition of either motion, an order of the court, after the last motion, for a jury to be impaneled to try the issues is, in effect, an allowance of the last motion and a denial of the first. *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

4. An order confirming the report of a referee disposes of and is in effect the denial of a motion to set aside such a report. *Houghton v. Milburn*, 54 Wis. 551.

A motion to quash a writ because the declaration does not give the court jurisdiction is virtually overruled by leave to amend the declaration on motion. *Shepard v. Ogden*, 3 Ill. 257.

Sustaining a Motion to Strike Out another motion, although an irregular proceeding, is equivalent to a denial of the latter motion. *Lang v. Superior Ct.*, 71 Cal. 491; *White v. Morgan*, 119 Ind. 338; *Blemel v. Shattuck*, 133 Ind. 498; *Long v. Ruch*, 148 Ind. 74.

5. *Mix v. Page*, 14 Conn. 329; *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Home Flax Co. v. Beebe*, 48 Ill. 138; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237; *Webb v. Stevens*, 14 Mo. 480.

A judgment on a verdict disposes, *ipso facto*, of a motion to set aside the verdict. *Home Flax Co. v. Beebe*, 48 Ill. 138; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237.

6. "The order appealed from states that the motion for a new trial is denied *pro forma*. From this we understand that there was no actual decision of the motion, but an order entered denying it, as a form, and without any consideration of the points raised. The parties to such a motion are entitled to the judgment and decision of the court below on the merits upon all points on which the motion is made, and there is an appropriate remedy to enforce the right to such judgment and decision. The theory of the judicial system in this state is, that the parties shall have first a decision of the court below, and then a review of that decision in this court. The practice, which is getting to be very common, of entering a *pro forma* order without consideration deprives the parties of the right to the judgment of the lower court, and, in effect, would make of this court the court to decide the application in the first instance, rather than a court of review, as is intended by the constitution. The objection to this court making a first decision upon a point raised in the court below is peculiarly applicable to the points that a verdict is excessive, or that it is not sustained by evidence, to judge of which points correctly the court in which the trial was had has advantages not possessed by this court. We doubt whether we ought, in an appeal, to consider here a point involved in the order appealed from if the record shows that there was

e. RULES OF DECISION. — Motions should be determined as of the time they are submitted.¹ Where there is an equal division of opinion in the court as to whether a motion should be granted or denied, the motion fails.² Where a conclusive answer is given to a special motion, the motion should be denied and not continued over to allow the moving party an opportunity of replying.³ When the favor of the court is appealed to, the court will not grant what is not shown to be for the advantage of the party asking it if some concealed purpose may be inferred.⁴ The decision of a motion in one action may be ground for denying a similar motion in another action in another court on the same facts between the same parties.⁵

f. DEFAULTS — (1) *Of Moving Party.* — In the absence of any statute or rule of court to the contrary, where a party neglects to make a motion which he has noticed, the other party cannot take an order denying it as of course, but only an order giving costs for not appearing.⁶ He may, however, call up the motion and have it heard and determined.⁷

no actual decision upon it in the court below." *Colvill v. Langdon*, 22 Minn. 568.

1. When a motion is argued and submitted to court for decision, it is the duty of the court to decide the same upon record as it existed at that time. Any papers filed after the submission without leave of the court or the knowledge of the judge will not be considered in reviewing such decision. *Jacoby v. Mitchell*, 19 Neb. 537.

The delay of the court in announcing its decision upon a motion will not be allowed to operate to the prejudice of the party in whose favor the decision is made. The court having determined the question must give effect to the decision as of the time when the motion was made. *Willson v. Henderson*, 15 How. Pr. (N. Y. Supreme Ct.) 90.

2. *Goddard v. Coffin*, Davies (U. S.) 381.

3. *Standard v. Williams*, 10 Wend. (N. Y.) 600, holding that if the answer be untrue or can be satisfactorily explained, the proper course is on a new notice to ask for a vacatur of the rule denying the motion.

4. *Ball v. Sprague*, 23 How. Pr. (N. Y. Supreme Ct.) 241.

5. *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412.

When a Motion Is Certified to the General Term to be heard in the first instance, the same order will be made as upon the whole case ought to have been made by the justice holding the special

term. *Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArthur (D. C.) 220.

6. *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 233.

Enumerated Motions. — In New York, under the general rules of practice, Rule 40 (Hun's Court Rules), enumerated motions may be noticed and called up by either party, and where the moving party fails to proceed the adversary may take an order in his own favor. *Roosevelt v. Fulton*, 5 Cow. (N. Y.) 438.

Motion for Costs for Failure to Bring On.

— Where a party moves for costs in a case where a special motion is not brought on, pursuant to notice, counsel who asks for costs merely reads the notice he has received. He is never required to produce an affidavit of the opposing attorney that the notice was served on him. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182.

7. *Bosworth v. Hightower*, 73 Ga. 46, holding that there was no error in hearing and determining the motion instead of dismissing it; *Cross v. Stevens*, 45 Kan. 443.

The court at general term, in the absence of a party whose motion for a new trial on case and exceptions is regularly called, has power, at the instance of the adverse party, to decide the motion, instead of allowing a default; and a general term composed of other judges should not interfere while the cause is under consideration by the former general term. *Bolles v. Duff*,

(2) *Of Party Moved Against.* — When the party moved against is in default, the moving party obtains the precise thing he asked for in his notice of motion. In such a case, the court does not look into the papers, but only requires proof of the service of the notice of the motion with a copy of the papers upon which the motion is founded, and thereupon grants all that is claimed in the notice.¹ A final order on default cannot extend beyond the relief designated in the notice or order to show cause.² The default must be taken at the time and place named in the notice.³ It is almost a matter of course to open defaults upon any excuse being shown.⁴

XIV. REHEARING AND REARGUMENT OF MOTION — 1. **When Granted** — *Discretion of Court.* — A motion for a rehearing or reargument of a motion is addressed to the discretion of the court.⁵

7 Abb. Pr. N. S. (N. Y. Supreme Ct.) 385, 55 Barb. (N. Y.) 313, 38 How. Pr. (N. Y.) 492, 504.

1. *Indiana.* — Scott v. Indianapolis Wagon Works, 48 Ind. 75.

Louisiana. — Haggerty's Succession, 28 La. Ann. 87.

Michigan. — Parsons v. Copland, 5 Mich. 143.

Minnesota. — Barker v. Walbridge, 14 Minn. 469.

Missouri. — Robinson v. Rice, 20 Mo. 229.

New York. — Rogers v. Toole, 11 Paige (N. Y.) 212; Bryant v. Bryant, 2 Robt. (N. Y.) 612; Bowman v. Sheldon, 5 Sandf. (N. Y.) 657; Maury v. Van Arnum, 1 Hill (N. Y.) 370; Alexander v. Esten, 1 Cai. (N. Y.) 152; Wilkinson v. Tiffany, 4 Abb. Pr. (N. Y. Supreme Ct.) 98; Rule 37 of the General Rules of the Supreme Court of N. Y.; Ohly v. Ohly, 11 N. Y. Wkly. Dig. 129; Thompson v. Erie R. Co., 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 238.

But see Farrow v. Orear, 2 Duv. (Ky.) 263, wherein it was held that the facts stated in a notice of motion to have execution issued on a lost replevin bond must be proved and cannot be taken as true because the defendants do not appear and dispute them.

Reason for Rule. — The opposing party's failure to appear is a tacit consent to the entering of the orders, and it is accordingly unnecessary for the court to pass upon the merits of the motion. Thompson v. Erie R. Co., 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 238.

Proof of Service. — A motion, though not opposed, cannot be granted if proof of service is insufficient. Jackson v. Giles, 3 Cai. (N. Y.) 88, Col. & C. Cas.

(N. Y.) 442. But a party who relies on the attention and vigilance of the court and does not attend to oppose the motion cannot, after the lapse of a term, object to the insufficiency of the proof of service if the court failed to notice it. Caines v. Brown, 3 Cai. (N. Y.) 89, note 1. Where there is no opposition the court will not examine further than to see that there has been regular service of the notice. If the notice was regularly served, but was defective, the party must appear and oppose. Hoyt v. Campbell, Col. & C. Cas. (N. Y.) 129.

2. Anderson v. Johnson, 1 Sandf. (N. Y.) 713.

3. Cobb v. Lackey, 2 Abb. Pr. (N. Y. Super. Ct.) 158, holding that when the attorneys or counsel of both parties attend they may be heard before any justice of the court who is disengaged, but that there is but one place where defaults can be taken, on failure of the attorney serving a notice or order to show cause to bring on his motion, or on the failure of the attorney on whom it is served, to appear and oppose. See also Vernovy v. Tauney, 3 How. Pr. (N. Y. Supreme Ct.) 359.

4. Thompson v. Erie R. Co., 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 239, decided upon the principle that it is right that both parties should be heard.

It Is a Sufficient Excuse for not opposing a motion on the first day of the term that the attorney receiving the notice resided at some distance from the place of the court. Torrey v. Morehouse, 1 Johns. Cas. (N. Y.) 242.

5. Holmes v. Rogers, (Supreme Ct.) 18 N. Y. St. Rep. 652, holding that such discretion will not be interfered with on appeal unless the moving party makes

Grounds.—Leave to reargue will be granted where it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked, or that there has been a misapprehension of facts, but not otherwise.¹

a case which, if presented on the original hearing, would have entitled him to a favorable determination. See also *Fleischmann v. Stern*, 90 N. Y. 110. But the power to grant a rehearing cannot be arbitrarily exercised, and if the judge grants it upon insufficient grounds it is an error which should be and will be corrected by the appellate court whenever the question is properly brought before it for review. *Matter of Livingston*, 34 N. Y. 576.

The Term "Rehear," technically speaking, is appropriate only to the proceeding in chancery by which a certain class of errors in a decree or decretal order could, before enrolment, be corrected, but it has no application to orders made upon mere motion. These cannot be reached by "rehearing," but are varied or discharged by the court on application by motion. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

New Trial of Motions.—"There is no authority in the code for the new trial of a motion, but if after the decision of the motion it is desired to present any new facts for the consideration of the court, the proper practice is to ask for leave to renew the motion. [See next section, *infra*.] If it is desired to review the action of the court upon an appeal, it is sufficient to present the order in connection with a bill of exceptions containing the matter upon which the court based its action. A motion which does not ask for a decision upon an issue of fact that arises upon the pleadings is not the subject of a new trial, and it needs little reflection to see that if every motion which is made in the courts on a trial, or with reference to an action, could be followed by a motion for a new trial of such motion, the case itself would be inextricably involved in the determination of these motions, and the final judgment in the action indefinitely postponed." *Harper v. Hildreth*, 99 Cal. 270.

Motions in Special Proceedings.—An order made on a motion in a special proceeding is not a proper subject for a rehearing. *Matter of Livingston*, 34 N. Y. 555, 2 Abb. Pr. N. S. (N. Y.) 1, 32 How. Pr. (N. Y.) 20.

Final and Interlocutory Orders.—A final order partaking of the character of a judgment can be reheard; a mere interlocutory order cannot. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Matter of Livingston*, 34 N. Y. 555.

1. *New York.*—*Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Webb v. Groom*, 6 Robt. (N. Y.) 532; *Arnold v. Oliver*, 64 How. Pr. (N. Y. Supreme Ct.) 452; *White v. Munroe*, 33 Barb. (N. Y.) 650; *Averell v. Barber*, (Supreme Ct.) 44 N. Y. St. Rep. 542; *Matter of Crane*, 81 Hun (N. Y.) 96; *Trinity Church v. Higgins*, 4 Robt. (N. Y.) 1; *Coleman v. Livingston*, 45 How. Pr. (N. Y. Super. Ct.) 483, 56 N. Y. 658.

North Carolina.—*Walton v. Erwin*, 1 Ired. Eq. (N. Car.) 136.

Texas.—*Howard v. McKenzie*, 54 Tex. 171.

Judicial Statements of Rule.—"A reargument is granted only where some question decisive of the case and duly submitted by counsel was overlooked or where the decision is in conflict with an express statute or a controlling decision to which attention was not called by counsel." *Banks v. Carter*, 7 Daly (N. Y.) 417. *Citing Curley v. Tomlinson*, 5 Daly (N. Y.) 283.

It must appear that there has been a miscarriage of justice on a former occasion. *In re May*, 49 L. T. N. S. 770.

Illustrations.—The decision of a question of law not raised or argued by counsel is sufficient ground for a rehearing. *Webb v. Groom*, 6 Robt. (N. Y.) 532.

The fact that an *ex parte* order contains gross errors is sufficient evidence of surprise to justify a re-examination of the order. *Walton v. Erwin*, 1 Ired. Eq. (N. Car.) 136.

Where the highest appellate court has, pending the appeal, decided the question otherwise, a reargument may be ordered. *Coleman v. Livingston*, 36 N. Y. Super. Ct. 231; *Taylor v. Grant*, 36 N. Y. Super. Ct. 259; *Butterfield v. Radde*, 40 N. Y. Super. Ct. 169; *Produce Bank v. Morton*, 42 N. Y. Super. Ct. 124.

Or if the court or counsel overlooked an important point. *Krom v. Levy*, 6 Thomp. & C. (N. Y.) 253; *Banks v. Car-*

Remedy by Appeal. — And even in these cases it will rarely be granted when there is a remedy by appeal.¹

Rehearing on New Facts. — A rehearing will not be granted to let in facts not in existence at the time the motion was decided.²

Time. — A rehearing may be granted even after the expiration of the time limited for moving originally.³ But not, it would seem, after the expiration of the time for appealing from the former decision.⁴

2. How Obtained. — A rehearing can be had only upon leave being obtained from the court.⁵ If the motion has been already decided, it seems that the order must first be opened or set aside.⁶ The motion for a rehearing may be made either upon the original papers or upon those and additional papers served for

ter, 7 Daly (N. Y.) 417; Guidet v. New York, 37 N. Y. Super. Ct. 124; Weston v. Ketcham, 39 N. Y. Super. Ct. 54.

An application for the rehearing of a motion, made at general term, to set aside an order granted at special term, on the ground that the appellants failed to print all the papers upon appeal, and that copies were not served upon respondents in time for them to discover an error in them, where it appeared that the error sought to be corrected was objected to, and the point argued on the appeal, was denied. *People v. Board of Apportionment*, 1 Hun (N. Y.) 123.

1. *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Matter of Livingston*, 34 N. Y. 555; *McGarry v. Board of Supervisors*, 1 Sweeny (N. Y.) 217; *Giles v. Austin*, 34 N. Y. Super. Ct. 540.

Rehearing or Appeal. — A mistake of the judge in deciding all the questions raised by a petition instead of ordering a reference of some of them as intended by agreement of counsel is to be corrected by rehearing and not by appeal. *Herbert v. Smith*, 6 Lans. (N. Y.) 493.

2. *Webb v. Groom*, 6 Robt. (N. Y.) 532; *Wright v. Terry*, 24 Hun (N. Y.) 228; *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *People v. Cohocton Stone Road*, 25 Hun (N. Y.) 13.

A Rehearing Will Not Be Granted on account of the discovery of new evidence or new matter, nor because the importance of the testimony has only been ascertained since the decision, nor to obtain cumulative testimony, nor for the purpose of contradicting the adverse party's witnesses. *Matter of Livingston*, 34 N. Y. 576.

Thus where a motion to vacate an order of arrest and attachment was

granted upon affidavits disproving any fraudulent intent on the part of the party arrested, a reargument of such motion will not be granted merely upon the ground that certain subsequent acts of the defendant tend to establish the alleged fraud. The only remedy under such circumstances is to make a fresh application for the provisional remedies founded upon the new facts. *Webb v. Groom*, 6 Robt. (N. Y.) 533.

3. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

4. *Megary v. Shipley*, 72 Md. 33.

5. *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *In re May*, 49 L. T. N. S. 770; *Holmes v. Rogers*, (Supreme Ct.) 18 N. Y. St. Rep. 652.

What Court or Judge. — It seems that the application for a rehearing should be to a court held by the judge making the decision. *Arnold v. Oliver*, 2 Civ. Pro. Rep. (N. Y. Supreme Ct.) 457, 64 How. Pr. (N. Y.) 452; *Matter of Crane*, 1 N. Y. Ann. Cas. 148. But see *Averill v. Barber*, 63 Hun (N. Y.) 630, 18 N. Y. Supp. 80, holding that a motion for rehearing may be made at the special term for the hearing of non-enumerated motions notwithstanding the fact that the justice who denied the original motion is not presiding, but the motion should not be then considered. The proper course in such a case is to refer the application to the justice who heard the original motion, or defer its hearing until he presides at special term.

6. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Townsend v. Wisner*, 62 Iowa 672, holding that a motion which has once been passed upon should not be reheard at the instance of the unsuccessful party until the ruling thereon has been set aside on his motion with notice to the opposite party.

the purpose.¹ Pending the determination of such an application the original motion or rule is continued in force.²

3. **Hearing.**—Where a reargument is granted it should be had upon the original papers.³ Frequently no actual reargument is had, as the argument on the motion for rehearing often practically amounts to a reargument of the original motion.⁴

XV. RENEWAL OF MOTIONS—1. Decision of Motions as Res Judicata.—The doctrine of *res judicata* does not strictly apply to decisions upon interlocutory motions,⁵ even in cases where

1. *Arnold v. Oliver*, 64 How. Pr. (N. Y. Supreme Ct.) 452, 2 Civ. Pro. Rep. (N. Y.) 457; *Matter of Crane*, 81 Hun (N. Y.) 96, 1 N. Y. Ann. Cas. 148.

The entry of a final order granting a motion for a new trial on the minutes does not prevent the judge from listening upon the same papers to a rehearing on application of the defeated party, and making an order vacating the former final order, and deciding the motion the other way by denying it. *Herzig v. Metzger*, 62 How. Pr. (N. Y. Marine Ct.) 355.

2. *Van Vliet v. Conrad*, 95 Pa. St. 494, holding that where a motion for the reargument of a rule for a new trial is made on the same day on which the rule is discharged, it continues the rule and the judgment cannot be entered on the verdict. Compare *Louisville Rock, etc., Co. v. Kerr*, 78 Ky. 12, wherein it is held that there is no authority for a motion to rehear a motion for a new trial, and that therefore such motion cannot enlarge the period during which the court has power over its orders; that a motion for a new trial suspends the judgment, but that a motion to set aside an order overruling a motion does not.

3. *Webb v. Groom*, 6 Robt. (N. Y.) 532; *Wright v. Terry*, 24 Hun (N. Y.) 228; *Knowlton v. Bowrason*, 8 Cow. (N. Y.) 135; *People v. Cohocton Stone Road*, 25 Hun (N. Y.) 13; *Bolles v. Duff*, 56 Barb. (N. Y.) 567.

Whether it be the party whose motion was denied, or the party moved against who asks the favor, if proper cause exists, the practice is the same. In either case the order previously entered is "opened," or vacated, and the matter heard anew, precisely as if it had never been argued before, and as if the principal or original motion on all the papers then presented, had then, for the first time, been made. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

4. "It generally happens that the

argument of the motion for leave to reargue involves the reargument itself. In such cases it is of course an unnecessary waste of time and labor, after granting the motion for leave, to hear counsel again on the reargument, for the bare purpose of having them again go over the same reasoning and citations which they have addressed to the court. But where the court grants a reargument on the ground that there is a decision or principle of law which has been overlooked and which would have had a controlling effect, or that there has been a misapprehension of fact, without having heard counsel either as to the soundness or extent of the principle of law, or as to the controlling effect of the principle, decision or misapprehension of facts, then the reargument should be had, in order to allow counsel to be heard on those points." *Bolles v. Duff*, 56 Barb. (N. Y.) 574. Compare *Fowler v. Huber*, 7 Robt. (N. Y.) 52.

5. *California*.—*Ford v. Doyle*, 44 Cal. 635; *Kenney v. Kelleher*, 63 Cal. 442; *Johnston v. Brown*, 115 Cal. 697; *Bowers v. Cherokee Bob*, 46 Cal. 280.

Kansas.—*Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; *Hoge v. Norton*, 22 Kan. 374.

Montana.—*Jensen v. Barbour*, 12 Mont. 566.

New York.—*Snyder v. White*, 6 How. Pr. (N. Y. Supreme Ct.) 321; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Van Rensselaer v. Albany*, 1 Cow. (N. Y.) 501; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 640; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Smith v. Spalding*, 30 How. Pr. (N. Y. Super. Ct.) 339, 3 Robt. (N. Y.) 615; *People v. Eddy*, 3 Lans. (N. Y.) 80; *Acker v. Ledyard*, 8 Barb. (N. Y.) 514; *Hall v. Emmons*, 2 Sweeny (N. Y.) 396; *Steuben County Bank v. Alberger*, 83 N. Y. 274; *Pendleton v. Weed*, 17 N. Y. 77; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Howell v. Mills*,

such motions result in orders reviewable on appeal,¹ although there is a growing disposition to enlarge the scope of the doctrine, and to regard the decision of a motion as *res judicata* where the proceedings permit of a full hearing upon the merits, and especially where the order may be reviewed on appeal.² But

53 N. Y. 322; *Riggs v. Pursell*, 74 N. Y. 370; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368; *Thayer v. Parr*, 13 N. Y. Wkly. Dig. 137; *Dawson v. Parsons*, 16 Misc. Rep. (N. Y. Supreme Ct.) 190.

North Carolina. — *Allison v. Whittier*, 101 N. Car. 490.

Wisconsin. — *Corwith v. State Bank*, 11 Wis. 430.

It is well settled that whatever can be done upon motion to the court may, by the court, upon further motion by either party, be altered, modified, or wholly undone. *Belmont v. Erie R. Co.* 52 Barb. (N. Y.) 637.

The Rules Applicable to Judgments as Estoppels do not apply to their full extent to orders made on motions. *Veeder v. Baker*, 83 N. Y. 163; *Smith v. Zalinski*, 94 N. Y. 524. Such an order is not conclusive, as an adjudication, as to a fact which might have been, but which was not actually litigated. *Riggs v. Pursell*, 74 N. Y. 370.

"The decision of a motion is not regarded, in the light of *res adjudicata*, with the same strictness as in judgments, and therefore an interlocutory order may be vacated and set aside upon the motion of an aggrieved party, if made in pursuance of the rules and practice of the court." *Union Mills First Nat. Bank v. Clark*, 42 Hun (N. Y.) 92. *Citing Smith v. Spalding*, 3 Robt. (N. Y.) 615; *White v. Munroe*, 33 Barb. (N. Y.) 654; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Simson v. Hart*, 14 Johns. (N. Y.) 63.

1. See *infra*, XV. 4. *Appeal as Affected by Renewal Proceedings and Vice Versa*.

2. When Decision of Motion Is Res Judicata. — See *Wilson County v. McIntosh*, 30 Kan. 234, wherein Brewer, J., in the course of an elaborate opinion, said: "We think there is a growing disposition to enlarge the scope of the doctrine of *res adjudicata*, and to place more regard on the substance of the decision than on the form of the proceedings. One thing which indicates this is the increased facility of review in the appellate courts. It used to be the practice that no ruling of the trial court went up for review

until after final judgment; any preliminary rulings, if erroneous, might, up to that time, be corrected by the trial court. Then it was assumed that a final examination in that tribunal had been had, and the whole record was ready to be transferred to the appellate court; and hence it was argued that no prior decision should be considered as final or *res adjudicata*. But our present practice provides for taking immediately to the appellate court a vast number of rulings prior to the final judgment. Now the fact that the decision of a motion can be preserved in a separate record and taken up by itself, presupposes a full and careful consideration in both the trial and appellate courts; and when that is had, it would seem that the question thus separately and carefully considered should be finally disposed of, and not be thrown back for further litigation at the mere caprice of either party."

See also *Riggs v. Pursell*, 74 N. Y. 378, wherein the court said: "We do not understand the rules applicable to judgments as estoppels to be applicable to their full extent to orders made on motions. Prior to the decision in *Dwight v. St. John*, 25 N. Y. 203, it was considered that a decision made upon a motion had no force as a former adjudication. (*Simson v. Hart*, 14 Johns. (N. Y.) 76; *Van Rensselaer v. Albany*, 1 Cow. (N. Y.) 512; *Dickenson v. Gililand*, 1 Cow. (N. Y.) 495; *Smith v. Spalding*, 3 Robt. (N. Y.) 615; *White v. Munroe*, 33 Barb. (N. Y.) 650.) In *Dwight v. St. John*, 25 N. Y. 203, in view of the provisions of the Code giving the right of appeal from orders, a limited effect was given to them as adjudications, binding in case of a subsequent controversy, and it was there held that in the case of an order affecting a substantial right, and appealable, where a full hearing had been had before a referee on a controverted question of fact, the decision of a point actually litigated before the referee and upon the motion was an adjudication binding upon the parties and conclusive to that extent. An examination of the case shows that the effect of

although the decision of a motion is not technically *res judicata*, the order made should not be disregarded when the same question is raised again in the same action.¹ And while a motion once denied may ordinarily be renewed and the former denial will be no absolute bar to granting the relief upon the second application, this cannot usually be done without first obtaining leave of court to renew the motion.²

2. Rule Against Renewals—*a*. STATEMENT OF RULE.—Notwithstanding the fact that the decision of a motion is not *res judicata*,³ as a matter of practice, the first decision is considered conclusive, and is a bar to the subsequent maintenance of a substantially similar motion upon substantially similar facts,⁴

an order as an adjudication was thus expressly limited, and that it was not held in that case that the order was conclusive as to a fact which might have been litigated, but only as to one which actually had been litigated and on which there had been a full hearing. Nor was the familiar right of a party to renew a motion upon a different state of facts, or by supplying defects in proof, in any manner questioned or impaired by that decision. In *Matter of Livingston*, 34 N. Y. 575, the application which was reheard at Special Term was made upon petition and was held to be a special proceeding in equity, not subject to the rules governing motions. Where additional facts are presented or defects in proof supplied, it is quite usual to grant leave to renew a motion which has been denied or to rehear one which has been granted. (*Smith v. Spalding*, 3 Robt. (N. Y.) 615; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, and authorities cited.) And in *White v. Munroe*, 33 Barb. (N. Y.) 650, the power of the court to reconsider its decision on the same state of facts is maintained, though such power is rarely exercised."

The principle of *res judicata* does not extend to ordinary motions incidental to the progress of a cause, for what may one day be refused may the next day be granted, but it does apply to decisions affecting the substantial right subject to review in an appellate court. *Allison v. Whittier*, 101 N. Car. 496. *Citing Mabry v. Henry*, 83 N. Car. 298.

The decision of a motion may be regarded as *res judicata* as to a motion even in another action for the same relief. *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 432. Thus a motion for an attachment may be denied on the ground that an attachment in another

court between the same parties and on the same facts had been vacated. *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412.

See generally, for decisions upon motions held to be *res judicata*, *Schaughnessy v. Reilly*, 41 How. Pr. (N. Y. Super. Ct.) 384, wherein a decision upon a motion was held to be *res judicata* in the absence of leave to renew the motion. *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *State v. Evans*, 74 N. Car. 325; *Rogers v. Hoenig*, 46 Wis. 361; *Webster v. Oconto County*, 47 Wis. 227; *Pierce v. Kneeland*, 9 Wis. 33.

1. *Dawson v. Parsons*, 16 Misc. Rep. (N. Y. Supreme Ct.) 190.

Decisions Prima Facie Final.—In *Chichester v. Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238, it was held that while an order of court on a motion or summary application was not technically *res judicata*, the same matter would not be twice heard without good cause being shown. To the same effect, *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594.

2. *Johnston v. Brown*, 115 Cal. 604; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Allison v. Whittier*, 101 N. Car. 496. See also *infra*, XV. 3. *Leave to Renew*.

Discouraging Litigiousness.—In order that mere litigiousness should not be encouraged or permitted, the practice of the courts has been established to be that after a motion has been once fully heard and decided, it shall not be revived again, except upon leave of the court first had and obtained, or unless a different state of facts has arisen since the first determination. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

3. See preceding section.

4. *Iowa*.—*Barkdull v. Callanan*, 33 Iowa 391.

before either the same or a different judge,¹ unless leave of court

Kansas. — *Adams v. Lockwood*, 30 Kan. 373; *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594.

Louisiana. — *Harlan v. White*, 18 La. Ann. 399.

Minnesota. — *Griffin v. Jorgenson*, 22 Minn. 92.

Missouri. — *Reilly v. Russell*, 39 Mo. 152, 90 Am. Dec. 457.

New York. — *Banks v. American Tract Soc.*, 4 Sandf. Ch. (N. Y.) 438; *Snyder v. White*, 6 How. Pr. (N. Y. Supreme Ct.) 321; *Dwight v. St. John*, 25 N. Y. 203; *Ammidon v. Wolcott*, 15 Abb. Pr. (N. Y. Supreme Ct.) 315; *Wheeler v. Falconer*, 7 Robt. (N. Y.) 49; *Fowler v. Huber*, 7 Robt. (N. Y.) 52; *Jay v. De Groot*, 2 Hun (N. Y.) 205; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 114; *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493; *Devlin v. New York*, 11 Daly (N. Y.) 363; *Havana Bank v. Moore*, 5 Hun (N. Y.) 624; *Fenton v. Lumberman's Bank*, Clarke Ch. (N. Y.) 360; *Willet v. Fayerweather*, 1 Barb. (N. Y.) 72; *Schultze v. Rodewald*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 365; *Chichester v. Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238.

Pennsylvania. — *Mitchell v. Pierce*, 1 W. N. C. (Pa.) 156.

An order denying, unconditionally, a motion to vacate a previous order, is, while it remains unchanged, a bar to any subsequent application for the same relief. *Griffin v. Jorgenson*, 22 Minn. 92.

A Party Is Not to Be Continually Vexed by the same application, nor should the courts hear and decide upon the same matters more than once. *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412.

A motion three times refused will not be granted on the fourth application, no controlling facts being presented. *Devlin v. New York*, 11 Daly (N. Y.) 363.

If a party does not apply for all the costs which he is entitled to on his motion, he waives what he does not ask, and cannot move for them at a subsequent term. *Palmer v. Mulligan*, 2 Cai. (N. Y.) 380.

Revocation of Order Equivalent to Denial. — Under 2 Rev. Stat. (2d ed.), 209, § 27, which forbids a second application to a supreme court commissioner for

an order once refused, revocation of an order by the officer who granted it is equivalent to an original refusal of it, and an appeal or a motion to set aside the revocation cannot be had. *Gould v. Root*, 4 Hill (N. Y.) 554.

Rule Not Inflexible. — The rule that an application once disposed of cannot be renewed under the same circumstances, and for the same objects, is not binding in all cases. *Matter of Butler*, 13 Q. B. 341, 66 E. C. L. 341, 18 L. J. Q. B. 328, 13 Jur. 869.

1. *Illinois*. — *People v. Gibbons*, 167 Ill. 510, 12 Nat. Corp. Rep. 331.

New York. — *Gould v. Root*, 4 Hill (N. Y.) 554; *Hall v. Emmons*, 8 Abb. Pr. N. S. (N. Y. Super. Ct.) 451, 39 How. Pr. (N. Y.) 187; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 114; *Talcott v. Burnstine*, (Supreme Ct.) 13 N. Y. St. Rep. 552; *Knapp v. Post*, 10 Hun (N. Y.) 35; *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412; *Rondout First Nat. Bank v. Hamilton*, 50 How. Pr. (N. Y. Supreme Ct.) 116; *Matter of Livingston*, 34 N. Y. 555; *Wilson v. Barney*, 5 Hun (N. Y.) 257; *People v. National Trust Co.*, 31 Hun (N. Y.) 20; *Koehler v. Farmers', etc., Bank*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 71; *Mitchell v. Allen*, 12 Wend. (N. Y.) 290; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493; *Allen v. Gibbs*, 12 Wend. (N. Y.) 202; *Cazneau v. Bryant*, 6 Duer (N. Y.) 668, 4 Abb. Pr. (N. Y.) 402; Rule 31 of 1870.

South Dakota. — *Jeansch v. Lewis*, 1 S. Dak. 609.

In *New York* it is provided by rule of court that when an application for an order has been refused, no subsequent application upon the same state of facts shall be made to any other judge; and, if upon such subsequent application an order be made, it will be revoked. *Hall v. Emmons*, 39 How. Pr. (N. Y. Super. Ct.) 187, 8 Abb. Pr. N. S. (N. Y.) 451; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 115. But this rule does not apply to the case of an application to the discretion of the court to allow bail to surrender as a matter of favor, upon excuse for delay, after an application for exoneration as a matter of right has been denied, on the ground that the strict time has passed. *Hall v. Emmons*, 9 Abb. Pr. N. S. (N. Y. Ct. App.) 370, reversing on this point *Hall*

has arisen since the determination of the original motion, a new motion for the same relief, founded in part at least upon such new facts, may be made without leave and as a matter of right.¹

The Reason is that such a motion does not call for a review of matters already tried and determined.²

What Are New Facts Within Rule. — The new matter which will alone justify the renewal of a motion without leave must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion.³

1. *California*. — *Ford v. Doyle*, 44 Cal. 635.

Kansas. — *Wilson County v. McIntosh*, 30 Kan. 238.

Louisiana. — *Harlan v. White*, 18 La. Ann. 399.

Nebraska. — *Hershiser v. Delone*, 24 Neb. 380.

New York. — *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Erie R. Co. v. Ramsey*, 57 Barb. (N. Y.) 449; *Havana Bank v. Moore*, 5 Hun (N. Y.) 624; *Butts v. Burnett*, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 302; *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 113; *Fox v. Fox*, 24 How. Pr. (N. Y. Supreme Ct.) 385; *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 412; *Ray v. Connor*, 3 Edw. Ch. (N. Y.) 478; *Banks v. American Tract Soc.*, 4 Sandf. Ch. (N. Y.) 438; *Lovell v. Martin*, 21 How. Pr. (N. Y. C. Pl.) 238; *Tone v. Brace*, *Clarke Ch.* (N. Y.) 503; *Melville v. Matthewson*, 49 N. Y. Super. Ct. 388; *Klumpp v. Gardner*, 44 Hun (N. Y.) 515; *New York Cable Co. v. New York*, 104 N. Y. 40; *Riggs v. Pursell*, 74 N. Y. 370; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289; *Willet v. Fayerweather*, 1 Barb. (N. Y.) 73; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *Elston v. Schilling*, 7 Robt. (N. Y.) 74; *Steuben County Bank v. Alberger*, 83 N. Y. 274; *Goddard v. Stiles*, 99 N. Y. 640, 1 N. E. Rep. 402; *Noonan v. New York, etc., R. Co.*, 68 Hun (N. Y.) 387.

Contra. — *Lovell v. Martin*, 21 How. Pr. (N. Y. C. Pl.) 238, wherein Brady, J., said that he deemed it beyond reasonable doubt that a second motion cannot be made without leave on any state of facts. See also *Banks v. American Tract Soc.*, 4 Sandf. Ch. (N. Y.) 438, wherein the Vice-Chancellor said: "The late vice-chancellor, on the coming in of the answer, dissolved the injunction. His decision is conclusive between the parties in this

branch of the court, on any application on the same state of facts (or on a new state of facts, except upon leave, first had, to apply anew), for a revival of the injunction which he dissolved. But it did not conclude him, nor does it conclude any judge from holding at the final hearing of the cause, on the same facts, that the complainants are entitled to the relief which they seek by their bill, by a perpetual injunction, or otherwise. An order of the court made upon a motion is not *res adjudicata* in any other sense than that which I have stated. It does not conclude the court as to points of law involved in its decision, whether arising in the same case or in another." See also *Sheehan v. Carvalho*, 12 N. Y. App. Div. 430.

A Motion Should Not Be Denied merely on the ground that a motion of the same nature has been made and denied, if new facts are proven on the second motion, such as would be ground for giving leave to renew. *Butts v. Burnett*, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 302.

2. *Goddard v. Stiles*, 99 N. Y. 640, 1 N. E. Rep. 402; *Veeder v. Baker*, 83 N. Y. 156.

3. *Willet v. Fayerweather*, 1 Barb. (N. Y.) 72; *Havana Bank v. Moore*, 5 Hun (N. Y.) 624.

Illustrations of New Facts Within Rule. — The denial of a motion to open a default is not a bar to a new motion founded on the fact, for the first time presented, that the default was caused by the incapacity of the attorney. *Elston v. Schilling*, 7 Robt. (N. Y.) 74.

Where two motions made at different times, to open a default, are not made on precisely the same state of facts, because an excuse for not making an earlier application was given on the second motion but not on the first, it is in the discretion of the court to open the default, on that state of facts, or leave the party to his remedy against

Merely Cumulative Evidence of facts presented and urged upon the prior motion does not constitute new matter within the rule.¹

(3) *Renewal on Different Grounds.* — Motions for the same relief upon different grounds have sometimes been allowed to be renewed.² But this will not be done where it would result in

his attorney; and the exercise of that discretion cannot be interfered with on appeal, if used in a proper mode. *Fowler v. Huber*, 7 Robt. (N. Y.) 52.

The denial of a motion to change the place of trial to the proper county, based upon a complaint which does not state a cause of action, is not a bar to a similar motion based upon a valid amended complaint. *Veeder v. Baker*, 83 N. Y. 156, reversing 10 N. Y. Wkly. Dig. 498.

A judgment creditor moved to set aside a judgment by confession. His motion was denied, without leave to renew. Subsequently his assignee recovered another judgment, and made a new motion upon them both. It was held that the subject of the motion was not *res adjudicata* but that the new judgment gave a right to move. *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142.

Additional Lapse of Time as a New Fact. — In *Dunn v. Meserole*, 5 Daly (N. Y.) 434, an order denying a motion under Code of Procedure, § 274, to dismiss for neglect to serve other defendants, was held to be a bar to a new motion to dismiss for the same reason made a year afterwards without obtaining leave to renew. In other words, the additional lapse of time was not such a new fact as to take it out of the general rule.

1. *Johnson v. Johanson*, Walk. (Mich.) 309; *Ray v. Connor*, 3 Edw. Ch. (N. Y.) 478; *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Schultze v. Rodewald*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 365; *Bascom v. Feazler*, 2 How. Pr. (N. Y. Supreme Ct.) 16; *Dunham v. Winans*, 2 Paige (N. Y.) 24.

Where a party fails, in the first instance, from the incompleteness of his materials, he cannot afterwards come to the court. *Levi v. Coyle*, 12 L. J. Q. B. 295, 7 Jur. 724.

2. The denial of a motion to strike out an answer as frivolous does not prevent a motion to strike it out as sham. *Kreitz v. Frost*, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 277. See *Fox v. Fox*, 24 How. Pr. (N. Y. Supreme Ct.) 385; *Frost v. Flint*, 2 How. Pr. (N.

Y. Supreme Ct.) 125; *Bonnell v. Henry*, 13 How. Pr. (N. Y. Supreme Ct.) 142; *New Jersey Zinc Co. v. Blood*, 8 Abb. Pr. (N. Y. Supreme Ct.) 147.

Right and Favor. — The rule that a motion denied by one judge cannot be renewed before another on the same facts, without leave, does not apply to the case of an application to the discretion of the court to allow bail to surrender as matter of favor, upon excuse for delay, after an application for exoneration as matter of right has been denied on the ground that the strict time has passed. *Hall v. Emmons*, 9 Abb. Pr. N. S. (N. Y. Ct. App.) 370, reversing 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 451, 39 How. Pr. (N. Y.) 187, 2 Sweeny (N. Y.) 396.

Distinct Property Rights. — "The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion." *Per Andrews, J.*, in *Steuben County Bank v. Alberger*, 83 N. Y. 274. In this case a motion by a judgment creditor to vacate an attachment of the judgment debtor's property was denied on the ground that the judgment on which the motion was founded was not a valid judgment and conferred no lien. This was held to constitute no bar to a second motion by the same party to vacate the attachment on the same grounds, founded upon the creditor's ownership of the attached property under a deed, as under such circumstances the second motion was not in the nature of an application to review the question decided upon the prior motion.

Contrary View. — "We think that the mere fact that the grounds were different, the relief sought being the same, does not take the motions out of the general rule that a party cannot make a second motion for the same relief without leave of the court." *Sheehan v. Carvalho*, 4 N. Y. Ann. Cas. 32 {citing

permitting a party to bring forward his objections by instalments, without any excuse for not presenting all his objections upon the former motion.¹

The Rule is that when, without laches, the new grounds were not discovered until after the hearing of the former motion, it may be renewed;² but where such grounds were known and might have been brought forward on the original motion, a renewal based thereon will not be permitted.³

Lovell v. Martin, 21 How. Pr. (N. Y. C. Pl.) 238; Pattison v. Bacon, 12 Abb. Pr. (N. Y. Supreme Ct.) 142, 21 How. Pr. (N. Y.) 478; Klumpp v. Gardner, 44 Hun (N. Y.) 515].

1. Hart v. Walker, 77 Ind. 331, holding that a second motion, though on different grounds, should not be offered without showing a reasonable excuse for not embracing all the causes in the first motion. Klumpp v. Gardner, 44 Hun (N. Y.) 515; Mills v. Thursby, 11 How. Pr. (N. Y. Supreme Ct.) 115; Desmond v. Wolf, 1 Code Rep. (N. Y. Special Term) 49; Corwith v. State Bank, 11 Wis. 430.

Rule Applied to Resistance of Motion.—The same principle applies to a party resisting a motion, and he will not thereafter be permitted to move to vacate an order upon grounds which he might have urged in opposition to the original motion. Pierce v. Kneeland, 9 Wis. 34, wherein the court said: "But it is said that on the present application further facts are shown. Grant it. It likewise clearly appears that the additional facts now relied upon were within the knowledge and reach of the defendants at the time they first appeared and resisted the plaintiff's motion to confirm; and we hold it as an incontestable rule in such cases, that a party who seeks to take advantage of irregularities or defects must bring forward all his objections at once, and that he will not be permitted to parcel them out, and produce them piecemeal. Any other rule would be absurd, and would lead to endless and most oppressive litigation. If it were otherwise, a defendant conceiving himself to have several objections to a confirmation could bring them forward, one after the other, and try them separately in the court below, and then in this court upon appeal. Nay, more, if the theory of the defendants be true, after his several objections had been tried in this manner, heard, and determined against him, he

could, because he had theretofore been resisting motions instead of making them, commence making cross-motions to set aside the order of confirmation which the plaintiff had thus obtained, and one by one review the same objections, as well as others, and again go through the same process of trial and appeal. Thus it would happen that years of most vexatious and oppressive litigation would be required to determine whether a sheriff's report of sale should be confirmed or not."

2. Elston v. Schilling, 7 Robt. (N. Y.) 74; Cazneau v. Bryant, 6 Duer (N. Y.) 668, 4 Abb. Pr. (N. Y.) 402; Havana Bank v. Moore, 5 Hun (N. Y.) 624. See cases cited in the succeeding note.

3. Adams v. Lockwood, 30 Kan. 373; Pattison v. Bacon, 12 Abb. Pr. (N. Y. Supreme Ct.) 142, 21 How. Pr. (N. Y.) 478; Willet v. Fayerweather, 1 Barb. (N. Y.) 72; Lovell v. Martin, 12 Abb. Pr. (N. Y. C. Pl.) 178; Schlemmer v. Myerstein, 19 How. Pr. (N. Y. Supreme Ct.) 413; Hall v. Emmons, 2 Sweeney (N. Y.) 396; Pierce v. Kneeland, 9 Wis. 34; Hill v. Hoover, 9 Wis. 15; Leggo v. Young, 17 C. B. 549, 84 E. C. L. 549, 25 L. J. C. P. 176; Greathead v. Bromley, 7 T. R. 451.

Argument in Support of Rule.—In Pattison v. Bacon, 12 Abb. Pr. (N. Y. Supreme Ct.) 142, 21 How. Pr. (N. Y.) 478, a renewal of a motion to open a judgment taken by default upon a ground of defense which was known to the defendant when the original motion was made, but was not then stated, was denied. Ingraham, J., said: "I see no reason for a reargument of this motion. The additional matters which the defendant wishes to set up on the renewed motion were all known to him when that original motion was made. He should have stated all that was necessary at that time to secure his success. If he has neglected to do so, it is not consistent with the rules of practice in such case to allow him the opportunity of making up the facts necessary to avoid the

(4) *Renewal of Motion Denied for Irregularity.* — It has sometimes been held that a motion denied merely for irregularity in the motion papers may be renewed without leave,¹ but the better opinion seems to be that where a motion is once denied for any cause, technical or on the merits, the defeated party must obtain leave of court before he can renew the motion on the same state of facts.²

(5) *Renewal of Motion Granted on Conditions Not Performed.* — Where a motion is granted upon terms which the moving party has failed to comply with it is in effect denied, and it cannot be renewed without leave,³ in the absence of circumstances,

effect of the former decision. It is no more within the rules of propriety to allow a renewal of a motion for such purpose than it would be to set aside a verdict of a jury because a party did not put in evidence all of his defense which was known to him at the time. If the order, as made on the motion, was right, it ought not to be vacated for the reasons now submitted. If it was erroneous, the defendant should appeal to the general term and have it renewed."

1. *Marvin v. Lewis*, 12 Abb. Pr. (N. Y. Super. Ct.) 482; *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 112; *Corwith v. Illinois State Bank*, 15 Wis. 289, wherein the court, *per* Dixon, C. J., said: "It is like a judgment of nonsuit, or the abatement of an action for some error in bringing or conducting it, which have never been held to preclude the plaintiff from beginning anew. Through ignorance or inattention to the rules of practice, the motion was abated for defect in the form of the papers. There is some uncertainty in the authorities, but the more just and rational rule seems to be that it should not be a bar to a subsequent motion, regularly made, even though the party do not ask and obtain formal leave to renew it."

This is also implied in several cases where the court, in stating the rule requiring leave to renew, limits it to motions denied upon the merits. See *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Dodd v. Astor*, 2 Barb. Ch. (N. Y.) 395; *Pike v. Power*, 1 How. Pr. (N. Y. Supreme Ct.) 164; *Harker v. McBride*, 1 How. Pr. (N. Y. Supreme Ct.) 108; *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 113; *Seaman v. McReynolds*, 52 N. Y. Super. Ct. 543.

"We are not aware of any statute

law or rule of practice which requires a plaintiff to obtain leave of the court before applying for a second order for the examination of a defendant, where, as in this case, a previous order was vacated by reason of the insufficiency of the papers upon which the application was made." *Skinner v. Steele*, 88 Hun (N. Y.) 307.

2. *Irvine v. Myers*, 6 Minn. 558; *Mills v. Thursby*, 11 How. Pr. (N. Y. Supreme Ct.) 114; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368, holding that a motion cannot be renewed without leave of court after being once denied because of a formal defect in the affidavit.

A Motion to Vacate an Order Granting a Provisional Remedy in an action cannot be first made on the ground of the insufficiency of the papers upon which the order was granted and then, if unsuccessful, be renewed without leave and as a matter of right upon affidavits contesting the facts alleged in the original moving papers upon the merits. All such objections must be combined in one motion. *Sheehan v. Carvalho*, 12 N. Y. App. Div. 430, 4 N. Y. Ann. Cas. 32; *Lovell v. Martin*, 21 How. Pr. (N. Y. C. Pl.) 238.

But in the case of injunctions, the New York Code Civ. Pro., §§ 627, 628, expressly authorizes two motions to be made to vacate the injunction order; the first based upon defects in the papers upon which the injunction was granted, and the second upon counter-affidavits.

3. *Argabright v. State*, 46 Neb. 822; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289, wherein the defendant's motion was denied upon this ground, but such denial was without prejudice to a motion for leave to renew a motion for leave to serve an amended answer.

such as new facts, taking it out of the general rule.¹

(6) *Renewal After Default*. — A denial of a motion by default of the moving party is no bar to its renewal, if the default is excused.²

b. *EFFECT OF PROCEEDING WITHOUT LEAVE*. — Want of leave to renew a motion in a case where leave is necessary is a sufficient ground for denying the renewed motion,³ and it has been held to be reversible error to grant such a motion,⁴ but if the order is granted it is not void,⁵ because, as has been seen, the rule requiring leave to renew is merely one of practice, and may be disregarded by the court,⁶ and it would seem to be the better opinion that such an order is not even erroneous, as hearing and granting a second motion is tantamount to granting leave to renew the first.⁷

c. *POWER TO GRANT*. — The court has power to grant leave to renew a motion upon the same facts.⁸ But where the party has stipulated to abide the event of a pending motion, it cannot be renewed even where it was denied without prejudice.⁹

d. *PROCEEDINGS TO OBTAIN*. — Where it is desired to renew

1. *Evans v. Van Hall*, Clarke Ch. (N. Y.) 22, wherein it was held that a defendant may move upon his answer for a discharge of a *re exeat*, although before answer he had obtained an order for his discharge upon terms he never complied with, the court saying that the former motion did not preclude him from making another in a more mature state of the cause.

2. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

3. *Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 280; *Reed v. Allison*, 54 Cal. 490; *Tyrrell v. Baldwin*, 78 Cal. 470; *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 113; *Jeansch v. Lewis*, 1 S. Dak. 609; *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 367; *Branger v. Buttrick*, 28 Wis. 450; *Moll v. Benckler*, 28 Wis. 611.

But see *Butts v. Bennett*, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 302, wherein it was held that a motion should not be denied merely on the ground that a motion of the same nature has already been made and denied, if new facts are proven on the second motion such as would be ground for giving leave to renew.

4. *Chamberlain v. Dumville*, (Supreme Ct.) 50 N. Y. St. Rep. 356; *Melville v. Matthewson*, 49 N. Y. Super. Ct. 388; *Hall v. Ermons*, 2 Sweeny (N. Y.) 396, 9 Abb. Pr. N. S. (N. Y. Ct. App. 370; *Pierce v. Kaeeland*, 9 Wis.

37; *Rogers v. Hoenig*, 46 Wis. 361, wherein it was held that where the record shows that a new trial was absolutely denied and a second motion for like relief, founded on substantially the same grounds, was granted, there is error, although the judge states in the bill of exceptions or otherwise that the first order was made without prejudice and inadvertently made to appear as absolute.

But see *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368, wherein an order made without previous application for leave to renew was held to be irregular, but under the special circumstances of the case it was permitted to stand, upon payment of costs.

5. *Riggs v. Pursell*, 74 N. Y. 370; *Tone v. Brace*, Clarke Ch. (N. Y.) 503; *White v. Munroe*, 33 Barb. (N. Y.) 650.

6. See *supra*, XV. 2. b. *Power to Disregard Rule*.

7. *Riggs v. Pursell*, 74 N. Y. 381; *Harris v. Brown*, 93 N. Y. 390; *Thayer v. Parr*, 13 N. Y. Wkly. Dig. 137. See *infra*, XV. 3. f. *Manner of Granting*.

8. All the cases cited in this and the preceding sections, as to leave to renew, are authorities in support of this proposition.

9. *Smith v. Van Patten*, 2 How. Pr. (N. Y. Supreme Ct.) 235.

As to effect of denying a motion "without prejudice," see *infra*, XV. 3. f. *Manner of Granting*.

a motion for which leave is necessary, and the order denying the original motion does not grant such leave,¹ the party should apply to the court or judge² by motion for leave to renew.³ But the court has a right, when a motion renewed without leave comes up for hearing, to grant leave on the spot, and, without making a formal order to that effect, to hear the motion on the merits.⁴

c. RULES GOVERNING ALLOWANCE — (1) Discretion of Court. — Whether or not leave will be granted to renew a motion upon the same or additional papers is a matter resting within the

1. See *infra*, XV. 3. *f. Manner of Granting.*

2. The Judge at Chambers may grant leave to renew a motion. *Kenney v. Kelleher*, 63 Cal. 442.

Same or Different Judge. — Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew such motion. *Robinson v. Satterlee*, 3 Sawy. (U. S.) 134. See also *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, wherein it was held to be no objection to an application to open a previous motion that it was made before a different judge from the one before whom the original order was made, as both orders are properly the acts of the same court — the special term — and not of the judges. Compare *Averell v. Barber*, (Supreme Ct.) 44 N. Y. St. Rep. 542. And see *Steele v. Charlotte, etc., R. Co.*, 14 S. Car. 328, wherein the order of a circuit judge granting leave to a party to renew a motion before another judge was held to be without force, as the latter could grant leave as well as any other judge.

3. *Dollfus v. Frosch*, 5 Hill (N. Y.) 493; *Smith v. Spalding*, 30 How. Pr. (N. Y. Super. Ct.) 339; *Crocker v. Crocker*, 1 Sheld. (N. Y.) 274; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289, holding that upon such an application fresh facts or some good excuse should be furnished. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637, holding that the court may grant leave either upon additional facts and papers or upon the same papers originally before the court.

Notice to the Adverse Party of an application for leave to renew a motion which has been previously denied is not required where the adverse party appears and is heard upon the motion when it is in fact renewed. *Jensen v. Barbour*, 12 Mont. 566, wherein the court said: "There was notice to

plaintiff of the motion itself, and he was heard upon the motion. He had no complaint in that respect. He only complains that he was not notified that the defendant would ask leave to make the motion. We can say of this point, as of the last one discussed, that appellant has not shown us any reason, or any statute, or any authority, to the effect that there is required to be a notice to the opposite party for an application for leave to make the motion. No rights were affected by the leave granted, and the position of no one was changed. When it came to the hearing of the motion itself, the plaintiff did have notice, and appeared."

4. *People v. Eddy*, 3 Lans. (N. Y.) 82. See also *supra*, XV. 3. *b. Effect of Proceeding Without Leave*; and *infra*, XV. 3. *f. Manner of Granting.*

Granting Leave to Renew Under General Prayer. — In *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 114, a motion renewed without leave was denied upon that ground, and the court said: "I do not doubt that I have the power to give him leave to renew the motion, on the denial of this application, just as I might have done on the decision of the former motion, had the request been made, and had it been a proper case. This relief, however, cannot be granted under the general prayer as a legitimate object of this motion, for the reason that there are no facts in the moving papers on which to found this particular relief. * * *

This general prayer is borrowed from the Court of Chancery, and the same rule of practice should be held to apply in the case of motions that prevailed in that court. There is a rule also that is especially applicable to motions which forbids the granting of this relief as a legitimate object of the motion; and that is, that it is incumbent on the moving party to indicate in his motion, or his affidavit, distinctly, the

discretion of the court,¹ and unless the contrary appears this discretion will be presumed to have been properly exercised,² and will not be interfered with or reviewed upon appeal or otherwise, except in cases of palpable abuse.³

(2) *When Leave Will Be Granted.* — In the exercise of its discretion, the court will not grant leave to renew a motion except upon cause shown.⁴ Generally, leave will be granted whenever in the circumstances of the opposition there is anything to excite suspicion of unfairness or the belief that the party moving is taken by surprise,⁵ or where the original motion was denied because of some defect in the moving papers arising from ignorance of the practice,⁶ or where the affidavits used in oppo-

ground on which he asks to set aside a proceeding, or to obtain any other relief."

1. *California.* — *Johnston v. Brown*, 115 Cal. 697; *Hitchcock v. McElrath*, 69 Cal. 634; *Bowers v. Cherokee Bob*, 46 Cal. 280; *Kenney v. Kelleher*, 63 Cal. 442; *Mace v. O'Reilly*, 70 Cal. 231; *Tyrrell v. Baldwin*, 78 Cal. 470; *Ford v. Doyle*, 44 Cal. 635.

Minnesota. — *Irvine v. Myers*, 6 Minn. 558.

Montana. — *Jensen v. Barbour*, 12 Mont. 572.

Nebraska. — *Livingston v. Coe*, 4 Neb. 379; *Stutzner v. Printz*, 43 Neb. 306.

New York. — *White v. Munroe*, 12 Abb. Pr. (N. Y. Supreme Ct.) 357; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289; *Pattison v. Bacon*, 21 How. Pr. (N. Y. Supreme Ct.) 478; *Smith v. Spalding*, 3 Robt. (N. Y.) 615, cited 52 Barb. (N. Y.) 637, 30 How. Pr. (N. Y.) 339; *People v. Eddy*, 3 Lans. (N. Y.) 80; *Hall v. Emmons*, 2 Sweeny (N. Y.) 396; *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 112; *Fenton v. Lumberman's Bank*, Clarke Ch. (N. Y.) 360; *Havana Bank v. Moore*, 5 Hun (N. Y.) 626; *Thayer v. Parr*, 13 N. Y. Wkly. Dig. 137.

Extent of Discretion. — "Motions in the course of practice are addressed to the discretionary power of the court, and the doctrine of *res adjudicata* does not strictly apply. The renewal of them is a matter of discretion, and the question of granting leave or allowing them to be made without any leave must always rest in the judgment of the tribunal to which they are addressed, without limiting its operation to any strict rule of practice." *People v. Eddy*, 3 Lans. (N. Y.) 80.

2. *Hitchcock v. McElrath*, 69 Cal. 634; *Johnston v. Brown*, 115 Cal. 697; *Kenney v. Kelleher*, 63 Cal. 442.

3. *California.* — *Bowers v. Cherokee Bob*, 46 Cal. 280; *Kenney v. Kelleher*, 63 Cal. 442; *Hitchcock v. McElrath*, 69 Cal. 634.

Minnesota. — *Irvine v. Myers*, 6 Minn. 558.

Montana. — *Jensen v. Barbour*, 12 Mont. 566.

It Is Not an Abuse of Discretion to grant leave to renew a motion denied because of a mistake of counsel in calculating time, in forgetting that February of that year had twenty-nine days, *Jensen v. Barbour*, 12 Mont. 566; nor to grant leave upon the same facts more fully stated, *Kenney v. Kelleher*, 63 Cal. 442.

4. *Kansas.* — *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594.

Montana. — *Jensen v. Barbour*, 12 Mont. 566.

Nebraska. — *Hershiser v. Delone*, 24 Neb. 380.

New York. — *Mitchell v. Allen*, 12 Wend. (N. Y.) 290; *Chichester v. Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238. See also *Lundberg v. Albany*, etc., *Steele Co.*, 32 Fed. Rep. 501, wherein the motion was denied with leave to renew it on the trial if the defendant should be so advised.

5. *Per Sutherland, J.*, in *Mitchell v. Allen*, 12 Wend. (N. Y.) 290. See also:

California. — *Ford v. Doyle*, 44 Cal. 635; *Kenney v. Kelleher*, 63 Cal. 442; *Bowers v. Cherokee Bob*, 46 Cal. 280.

Montana. — *Jensen v. Barbour*, 12 Mont. 572.

New York. — *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368; *Hall v. Emmons*, 2 Sweeny (N. Y.) 396, 39 How. Pr. (N. Y.) 187.

6. **Defects in Moving Papers.** — *Dollfus v. Frosch*, 5 Hill (N. Y.) 494.

sition can be falsified or explained so as to show that the facts stated therein do not amount to a denial of the grounds of the motion.¹

New Facts. — A motion will sometimes be opened on the question being changed by new material discovered or arising afterwards.²

But if the Facts Remain Essentially the Same at the time of the application to renew that they were when the former motion was denied, the court will rarely allow the matter to be reheard on the merits.³

Thus, where a motion has been denied upon the ground that material facts stated in the moving papers ought to have been substantiated by the oaths of the witnesses, instead of merely by that of the attorney or party, it is proper to grant an application for leave to renew, especially where the objection was not interposed by counsel, but was raised by the court of its own motion. *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 112.

Motion Raising Technical Objections. — Where a motion, beside the merits of the case, fails by reason of some defect in the affidavits, the court will not give leave to renew the application. *Ilderton v. Burt*, 6 C. B. 433, 60 E. C. L. 433.

1. *Per Nelson, J.*, in *Standard v. Williams*, 10 Wend. (N. Y.) 300.

2. *Per Cowen, J.*, in *People v. Meicein*, 3 Hill (N. Y.) 416. See also *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Butts v. Burnett*, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 302. And see *supra*, XV. 3. a. (2) *Renewal on New Facts*.

When Leave Will Be Granted on New Facts. — Where a party, upon such an application, shows material facts which were not presented to the court upon the previous motion, and that he was, so far as such matters then existed, prevented from bringing them to the notice of the judge by mistake, inadvertence, surprise, or excusable neglect, this presents such a case as will justify the granting of a motion to open the rule taken against him. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 638.

Where an application for a receiver was denied partially, upon the ground that to grant it would practically destroy the interests in dispute, and also because the equities of the plaintiff were almost entirely controverted by the answer, it was held that leave to renew the application upon additional evidence should be given. *Devlin v.*

Hope, 16 Abb. Pr. (N. Y. Supreme Ct.) 315.

Cumulative Evidence. — Affidavits which merely present additional or cumulative evidence on the points before presented are not to be considered as showing new grounds for the motion. *Ray v. Connor*, 3 Edw. Ch. (N. Y.) 478; *Bascom v. Feazler*, 2 How. Pr. (N. Y. Supreme Ct.) 16; *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Dunham v. Winans*, 2 Paige (N. Y.) 24; *Johnson v. Johnson*, Walk. (Mich.) 309.

3. *California.* — *Ford v. Doyle*, 44 Cal. 635; *Kenney v. Kelleher*, 63 Cal. 444; *Bowers v. Cherokee Bob*, 46 Cal. 280; *Fagundes v. Central Pac. R. Co.*, 79 Cal. 97.

Kansas. — *Adams v. Lockwood*, 30 Kan. 373.

New York. — *Allen v. Gibbs*, 12 Wend. (N. Y.) 202; *Dollfus v. Frosch*, 5 Hill (N. Y.) 494. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289.

United States. — See *Witters v. Sowles*, 31 Fed. Rep. 5.

England. — *Greathead v. Bromley*, 7 T. R. 451; *Schumann v. Weatherhead*, 1 East 537.

Leave Will Not Be Given to Renew a motion to enable a party to insist on facts known to him, but not insisted upon at the hearing of the original motion. *Lovell v. Martin*, 12 Abb. Pr. (N. Y. C. Pl.) 178; *Schlemmer v. Myerstein*, 19 How. Pr. (N. Y. Supreme Ct.) 413; *Pattison v. Bacon*, 12 Abb. Pr. (N. Y. Supreme Ct.) 142, 21 How. Pr. (N. Y.) 478; *Hall v. Emmons*, 2 Sweeny (N. Y.) 396; *Adams v. Lockwood*, 30 Kan. 373.

An application for leave to renew a motion is properly denied where a party deliberately elects on the first motion not to rely upon affidavits in his possession, and nothing is shown

Unjust and Unnecessary Renewal. — Leave will not be granted where a renewal of the motion is unnecessary, and by reason of changed conditions might result in injustice to the opposing party.¹

f. MANNER OF GRANTING—(1) *By the Original Order.* — It is not unusual for the court, in denying a motion, to grant leave to renew it, either with or without application therefor. The usual mode is to insert a clause in the order denying the motion to the effect that such denial is without prejudice to a renewal of the motion.² Where this is done the motion may be renewed without further leave.³

to explain or excuse his election. *Witmark v. Herman*, 44 N. Y. Super. Ct. 144.

1. Leave to renew a motion made by a defendant, for liberty to withdraw his plea and file an answer, will not be granted where the testimony has been taken and the proofs closed as to the matters set up in the plea, and where, since the plea was put in, an important witness in regard to the new defense sought to be set up by answer has died. Nor will such leave be granted after a codefendant has, in his answer, set up the same defense which the plea asserts, and the testimony on both sides has been closed on that issue. *Willet v. Fayerweather*, 1 Barb. (N. Y.) 72.

2. *California.* — *Bowers v. Cherokee* Bob, 46 Cal. 280; *Tyrrell v. Baldwin*, 78 Cal. 470.

Minnesota. — *Irvine v. Myers*, 6 Minn. 558; *Matter of Minneapolis R. Terminal Co.*, 38 Minn. 157.

New York. — *Mitchell v. Allen*, 12 Wend. (N. Y.) 290; *Dodd v. Astor*, 2 Barb. Ch. (N. Y.) 395; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493, 40 Am. Dec. 368; *Devlin v. Hope*, 16 Abb. Pr. (N. Y. Supreme Ct.) 314; *Smith v. Spalding*, 30 How. Pr. (N. Y. Super. Ct.) 339; *Wentworth v. Wentworth*, 51 How. Pr. (N. Y. Supreme Ct.) 289; *Macomber v. New York*, 17 Abb. Pr. (N. Y. Super. Ct.) 35; *Smith v. Van Patten*, 2 How. Pr. (N. Y. Supreme Ct.) 235; *Hill v. Hermans*, 59 N. Y. 396; *Bellinger v. Martindale*, 8 How. Pr. (N. Y. Supreme Ct.) 113.

Wisconsin. — *Webster v. Oconto County*, 47 Wis. 226.

United States. — *Lundberg v. Albany, etc., Steel Co.*, 32 Fed. Rep. 501.

When Denial Without Prejudice Is Proper. — The motion should be denied without prejudice where it is apparent to the court that the full merits have not been heard and that it is proper for

the party to move again. *Havana Bank v. Moore*, 5 Hun (N. Y.) 626.

Where a party falls in a motion because of some formal defect or insufficiency in his papers, he should ask leave to renew the application, or that it be denied without prejudice to another motion. *Dollfus v. Frosch*, 5 Hill (N. Y.) 493.

The Order Should Show in Itself that It Was Made Without Prejudice to a new motion. *Dollfus v. Frosch*, 5 Hill (N. Y.) 493; *Rogers v. Hoenig*, 46 Wis. 361, wherein it was held that a statement of the trial judge in the bill of exceptions or otherwise, that the first order was made without prejudice and inadvertently made to appear as absolute, was insufficient to prevent a reversal upon the ground that the second motion was renewed without leave. See also *Sheehan v. Carvalho*, 12 N. Y. App. Div. 430, 4 N. Y. Ann. Cas. 32, wherein it was held that the fact that the court, in denying a motion to vacate an order, orally stated on the hearing that another motion might be made to vacate such order on the merits, did not constitute leave to renew the motion.

3. *Matter of Minneapolis R. Terminal Co.*, 38 Minn. 157.

Effect of Stipulation. — Where the parties have stipulated to abide the event of the motion, it cannot be renewed, although it is denied without prejudice. *Smith v. Van Patten*, 2 How. Pr. (N. Y. Supreme Ct.) 235.

Effect of Intervening Statute. — Where a motion is denied with leave to renew, and before the second hearing a repealing statute is enacted which alters the law upon which the former motion was based, the latter motion is to be governed by the statute in force when it is made the same as if it were the first motion of its kind, and the leave to renew does not confer a right which is vested in such a sense as to escape

(2) *By Independent Order.* — Where leave to renew is not granted in the original order, it may be granted by a subsequent independent order entered upon motion therefor by the party seeking to open the order.¹

(3) *By Implication.* — Since the court has power to disregard the rule requiring leave as a condition precedent to the renewal of a motion,² it would seem that hearing the second motion and granting the relief implies permission to renew the motion, and it has been so held.³

Effect of Second Rule to Show Cause. — So it has been held that granting a second rule to show cause to the same effect as the first operates as a qualification of the order denying the first motion and constitutes sufficient leave of court to renew it.⁴ But this has also been explicitly denied.⁵

g. EFFECT ON TIME OF MOVING. — Where a statute limits the time within which a motion must be made, granting leave to renew such motion will not operate as an extension of the time for moving.⁶

4. Appeal as Affected by Renewal Proceedings and Vice Versa —

a. WAIVER OF RIGHT TO APPEAL. — Obtaining leave to renew a motion has been held to waive the right to appeal from the first

the effect of the subsequent statute. *People v. Cohocton Stone Road*, 25 Hun (N. Y.) 13.

1. *California.* — *Kenney v. Kelleher*, 63 Cal. 442; *Mace v. O'Relley*, 70 Cal. 231; *Hitchcock v. McElrath*, 69 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 280; *Ford v. Doyle*, 44 Cal. 635.

Minnesota. — *Irvine v. Myers*, 6 Minn. 558.

New York. — *Havana Bank v. Moore*, 5 Hun (N. Y.) 626; *Dollfus v. Frosch*, 5 Hill (N. Y.) 493.

Wisconsin. — *Webster v. Oconto County*, 47 Wis. 225.

2. See *supra*, XV. 2. *b. Power to Disregard Rule*; and XV. 3. *b. Effect of Proceeding Without Leave.*

3. *Kenney v. Kelleher*, 63 Cal. 444; *Bowers v. Cherokee Bob*, 46 Cal. 286; *Harris v. Brown*, 93 N. Y. 390; *Thayer v. Parr*, 13 N. Y. Wkly. Dig. 137.

"By Hearing the Motion and Granting the Relief the court did in fact give such permission, and its order is not vitiated by the circumstance that the permission was not separately or preliminarily obtained. The court might, if it had seen fit, have insisted upon that preliminary, but it had the power to dispense with it and entertain and dispose of the whole matter in one order, and that course is not error for which its

order should be reversed on appeal if right upon the merits." *Riggs v. Purcell*, 74 N. Y. 381.

4. *Goodrich v. Hopkins*, 10 Minn. 162; *Harris v. Brown*, 93 N. Y. 391.

5. *Amsinck v. Northrup*, 12 N. Y. Wkly. Dig. 573; *Webster v. Oconto County*, 47 Wis. 225.

6. *Wheeler v. Brady*, 2 Hun (N. Y.) 347. But compare *Oliver v. French*, (Supreme Ct.) 41 N. Y. Supp. 106.

Remedy by Rehearing. — Where a motion has been noticed within the period limited for making such a motion, and the motion is denied and the period expires, then no new notice of a new motion will avail. If the denial was on some ground not conclusive of the question, the remedy of the moving party is to make an application for a rehearing of the original motion on the original notice. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

The Denial of a Motion "Without Prejudice," which amounts to granting leave to renew it (see *supra*, XV. 3. *f. Manner of Granting*), simply leaves the parties in the same position as if the motion had not been made, and if it is renewed, the renewed motion must be made within the time limited by statute for moving originally. *Wallace v. Lewis*, 9 Mont. 403.

order,¹ and it is clear that an actual renewal of the motion is such a waiver.²

b. **WAIVER OF LEAVE TO RENEW.**—By appealing from an order, the appellant waives leave reserved to him to renew the motion which the order denied.³

c. **APPEAL AS A BAR TO RENEWAL.**—The pendency of an appeal from an order is no bar to an application for leave to renew the motion upon which such order was founded.⁴ But it has been held that after affirmance of the original order on appeal the motion cannot be renewed in the trial court.⁵

5. **Hearing on Renewal**—*a.* **NOTICE.**—Notice should be given of a motion which is renewed just as in the case of an original motion.⁶

b. **MOTION PAPERS.**—The court has power, at its discretion, to hear the renewal of a motion upon the same or different papers.⁷

1. *Robbins v. Ferris*, 5 Hun (N. Y.) 286; *Sweet v. Morrison*, 9 N. Y. Wkly. Dig. 453, holding that the final order made upon a renewed motion alone can be appealed from.

2. *Harris v. Brown*, 93 N. Y. 390; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 653; *Noble v. Prescott*, 4 E. D. Smith (N. Y.) 139; *Harrison v. Neher*, 9 Hun (N. Y.) 127; *Apsley v. Wood*, 67 How. Pr. (N. Y. Supreme Ct.) 406; *Peel v. Elliott*, 16 How. Pr. (N. Y. Supreme Ct.) 481.

3. *Peel v. Elliott*, 16 How. Pr. (N. Y. Supreme Ct.) 483.

4. *Union Mills First Nat. Bank v. Clark*, 42 Hun (N. Y.) 92; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 638; *Columpha v. Whiting*, 10 Abb. Pr. (N. Y. Supreme Ct.) 448. But see *Benedict, etc., Mfg. Co. v. Thayer*, 20 Hun (N. Y.) 547, wherein it was said that an order denying a second motion for leave to amend was proper for the reason that an appeal was then pending from the denial of the first motion.

5. *Dodd v. Astor*, 2 Barb. Ch. (N. Y.) 395; *Pierce v. Kneeland*, 9 Wis. 37, 14 Wis. 341; *Corwith v. State Bank*, 11 Wis. 430; *Hill v. Hoover*, 9 Wis. 15; *Second Ward Bank v. Upman*, 14 Wis. 596; *Danaher v. Prentiss*, 22 Wis. 311.

After Reversal of an Order Granting a Motion, it cannot be renewed in the trial court even upon different grounds, unless the appellate court in reversing the order granted leave to renew the motion in the trial court. *Corwith v. State Bank*, 11 Wis. 430. But see 15 Wis. 289.

Contrary View.—In New York a

different view prevails and it is held that the affirmance of an order by the appellate court does not add to its effect or preclude a renewal of the motion, in the discretion of the court below, upon different or additional facts. *Riggs v. Pursell*, 74 N. Y. 370.

6. See *Piles v. Charles*, 3 Greene (Iowa) 109; *Jensen v. Barbour*, 12 Mont. 566. See also *supra*, IX. *Notice of Motion*.

7. *White v. Munroe*, 33 Barb. (N. Y.) 650; *Apsley v. Wood*, 67 How. Pr. (N. Y. Supreme Ct.) 406.

Necessity of New Papers.—Generally a motion should not be reheard on the same papers, unless the court desires to correct some misapprehension or inadvertence of its own. *White v. Munroe*, 33 Barb. (N. Y.) 650.

A motion founded only upon the same papers, or only a part of the papers upon which it was formerly made and denied, must be denied with costs. *Fenton v. Lumberman's Bank, Clarke Ch.* (N. Y.) 360.

Renewal After Default.—Where a motion granted by default is opened on excuse, it must be heard as to the party who took it on the identical papers on which it was moved. *Knowlton v. Borwason*, 8 Cow. (N. Y.) 135.

Affidavits on Renewal—Sufficiency.—Where an order directing the examination of the defendant before trial has been vacated by reason of the insufficiency of the papers upon which the application was made, the failure of the plaintiff, upon his second application for an order directing such examination, to comply fully with the provisions of rule 25 of the General Rules of

c. HEARING MERITS ON APPLICATION FOR LEAVE TO RENEW. — Where notice is served to that effect, or in the absence of any objection to want of notice, the hearing of the application for leave to renew and the hearing of a renewed motion may proceed together as one proceeding.¹

Practice, by showing what new facts are claimed to be shown on the second application, or whether or not there are any new facts, is at most an irregularity and does not compel the court to refuse the order or to vacate it after it is granted. *Skinner v. Steele*, 88 Hun (N. Y.) 308.

1. *People v. Eddy*, 3 Lans. (N. Y.) 82.

"It is not unusual to move to open or reconsider a matter passed upon under a previous motion and order at special term, and at the same time to ask for the relief the party claims to be entitled to, and it depends very much upon the discretion of the special term whether both branches of the motion shall or shall not be heard together.

* * * Usually they are heard together and disposed of under one

order." *Andrews v. Cross*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 92 [*citing* *Riggs v. Pursell*, 74 N. Y. 370; *Smith v. Spalding*, 3 Robt. (N. Y.) 615].

Under an order to show cause why leave should not be granted to review a motion once denied, the court may, after granting leave, entertain the motion *instantly* if no objection to want of notice is made. It is common to give notice of an application for such leave and in the same notice to give notice of renewing such motion conditionally in case such leave be granted. *Fowler v. Huber*, 7 Robt. (N. Y.) 52. But see *Crocker v. Crocker*, 1 Sheld. (N. Y.) 274, wherein it is held that upon a motion for leave to renew a motion the merits of the main application are not to be investigated or determined.

MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY).

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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CROSS-REFERENCES.

As to *Multifariousness in Pleadings in Suits for Particular Relief*, see the various titles in this work, as *CREDITORS' BILLS AND FRAUDULENT CONVEYANCES*, vol. 5, p. 559; *DIVORCE*, vol. 7, p. 49; *DOWER*, vol. 7,

p. 148; *EQUITABLE ATTACHMENT*, vol. 7, p. 793; *FORECLOSURE OF MORTGAGES*, vol. 9, p. 367; *INJUNCTIONS*, vol. 10, p. 869; *PARTITION*; *REDEMPTION*; *RESCISSION*, *REFORMATION*, *AND CANCELLATION*; *SPECIFIC PERFORMANCE*.

As to *Joinder of Causes of Action at Law*, see article *ACTIONS*, vol. 1, p. 108; and see cross-references under the title *MISJOINDER*.

Multifariousness in Indictments and Informations, see article *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 535.

Multifariousness in Bill Seeking Relief Against Executions, see article *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 483.

I. DEFINITION AND NATURE — 1. Difficulty of Defining. — It is not easy to define the vice of equity pleading known as multifariousness. At the outset of a quest for such a definition one finds the statements, repeated by the courts of nearly every chancery jurisdiction, that there is no settled and inflexible rule as to whether or not a pleading is multifarious,¹ that the question is

1. No Inflexible Rule as to Multifariousness. — *Alabama.* — Planters', etc., *Bank v. Walker*, 7 Ala. 926, the court saying: "We have repeatedly had occasion to remark upon the doctrine of multifariousness, as applicable to bills in chancery, and have heretofore shown the utter impracticability of laying down any general rules by which, with unerring certainty, it may in all cases be determined whether the objection is well taken." *Compare Kennedy v. Kennedy*, 2 Ala. 608; *Lewen v. Stone*, 3 Ala. 490.

California. — *People v. Morrill*, 26 Cal. 361.

Connecticut. — *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 293.

Georgia. — *Marshall v. Means*, 12 Ga. 65; *Stephens v. Whitehead*, 75 Ga. 298.

Illinois. — *Baird v. Jackson*, 98 Ill. 92; *Sturgeon v. Burrall*, 1 Ill. App. 549.

Maine. — *Warren v. Warren*, 56 Me. 368; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 54 Me. 173.

Maryland. — "I am quite satisfied that an examination of the numerous cases in which this subject has engaged the attention of the courts will show that an effort to extract from them any fixed and immutable principle, as a guide for all subsequent decisions, will be entirely unsuccessful.

The courts, to be sure, in deciding upon new cases, as they present themselves, are not to disregard previous adjudications. They should be consulted and followed as far as may be safe, having due regard to considerations of general convenience and the important object of advancing the administration of justice, by avoiding, on the one hand, the multiplying unnecessary litigation, and on the other, the involving of suitors in needless and oppressive expenses. The difficulty, indeed the impossibility, of laying down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable, is conceded on all hands." *Johnson, C.*, in *Dunn v. Cooper*, 3 Md. Ch. Dec. 46. See also *Brian v. Thomas*, 63 Md. 476.

Massachusetts. — *White v. Curtis*, 2 Gray (Mass.) 467; *Robinson v. Guild*, 12 Met. (Mass.) 323.

Michigan. — *Torrent v. Hamilton*, 95 Mich. 159; *Densmore v. Savage*, 110 Mich. 27.

Mississippi. — *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583; *Roberts v. Starke*, 47 Miss. 260; *Butler v. Spann*, 27 Miss. 234; *Hardie v. Bulger*, 66 Miss. 577, the court saying: "When a bill is or is not multifarious is difficult of determination. Indeed, the

one which must be determined largely by the circumstances of each particular case,¹ and even that its determination is to a certain extent discretionary.²

2. Formula of Multifariousness. — But in spite of this unanimity of opinion regarding the absence of any general rule as to what constitutes multifariousness, there are said to be certain principles and tests by which that vice may be discovered in a particular case.³ There is also a time-honored formula which describes

decisions upon the subject are so inharmonious that no rule upon the subject can be said to be clearly announced."

New Hampshire. — *Eastman v. Savings Bank*, 58 N. H. 421; *Abbot v. Johnson*, 32 N. H. 26.

New Jersey. — *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706, 758; *Ferry v. Laible*, 27 N. J. Eq. 150; *Stevens v. Bosch*, 54 N. J. Eq. 59.

New York. — *Carroll v. Roosevelt*, 4 Edw. Ch. (N. Y.) 211.

Pennsylvania. — *Sheriff v. Globe Oil Co.*, 7 Phila. (Pa.) 4.

South Carolina. — *Barkley v. Barkley*, 14 Rich. Eq. (S. Car.) 26; *Edwards v. Sartor*, 1 S. Car. 266.

Tennessee. — *Brown v. Johnson*, 2 Humph. (Tenn.) 327; *Bartee v. Tompkins*, 4 Sneed (Tenn.) 623.

Texas. — *Clegg v. Varnell*, 18 Tex. 302.

Vermont. — *Wade v. Pulsifer*, 54 Vt. 70.

Virginia. — *Alexander v. Alexander*, 85 Va. 363; *Washington City Sav. Bank v. Thornton*, 83 Va. 165; *Almond v. Wilson*, 75 Va. 623; *Segar v. Parrish*, 20 Gratt. (Va.) 679.

West Virginia. — *Oney v. Ferguson*, 41 W. Va. 568.

United States. — *Shields v. Thomas*, 18 How. (U. S.) 253, the court saying: "There is, perhaps, no rule established for the conducting of equity pleadings with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is that each case must be determined by its peculiar features." Compare *Galns v. Chew*, 2 How. (U. S.)

619; *Oliver v. Piatt*, 3 How. (U. S.) 411; *U. S. v. Union Pac. R. Co.*, 98 U. S. 604; *M'Lean v. Lafayette Bank*, 3 McLean (U. S.) 415; *Chaffin v. Hull*, 39 Fed. Rep. 889; *Stafford Nat. Bank v. Sprague*, 8 Fed. Rep. 377; *Sheldon v. Keokuk Northern Line Packet Co.*, 8 Fed. Rep. 769; *Central Pac. R. Co. v. Dyer*, 1 Sawy. (U. S.) 641; *Baltimore, etc., Tel. Co. v. Interstate Tel. Co.*, 54 Fed. Rep. 50; *Barney v. Latham*, 103 U. S. 215; *Mills v. Hurd*, 32 Fed. Rep. 129; *U. S. v. Curtner*, 26 Fed. Rep. 296; *Singer Mfg. Co. v. Springfield Foundry Co.*, 34 Fed. Rep. 393.

England. — *Dawes v. Ridgway*, 2 W. R. 404; *Coates v. Legard*, L. R. 19 Eq. 59. In *Campbell v. Mackey*, 1 Myl. & C. 603, Lord Chancellor Cottenham used the following language: "To lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the subject are extremely various, and the court, in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule."

1. *Stevens v. Bosch*, 54 N. J. Eq. 59; *Johnson v. Brown*, 2 Humph. (Tenn.) 327; *Washington City Sav. Bank v. Thornton*, 83 Va. 166; *Wade v. Pulsifer*, 54 Vt. 70.

2. *Barkley v. Barkley*, 14 Rich. Eq. (S. Car.) 26; *Ferry v. Laible*, 27 N. J. Eq. 146; *Stevens v. Bosch*, 54 N. J. Eq. 59.

3. "Yet it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case, if we will only bear in mind these cardinal rules upon the subject, namely, that a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the de-

rather than defines multifariousness, and which declares that it means "the improper joining in one bill of distinct and disconnected matters, and thereby confounding them."¹ Other general formulæ differing in phraseology but not greatly in substance have been employed by the courts in stating this doctrine.²

3. Tests of Multifariousness. — Where the vice is of the first form, viz., multifariousness as to matters, it is said that "two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill."³ The test in actions at law as to what matters may be joined is whether a single judgment might be rendered,⁴ and while it is said that the rule of joinder in equity is not so technical and precise as at law,⁵ still it has been held that matters which are entirely disconnected, such as distinct injuries, may no more properly be joined in chancery than at law.⁶ Hence, a test sometimes employed is whether the causes of action united in the bill require separate proofs and decrees⁷ or separate

defendant will be compelled to unite, in his answer and defense, different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or again, where there is a demand of several matters of a distinct and independent nature, in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection." *Alexander v. Alexander*, 85 Va. 353.

1. This is the definition usually given by the text writers. See Story's Eq. Pl. (9th ed.), § 271; Daniell's Chancery Pr. (5th ed.) 334.

It has been adopted in the following cases:

Connecticut. — *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316.

Georgia. — *Nail v. Mobley*, 9 Ga. 278.

Illinois. — *Sherlock v. Winnetka*, 59 Ill. 401.

Mississippi. — *Darcey v. Lake*, 46 Miss. 115; *Morris v. Dillard*, 4 Smed. & M. (Miss.) 643.

Virginia. — *Porter v. Robinson*, (Va. 1895) 22 S. E. Rep. 844.

United States. — *Walker v. Powers*, 104 U. S. 251; *Lehigh Zinc, etc., Co.*

v. New Jersey Zinc, etc., Co., 43 Fed. Rep. 548; *Copen v. Flesher*, 1 Bond (U. S.) 444.

2. Other Formulæ. — "Multifariousness consists in stating against the same party two or more independent causes of action in the same bill, or it may consist in stating one or more causes of action against a portion of the defendants and another cause of action against another portion of the defendants." *Church v. Citizens St. R. Co.*, 78 Fed. Rep. 526.

"A bill is multifarious where several plaintiffs demand, by one bill, several matters, entirely distinct and separate; or where, in the same bill, several matters of distinct natures are demanded against different defendants; but where all the matters charged constitute but one whole transaction, then the bill is not multifarious, and all the parties mixed up in the transaction, and having an interest in the subject-matters, must be made parties, to avoid multiplicity of suits." *Ayers v. Wright*, 8 Ired. Eq. (N. Car.) 229. See also *Walker v. Powers*, 104 U. S. 245.

3. *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403; *Allen v. Fairbanks*, 45 Fed. Rep. 445; *McMahon v. Thornton*, 4 Mont. 46; *Bedsole v. Monroe*, 5 Ired. Eq. (N. Car.) 313.

4. *McDaniel v. Cater*, 21 N. H. 230.

5. *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31.

6. *Clamorgan v. Guisse*, 1 Mo. 141.

7. *Walker v. Powers*, 104 U. S. 245;

defenses.¹ Still another test, and one more frequently employed than those above mentioned, is whether the bill, fairly construed, shows a single object and seeks to enforce one general and common right.² A complete and satisfactory test would probably

Holton v. Wallace, 66 Fed. Rep. 409; Lewis v. Loper, 47 Fed. Rep. 259; Dunn v. Adams, 32 New Bruns. 267.

1. Gamewell Fire-Alarm Tel. Co. v. Chillicothe, 7 Fed. Rep. 351.

2. Existence of One Common Right as a Test—Alabama.—Collins v. Stix, 96 Ala. 338; Larkins v. Biddle, 21 Ala. 252; Randle v. Boyd, 73 Ala. 282.

Connecticut.—Wells v. Bridgeport Hydraulic Co., 30 Conn. 316.

Florida.—Robinson v. Springfield Co., 21 Fla. 203; Deans v. Wilcoxon, 25 Fla. 980. Compare Hayden v. Thrasher, 18 Fla. 795.

Georgia.—Wynne v. Lumpkin, 35 Ga. 208; Clary v. Haines, 61 Ga. 520, the court saying: "Was the bill multifarious? Both executions were between the same parties, levied by the same officer, on the same property, and were subject to the same objections. The relief prayed against one and the grounds thereof were identical with the relief prayed against the other and the grounds thereof. The bill sought to ward off, by the same means, two blows, with two like instruments, aimed by the same parties at the same object. To exact a unity in the bill more strict than this would be to go beyond the sticklers for the dramatic unities—the classical purists in dramatic composition, who are to be satisfied with nothing less than complete unity of time, of place, and of action. May not he who attacks with a double barrel be resisted just as if he shot with a single barrel?"

Illinois.—Merchants Nat. Bank v. Hogle, 25 Ill. App. 543.

Maine.—Kennebec, etc., R. Co. v. Portland, etc., R. Co., 54 Me. 173; Brown v. Haven, 12 Me. 164; Bugbee v. Sargent, 23 Me. 269.

Maryland.—Doub v. Barnes, 1 Md. Ch. 127; Young v. Lyons, 8 Gill (Md.) 162; Kunkel v. Markell, 26 Md. 390.

Massachusetts.—White v. Bigelow, 154 Mass. 593; Dimmock v. Bixby, 20 Pick. (Mass.) 368.

Michigan.—Wheeler v. Clinton Canal Bank, Harr. (Mich.) 449.

Mississippi.—Richardson v. Brooks, 52 Miss. 118; Garrett v. Mississippi,

etc., R. Co., Freem. (Miss.) 70; McGowan v. McGowan, 48 Miss. 553.

Missouri.—Martin v. Martin, 13 Mo. 36; Rosenstein v. Missouri Pac. R. Co., 16 Mo. App. 225; Boggess v. Boggess, 127 Mo. 305.

New Hampshire.—Chase v. Searles, 45 N. H. 511.

New Jersey.—Hicks v. Campbell, 19 N. J. Eq. 183.

New York.—Boyd v. Hoyt, 5 Paige (N. Y.) 65; Thomas v. Thomas, 9 N. Y. App. Div. 487; Wood v. Sidney Sash, etc., Co., 92 Hun (N. Y.) 22; Bates v. Plonsky, 62 How. Pr. (N. Y. Supreme Ct.) 429.

North Carolina.—Robertson v. Stevens, 1 Ired. Eq. (N. Car.) 247; Watson v. Cox, 1 Ired. Eq. (N. Car.) 389.

South Carolina.—Ragsdale v. Holmes, 1 S. Car. 91.

Tennessee.—Neal v. Read, 7 Baxt. (Tenn.) 333; Johnson v. Brown, 2 Humph. (Tenn.) 327.

Vermont.—Smith v. Scribner, 59 Vt. 96.

Virginia.—Thomas v. Sellman, 87 Va. 683.

Wisconsin.—Douglas County v. Walbridge, 38 Wis. 179.

United States.—Duff v. Wellsville First Nat. Bank, 13 Fed. Rep. 65; Woodruff v. North Bloomfield Gravel Min. Co., 16 Fed. Rep. 25; Norris v. Haggin, 28 Fed. Rep. 275; Potts v. Hahn, 32 Fed. Rep. 660; Western Land, etc., Co. v. Guinault, 37 Fed. Rep. 523; Rosenstein v. Burns, 41 Fed. Rep. 841; Osborne v. Wisconsin Cent. R. Co., 43 Fed. Rep. 824; Hartford F. Ins. Co. v. Bonner Mercantile Co., 44 Fed. Rep. 151; Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Chase v. Canon, 47 Fed. Rep. 674; Alma First Nat. Bank v. Moore, 48 Fed. Rep. 799; Pullman v. Stebbins, 51 Fed. Rep. 10; Eastern Building, etc., Assoc. v. Denton, 65 Fed. Rep. 569; U. S. v. Flournoy Live Stock, etc., Co., 69 Fed. Rep. 886; Hayden v. Thompson, 71 Fed. Rep. 60; Gaines v. Mauseaux, 1 Woods (U. S.) 118; Giveen v. Smith, 1 Hask. (U. S.) 358, 10 Fed. Cas. No. 5,467.

New Brunswick.—Dunn v. Adams, 32 New Bruns. 267.

require a combination of the foregoing, and this has indeed been made by some of the authorities.¹

II. FORMS OF MULTIFARIOUSNESS — 1. Multifariousness as to Matters. — The attempt to frame a general definition of multifariousness has led to a recognition of the fact that there are at least two general and distinct forms of this vice.² The first form con-

1. "With respect to the objection of multifariousness, I have examined the numerous decisions to which I was referred at the argument, and there would seem to be some confusion with respect to what constitutes multifariousness in a bill. The rule of multifariousness has recently been summed up in Gibson's Suits in Chancery, § 292 (*quoted in* 1 Beach, Mod. Eq. Prac., § 129), in a manner which commends itself to my judgment. He says that to make a bill demurrable for multifariousness it must contain all of the following characteristics: First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but be separate and independent; third, the evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper as to the other cause or causes must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants on one or more of the separate and independent causes of action must be distinct from the relief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other defendant or defendants on the other cause or causes of action; and eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest. If this be the correct doctrine upon the subject, this bill cannot be held to be multifarious under the seventh subdivision before

referred to." *Von Auw v. Chicago Toy, etc., Co.*, 69 Fed. Rep. 448. See the application of the rule changed in *Africa v. Knoxville*, 70 Fed. Rep. 739; *U. S. v. Guglard*, 79 Fed. Rep. 21.

2. **Two Kinds of Multifariousness.** — In *Gartland v. Nunn*, 11 Ark. 720, the court observed: "The only way of reconciling the authorities upon the subject is by adverting to the fact that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two kinds: 1. Frequently the objection raised to the bill, though termed 'multifariousness,' is in fact, properly speaking, a misjoinder; that is to say, the cases or claims asserted in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and the defendants are parties to the whole transactions which form the subject of the suit, but nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. 2. But what is more familiarly understood by multifariousness, as applied to a bill, is where a party is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever. In such a case he has a right to demur (and so the old form of demurrer was) and to state the evil of thus uniting distinct matters in one record to be that it put the parties to great and useless expense. Such an objection could have no application to the case of a mere misjoinder of different causes of action between the same parties, plaintiffs and defendants, and none others. See *Story's Eq. Pl.*, pp. 406, 407." See also *Brown v. Buckner*, 86 Va. 612; *Miller v. Harris*, 9 Baxt. (Tenn.) 101.

"It sometimes, therefore, means misjoinder of causes of action, and sometimes misjoinder of parties. See *Daniell's Ch. Pr.* 384, 385; *Story's Eq. Pl.*, §§ 271, 530, and note 6. In the present case there is a misjoinder of

sists in uniting in the same bill distinct and disconnected subjects, matters, or causes.¹ This by some authorities has been termed more properly misjoinder.² In some states it has been permitted by statute.³

2. Multifariousness as to Parties. — The other form of multifariousness, and the one which is said to be more properly such, consists in joining in the same suit, either as complainants or defendants, parties who are without a common interest in the subject of the litigation and have no connection with each other.⁴ In

neither." *Wales v. Newbould*, 9 Mich. 45.

1. First Form of Multifariousness — Maine. — *Weston v. Blake*, 61 Me. 452, the court saying: "It is said that the bill is multifarious. We think not. A bill is multifarious only when separate and distinct causes of relief are joined which ought not to be joined. This seldom happens; hence the objection that a bill is multifarious is not often sustained. We think there is no such misjoinder in this bill. On the contrary, we think the defendants might well have complained if each distinct contract mentioned in the bill had been made the ground of a separate suit. The demurrers are not sustained, therefore, on the ground that the bill is multifarious."

Maryland. — *Williams v. West*, 2 Md. 174; *Wilson v. Wilson*, 23 Md. 162.

Missouri. — *Clamorgan v. Guisse*, 1 Mo. 141, holding that several injuries by separate individuals could not be joined as causes of action.

New Hampshire. — *Whitten v. Whitten*, 36 N. H. 326.

New Jersey. — *Emans v. Emans*, 13 N. J. Eq. 205.

New York. — *Swift v. Eckford*, 6 Palge (N. Y.) 22.

United States. — *McDonnell v. Eaton*, 18 Fed. Rep. 710; *Ziegler v. Lake St. El. R. Co.*, 76 Fed. Rep. 662; *Sioux City First Nat. Bank v. Peavey*, 75 Fed. Rep. 154.

England. — *Ward v. Northumberland*, 2 Anstr. 469.

2. Misjoinder Distinguished from Multifariousness. — *Miller v. Harris*, 9 Baxt (Tenn.) 101; *Brown v. Buckner*, 86 Va. 612; *Green v. Richards*, 23 N. J. Eq. 32, wherein the court said: "The bill is not multifarious. The uniting these two contracts in one bill may be a misjoinder, and the bill, if it had been demurred to, might have been held bad. But in this case the error is not such that the court will,

after the defendant has allowed the cause to proceed to hearing, refuse relief on this technical objection." See also *Durling v. Hammar*, 20 N. J. Eq. 227; 1 *Daniell's Chancery Pr.* 335.

In *Campbell v. Mackay*, 1 Myl. & C. 618, Lord Chancellor Cottenham said: "Frequently the objection raised, though termed 'multifariousness,' is, in fact, more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever."

3. Georgia Pac. R. Co. v. Brooks, 66 Miss. 583 (construing Code Miss., § 1886); *Doherty v. Stevenson*, 1 Tenn. Ch. 518 (construing Code Tenn., § 4327).

4. Disconnected Parties — Alabama. — *McIntosh v. Alexander*, 16 Ala. 67.

Michigan. — *Taylor v. King*, 32 Mich. 42; *Hunton v. Platt*, 11 Mich. 264.

Missouri. — *Bobb v. Bobb*, 8 Mo. App. 257.

New Jersey. — *Crane v. Fairchild*, 14 N. J. Eq. 76; *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31; *Ferry v. Laible*, 27 N. J. Eq. 146; *Bolles v. Bolles*, 44 N. J. Eq. 385.

Ohio. — *State v. Ellis*, 10 Ohio 456.

Oregon. — *White v. Delschneider*, 1 Oregon 254.

Pennsylvania. — *Sheriff v. Globe Oil Co.*, 7 Phila. (Pa.) 4.

order to complain successfully of multifariousness in this form, a defendant must show that "he is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever."¹ But a bill is not so multifarious where complainants have a common interest as to the point at issue, though their claims are in a sense distinct.² For a treatment of parties in equity, see article PARTIES.

III. TERMINOLOGY AND DISTINCTIONS. — The word "multifarious," while commonly confined to equitable proceedings, is sometimes applied also to common-law actions.³ The more usual and proper common-law term, however, is "misjoinder;" but that has also a place in the nomenclature of chancery practice, being applied to the improper union of causes as distinct from that of parties.⁴ Misjoinder in equity is therefore a species of multifariousness.⁵ Under the code practice the terms "multifariousness" and "misjoinder" are often used indiscriminately to express the same idea,⁶ though the word "misjoinder" is the more common under that system.⁷ But owing to the use of the latter term in the two senses above noticed, it is desirable to retain the word "multifariousness" under the new procedure, and this is frequently done.⁸

IV. REASON FOR THE RULE AGAINST MULTIFARIOUSNESS. — Applications of the rule regarding multifariousness will be made more

Tennessee. — *Allison v. Davidson*, (Tenn. 1896) 39 S. W. Rep. 905.

United States. — *U. S. v. Alexander*, 4 Cranch (C. C.) 311; *Hayden v. Thompson*, 67 Fed. Rep. 273.

1. Lord Cottenham in *Campbell v. Mackay*, 1 Myl. & C. 618; *Ferry v. Laible*, 27 N. J. Eq. 146; *Bolles v. Bolles*, 44 N. J. Eq. 385.

2. *Randle v. Boyd*, 73 Ala. 282; *Thomas v. Mason*, 8 Gill. (Md.) 1; *Carey v. Coffee-Stemming Mach. Co.*, (Va. 1894) 20 S. E. Rep. 978, where a number of stockholders joined in a bill against the corporation for accounting, alleging fraud in obtaining their respective subscriptions.

3. See *Virginia F. & M. Ins. Co. v. Saunders*, 86 Va. 969; *Willey v. Carpenter*, 64 Vt. 212.

4. "The question of multifariousness is on two grounds. One is that the complainant prays first that her title to one half of this property as *cestui que trust* may be decreed and established, and also that it may be partitioned, and one-half set off to her by metes and bounds. This, if wrong, is not strictly multifariousness, but a misjoinder. It does not involve in litigation on a question in which he has

no interest a party who has an interest in a distinct question or litigation in the same bill." *Durling v. Hammar*, 20 N. J. Eq. 220. See also *Green v. Richards*, 23 N. J. Eq. 33; *Miller v. Harris*, 9 Baxt. (Tenn.) 101; *Brown v. Buckner*, 86 Va. 615; *Campbell v. Mackay*, 1 Myl. & C. 603.

5. See *supra*, II. *Forms of Multifariousness*.

6. Bliss, *Code Pleading* (2d ed.), § 289.

7. *Hastings First Nat. Bank v. Lambert*, 63 Minn. 263; Bliss, *Code Pleading* (2d ed.), § 289.

8. *Behlow v. Fischer*, 102 Cal. 209; *Wilson v. Castro*, 31 Cal. 421; *Mullen v. Hewitt*, 103 Mo. 639; *Mayberry v. McClurg*, 51 Mo. 256; *Clark v. Covenant Mut. L. Ins. Co.*, 52 Mo. 272; *Emery v. Erskine*, 66 Barb. (N. Y.) 9; *Heggie v. Hill*, 95 N. Car. 303; *Suber v. Allen*, 13 S. Car. 322; *National Bank v. Texas Invest. Co.*, 74 Tex. 421; *Douglas County v. Walbridge*, 38 Wis. 179.

If Both Terms Be Used it should be made plain that misjoinder is used in its chancery and not its common-law sense. It is so used in this article, and the combined phrase "multifarious-

intelligently when the object and reason of the rule are understood. The reason most often given in the books is the desire "to protect a defendant from unnecessary expense."¹ Another purpose is to serve the convenience of the defendant and to avoid compelling him to present unnecessary defenses,² or to complicate his defense by combining matters which have no necessary connection with each other.³ Some courts have so emphasized this feature as to make the rule merely one of convenience, and apply or withhold it according as the parties would be most accommodated.⁴

V. TO WHAT PLEADINGS APPLICABLE — Bill, Petition, or Complaint. —

The term "multifariousness" is usually applied only to the bill, or, under the code practice, to the petition or complaint. And where the bill is involved the court can look no further and will

ness and misjoinder" is intended to cover the entire subject of the improper union of causes or parties in equitable proceedings.

1. *Economy.* — Lord Chancellor Cottenham in *Atty.-Gen. v. Cradock*, 3 Myl. & C. 85, quoted in *Kennedy v. Kennedy*, 2 Ala. 611. See also *Butler v. Spann*, 27 Miss. 234.

"Yet it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case, if we will only bear in mind these cardinal rules upon the subject, namely, that a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite, in his answer and defense, different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or again, where there is a demand of several matters of a distinct and independent nature in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection." *Alexander v. Alexander*, 85 Va. 353. See also the expressions of the courts in *Droste v. Hall*, (N. J. 1894) 29 Atl. Rep. 437; *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730;

Turner v. American Baptist Missionary Union, 5 McLean (U. S.) 344; *Hayes v. Dayton*, 8 Fed. Rep. 703.

2. "It may be drawn from the cases, and is in accordance with the reason of the rule, that the test of multifariousness is: What is the burden imposed on the defendant? to what defense is he forced? can he make one defense to the whole bill?" *Gamewell Fire-Alarm Tel. Co. v. Chillicothe*, 7 Fed. Rep. 351.

"The question in all cases where the objection is interposed is whether the court can accord full and substantial relief to all parties in interest without embarrassing the chances for defense." *Wade v. Pulsifer*, 54 Vt. 45. Compare *U. S. v. Union Pac. R. Co.*, 98 U. S. 604.

3. *Williams v. West*, 2 Md. 174.

4. "Courts, in dealing with this question, look particularly to convenience in the administration of justice; and if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that when we look to see if a bill is multifarious, the first question to be determined is, does the bill propose to reach the end aimed at in a convenient way for all concerned? And if the mode adopted does accomplish the end of convenience, then the question arises, is any one hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?" *County School Board v. Farish*, 92 Va. 156. See to the same effect *Staudé v. Keck*, 92 Va. 544.

not consider the answers or proofs.¹

But a Cross-bill may be also multifarious, and will be so if it embraces matters not included in the original bill.²

Plea. — So the term "multifarious" is properly applied to the plea in chancery where that instrument contains more than one defense.³ But a plea is not multifarious because it negatives various averments in the bill charging fraud.⁴ See article PLEAS IN EQUITY.

VI. PRAYER FOR RELIEF AS DETERMINING MULTIFARIOUSNESS —

1. In General. — While it is said that the question whether or not a bill is multifarious depends upon its allegations, and not upon its prayer,⁵ still it seems that the prayer may be considered in determining the question.⁶ An erroneous prayer will not, as a rule, render the bill multifarious,⁷ nor will the fact that the prayer seeks different kinds of specific relief, provided they all relate to the same subject-matter⁸ or are incidental thereto.⁹ Indeed, it has been held that special relief might be prayed

1. *Halstead v. Shepard*, 23 Ala. 558.

2. *Hildebrand v. Beasley*, 7 Heisk. (Tenn.) 121.

3. **Multifariousness in Plea.** — *Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 210; *Porter v. Young*, 85 Va. 49, the court saying: "This plea, as the learned counsel for the appellee contended, was rightly overruled for three reasons, viz.: (1) That it raises an indefinite number of issues, and is therefore multifarious, according to the rule of equity pleading which provides that every plea must rest the defense upon a single point, which of itself creates a bar to the matter to which it is pleaded. 2 Rob. (old) Pr. 303."

In *Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 259, the court said: "The plea put in by the defendant cannot be sustained, even if this were to be treated as a suit between individuals and tried by the ordinary rules of chancery pleading. It is multifarious, and on that account ought to be overruled. It is a general rule that a plea ought not to contain more defenses than one. Various facts, therefore, can never be pleaded in one plea unless they are all conducive to a single point, on which the defendant means to rest his defense. This principle is so well established that it is unnecessary to refer to many adjudged cases to support it."

4. "The next objection is that the plea is multifarious because it negatives the various facts stated in the bill in charging fraud. The objection

is not well taken. The charges in the bill to support the allegation of fraud must be met in the plea. Mitf. Ch. Pl. 240, 271. They may be met by a general denial (no matter how general), provided it be sufficient to put the charges of fraud contained in the bill in issue. Mitf. Ch. Pl. 244. It is no ground of objection that the denials are explicit and particular. *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 195. They merely put the fraud in issue." *Harrison v. Farrington*, 38 N. J. Eq. 358.

5. *Washington City Sav. Bank v. Thornton*, 83 Va. 157; *Nunnally v. Strauss*, 94 Va. 255.

6. **Prayer Considered.** — "Whether a bill is multifarious or not does not depend on the statements alone which it contains, but also upon the prayer for relief. For instance, if a bill was filed by two, to recover a joint demand, and it also contained a statement of facts that would entitle one of the complainants to a separate demand against the same defendant, but no relief was prayed in regard to the separate demand, then the bill would not be liable to the objection of multifariousness." *Carpenter v. Hall*, 18 Ala. 439, citing *Dick v. Dick*, 1 Hog. 290.

7. *McCarthy v. McCarthy*, 74 Ala. 556; *McGlothlin v. Hemery*, 44 Mo. 350.

8. *Cleland v. Casgrain*, 92 Mich. 139; *Densmore v. Savage*, 110 Mich. 27.

9. *Wright v. Jewell*, 9 Manitoba L. Rep. 607.

against one of several defendants.¹ Neither will the addition of a prayer for general relief infringe the rule.² But of course the complainant cannot, by praying two kinds of specific relief, unite legal and equitable causes of action in the same bill, either conjointly³ or in the alternative.⁴

A Bill for the Perpetuation of Testimony is multifarious if it also prays relief.⁵

2. Alternative Prayer. — A bill is not necessarily rendered multifarious by the fact that it contains an alternative prayer for relief.⁶ Thus a bill to review and correct a former decree to which the plaintiff was not a party may, in case that is not the appropriate relief, alternatively seek to impeach the decree for fraud on the part of the trustee who was a party.⁷ So a bill may allege two alternative grounds upon which the complainants are entitled to an estate.⁸ But in all cases the different kinds of relief asked for must be consistent with each other and with the allegations of the bill.⁹ Thus a bill praying that a lease be declared void, and also that an accounting be required of the money due by the terms of the lease, if it should be declared

1. *Dougan v. Mitchell*, 9 Manitoba L. Rep. 477; *Manners v. Rowley*, 10 Sim. 470.

2. *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463.

3. **Injunction and Damages.** — Thus a bill to enjoin a nuisance was held multifarious because it also prayed that the defendants be decreed to pay the damages caused by the nuisance. *Brady v. Weeks*, 3 Barb. (N. Y.) 157. But in the case cited it was held that the objection was cured by striking from the bill that part of the prayer which asked for the payment of damages.

4. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641. In this case the plaintiff sought an injunction against the location of a railway, and also prayed that if the injunction was refused the plaintiff might be awarded full compensation for the appropriation of its lands. This was held to be an improper joinder of causes in the bill.

5. *Ætna L. Ins. Co. v. Smith*, 73 Fed. Rep. 318; *Jerome v. Jerome*, 5 Conn. 352. See article PERPETUATION OF TESTIMONY.

6. **Alternative Prayer Permissible** — *Alabama*. — *Lyons v. McCurdy*, 90 Ala. 497; *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15; *Lebeck v. Ft. Payne Bank*, 115 Ala. 447; *McCarthy v. McCarthy*, 74 Ala. 546.

Florida. — *Ritch v. Eichelberger*, 13 Fla. 169.

Michigan. — *Harte v. McKeen*, Walk. (Mich.) 417.

Mississippi. — *Murphy v. Clark*, 1 Smed. & M. (Miss.) 221; *Baines v. M'Gee*, 1 Smed. & M. (Miss.) 208; *Hardie v. Bulger*, 66 Miss. 577.

New Jersey. — *Rockwell v. Morgan*, 13 N. J. Eq. 384.

New York. — *Colton v. Ross*, 2 Paige (N. Y.) 396; *Lloyd v. Brewster*, 4 Paige (N. Y.) 537; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Mayne v. Griswold*, 3 Sandf. (N. Y.) 463; *Connecticut Mut. L. Ins. Co. v. Cornwell*, 72 Hun (N. Y.) 199; *Thomas v. Thomas*, 9 N. Y. App. Div. 487.

Tennessee. — *Roper v. Roper*, 3 Tenn. Ch. 53.

United States. — *Kilgour v. New Orleans Gas Light Co.*, 2 Woods (U. S.) 144. Compare *Halsey v. Goddard*, 86 Fed. Rep. 25; *Chaffin v. Hull*, 39 Fed. Rep. 887.

7. *Lebeck v. Ft. Payne Bank*, 115 Ala. 447, the court saying: "It is in no sense multifarious or repugnant because it submits to the court whether relief may be had under it as a bill of review or a bill to impeach the decree for fraud on the part of the trustee in suffering the decree, of which the bill also complains as a ground of relief."

8. *Halsey v. Goddard*, 86 Fed. Rep. 25.

9. **Prayer Must Be Consistent.** — *Lyons v. McCurdy*, 90 Ala. 497; *Hart v. Mc-*

valid, is inconsistent and multifarious;¹ and so is a bill which prays the rescission of contracts of subscription to corporate stock, and also seeks to call the corporate officers to account to the complainants as stockholders.²

3. Asking Impossible or Improper Relief. — A bill is not rendered multifarious because it contains averments and prays relief respecting them which could not in any event be granted.³ Thus a bill to redeem is not multifarious because it also asks to

Keen, Walk. (Mich.) 417; Swayze v. Swayze, 9 N. J. Eq. 273; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Brown v. Bedford City Land, etc., Co., 91 Va. 31.

Two alternative claims, each belonging to many persons not all of whom are interested in both, cannot be joined in the same bill. Stebbins v. St. Anne, 116 U. S. 386.

In Wilkinson v. Dobble, 12 Blatchf. (U. S.) 298, the court said: "It is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief. An action to set aside a transfer as fraudulent, in which the court is asked to adjudge the defendant's title to the vessel void, and one where the transfer is alleged to be valid and the complainant claims relief on the theory of a subsisting joint interest with the defendant by reason of the transfer, proceed on entirely different grounds and are utterly repugnant to each other. Both theories cannot be true on any hypothesis of fact or by any fiction of law. Analogous cases are those in which it was attempted to unite a cause of action for a forfeiture of a lease, and an injunction, on the theory that the lease was still subsisting; a cause of action to set aside a contract for fraud or, if valid, to enforce its specific performance; a claim to recover purchase money in arrear upon a contract, and for a forfeiture of the contract; in all of which the causes of action were held to be inconsistent." Compare Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641; St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 33 Fed. Rep. 440; Shields v. Barrow, 17 How. (U. S.) 144.

1. Inconsistent Prayer. — St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 33 Fed. Rep. 440, the court saying: "Finally, is the bill multifarious or contradictory? We think it is. It contains two distinct grounds of suit; one for the rescission of the contract, on the theory that it is void, and the

other for an accounting and a recovery of earnings, on the theory that it is valid. The averments that relate to the first ground of relief are wholly irrelevant if the bill be considered simply as a bill for an accounting. It is true that a complainant may state the facts of his case, and ask relief according to the conclusion of law which the court may draw from them, although this may be presented in two or more alternatives (Story's Eq. Pl., § 42), but this is not such a case. A bill to annul a contract for fraud or illegality, and to specifically enforce it if the court shall hold that it is valid, is fatally defective; and we can see no substantial difference between such a bill and the one now before us."

2. Brown v. Bedford City Land, etc., Co., 91 Va. 31.

3. Improper Prayer Will Not Cause Multifariousness. — *Alabama.* — Morris v. Morris, 58 Ala. 448; Carpenter v. Hall, 18 Ala. 439; McGriff v. Alford, 111 Ala. 634; Dargin v. Hewlitt, 115 Ala. 510; Yarborough v. Avant, 66 Ala. 526; Baines v. Barnes, 64 Ala. 375.

California. — Newman v. Smith, 77 Cal. 22.

Connecticut. — Bacon v. Huntington, 14 Conn. 98.

Florida. — Ritch v. Eichelberger, 13 Fla. 188.

Illinois. — Sturgeon v. Burrall, 1 Ill. App. 537.

Massachusetts. — McCabe v. Bellows, 1 Allen (Mass.) 269.

Missouri. — McGlothlin v. Hemery, 44 Mo. 350.

New Jersey. — Durling v. Hammar, 20 N. J. Eq. 220; Emans v. Emans, 14 N. J. Eq. 114.

New York. — Many v. Beekman Iron Co., 9 Paige (N. Y.) 188; Varick v. Smith, 5 Paige (N. Y.) 160.

Virginia. — Snaveley v. Harkrader, 29 Gratt. (Va.) 112.

United States. — Neufville v. New York, etc., R. Co., 81 Fed. Rep. 10.

have dower assigned, the latter being impossible in such a proceeding.¹ And in an action to set aside a contract for the sale of land, averments and prayer for damages to which the plaintiff is not entitled will be treated as surplusage, and not as rendering the complaint demurrable for misjoinder.² A bill for an accounting is not bad for multifariousness though it contains an improper claim for certain funds.³ Where the complainant is entitled to discovery alone against certain defendants, the fact that he also prays relief will not make his bill multifarious.⁴ And generally where the objectionable averments may be treated as redundant or as surplusage, the bill will be held to be free from the vice of multifariousness.⁵

VII. MULTIFARIOUSNESS UNDER THE CODE. — The codes of procedure make few important changes in the rules of joinder, and, among other things, they preserve in great part the equity doctrine of multifariousness.⁶ Under the codes, however, as in

1. **Redemption and Dower.** — *McCabe v. Bellows*, 1 Allen (Mass.) 269, where the court said: "Two causes of demurrer are stated in the argument. The first is that the bill is multifarious because it seeks to redeem and to have dower assigned. But the court has no authority to assign dower in this process; and, to render a bill multifarious, the matters must be not only separate and distinct, but each of a character to entitle the plaintiff to separate equitable relief. It is not multifarious if it set up one sufficient ground for relief and state another on which no relief can be had. Mitford's Ch. Pl. 181, note; Story's Eq. Pl. 283. A special demurrer to the part which is bad might be maintained by answering the remainder of the bill. But as it is, the case must proceed without regard to that part."

2. **Cancellation and Damages.** — "The respondents contend, however, that the demurrer should have been sustained on the ground of misjoinder of causes of action. The basis for this is that the complaint attempts to claim damages for the 'anxiety, worry, and harassment arising from the facts hereinbefore alleged,' and for expenses in taking care of the property and remaining away from her home. It is sufficient to say that she has no right of action for these things. We do not say that a demurrer on this ground should be overruled because one of the causes of action is defectively stated; but where, as here, it appears that by no possibility can she recover for these things, we think the allegations on the

subject should be treated as surplusage." *Newman v. Smith*, 77 Cal. 22.

3. **Accounting.** — *Dargin v. Hewlitt*, 115 Ala. 510. In this case the complainant had entered into an arrangement with the defendant by which the former was to receive certain of the proceeds of certain privileges incident to the holding of races, fairs, etc. In his bill the complainant claimed certain of the gate receipts, and though the court found that his claim was improper, it held that the bill was not demurrable on the ground of multifariousness.

4. **Discovery and Relief.** — *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188. See also article DISCOVERY, PRODUCTION, AND INSPECTION, vol. 6, p. 770.

5. *Morris v. Morris*, 58 Ala. 443; *Newman v. Smith*, 77 Cal. 22; *Bacon v. Huntington*, 14 Conn. 92; *Ritch v. Eichelberger*, 13 Fla. 188; *Sturgeon v. Burrall*, 1 Ill. App. 537.

6. **Doctrine of Multifariousness Preserved.** — "Whether a complaint is multifarious usually resolves itself into the question whether the causes of action united are such that they may be joined in the same action. The code, § 267, subdivision 1, provides that 'causes of action may be joined when they arise out of the same transaction, or transactions connected with the same subject of action.' This section of the code we do not think makes any substantial change in the rules of practice which obtained before the adoption of the code in the courts of equity, with regard to multifariousness. Whatever effect it may have had has

chancery, it is sufficient that the cause of action be single, and the relief prayed for need not be so.¹ So equity, having taken jurisdiction to set aside a deed, may retain the cause in order to award damages, and the complaint is not thereby multifarious.² Under the codes parties having separate interests in a trust fund may join in an action against the trustee.³ And though different causes of action may be united in one petition where they arise out of the same transaction, still they should be set forth in different counts.⁴ In the notes will be found a collection of cases further illustrating the operation of the doctrine of multifariousness under the codes and showing that even the name of that vice is preserved in the terminology of the reformed procedure.⁵

been to enlarge the right of uniting in one action different causes of action." *Heggie v. Hill*, 95 N. Car. 303.

"While by the code all the forms of pleading are abolished, yet it has prescribed rules which afford to parties the same protection against uniting either distinct causes of action in favor of several plaintiffs against the same defendant, or uniting several causes of action against defendants having no common interest in such causes of action; and thus the objection against multifariousness, although not permitted *eo nomine*, still exists in fact. Indeed, no system of pleading could be tolerated that would permit parties whose interests are entirely distinct to unite in the same action, or compel defendants having no common interests to contest causes of action against them severally." *Emery v. Erskine*, 66 Barb. (N. Y.) 9.

A petition under the code which attempts to join in an action against a judgment debtor the grantees in a number of separate deeds is multifarious. *Mullen v. Hewitt*, 103 Mo. 639.

Causes of Action Against Disconnected Defendants cannot be united under the code although they have accrued to the same plaintiff. *Atchison, etc., R. Co. v. Sumner County*, 51 Kan. 617.

For a Full Discussion of Joinder of Causes of Action under the Codes, see article ACTIONS, vol. 1, p. 180 *et seq.*

1. *Wickersham v. Crittenden*, 93 Cal. 17.

2. *Pinkum v. Eau Claire*, 81 Wis. 301. But this rule applies only when the parties seeking relief had originally a sufficient complaint. *Behlow v. Fischer*, 102 Cal. 208.

3. *Davenport v. Prince*, 41 Fed. Rep. 323.

4. *Sands v. Wood*, 1 Iowa 263, the court saying: "Whilst the code intends to produce facility in the practice, and permits the union of several causes of action in the same petition (§ 1751), it does not intend to favor confusion. Before the adoption of the code several causes of action (within certain limits) could be united in the same declaration, but they must be stated in different counts. So, under the code, the different causes of action embraced in one petition must be stated in separate counts. There is no other way in which the different issues can be distinctly made, and the trial proceed clearly upon the separate questions raised. There is nothing in the code which countenances the mingling of separate causes of action in one and the same count."

Under the Indiana Practice the Supreme Court will not reverse a judgment because of the action of the trial court in either overruling or sustaining a demurrer for a misjoinder of causes. *Bowen v. State*, 121 Ind. 235.

As to United Causes Arising out of the Same Transaction, see article ACTIONS, vol. 1, p. 181 *et seq.*

5. **Terminology Preserved under Code — California.** — *Behlow v. Fischer*, 102 Cal. 209; *Wilson v. Castro*, 31 Cal. 421.

Missouri. — *Mullen v. Hewitt*, 103 Mo. 639; *Mayberry v. McClurg*, 51 Mo. 256; *Clark v. Covenant Mut. L. Ins. Co.*, 52 Mo. 272.

New York. — *Emery v. Erskine*, 66 Barb. (N. Y.) 9.

North Carolina. — *Heggie v. Hill*, 95 N. Car. 303.

South Carolina. — *Suber v. Allen*, 13 S. Car. 322.

Texas. — *National Bank v. Texas Invest. Co.*, 74 Tex. 421.

VIII. WHEN AND WHERE OBJECTION MAY BE RAISED — 1. Not on Appeal. — As a rule, objections for multifariousness or misjoinder must be raised in the trial court, and will not be considered if urged for the first time on appeal.¹ Even where the decree was taken *pro confesso*, the defendant will not be allowed to raise this objection in the appellate court.² But there is some authority for the qualification of the general rule that where the vice of multifariousness or misjoinder is glaringly apparent the court itself may notice it on appeal, notwithstanding it may have been ignored by the defendant in the court below.³

Wisconsin. — Douglas County v. Walbridge, 38 Wis. 179.

1. Objection Must Be Raised Below —
Alabama. — Wellborn v. Tiller, 10 Ala. 305; Betts v. Betts, 18 Ala. 787, the court saying: "The parties have proceeded to a final hearing on one matter alone, and no inconvenience has resulted to either of the defendants from the prayer for a divorce. It would, in my judgment, be improper to dismiss in this court for this objection, when in all probability the objection was not urged in the court below. The ground on which the doctrine of multifariousness rests is the inconvenience of mixing up in one bill several distinct matters having no necessary connection with each other, and which may require different proceedings and distinct decrees (Story's Eq. Pl., § 280), thus embarrassing the court as well as the defendants. But to allow the objection at this time, under the circumstances of this case, instead of being productive of convenience would be productive of inconvenience, expense, and delay, for the same question that has been decided would have to be relitigated, and the same decree rendered upon the same allegations and proof that should have been rendered if the bill had not contained the prayer for a divorce. Under such circumstances we will treat the question of multifariousness as it appears to have been treated in the court below, that is, as waived or abandoned."

Colorado. — Davis v. Johnson, 4 Colo. App. 545; Farncomb v. Stern, 18 Colo. 279; Ayres v. Shields, 14 Colo. 475. The foregoing were cases of misjoinder under the code practice.

Illinois. — Gilmore v. Sapp, 100 Ill. 302. Compare Labadie v. Hewitt, 85 Ill. 341; Thornton v. Houtze, 91 Ill. 199.

Indiana. — Bryan v. Blythe, 4 Blackf. (Ind.) 249.

Iowa. — Hines v. Horner, 86 Iowa 594.

Kentucky. — McKee v. Pope, 18 B. Mon. (Ky.) 548.

Maryland. — Ashton v. Ashton, 35 Md. 504.

Michigan. — Snook v. Pearsall, 95 Mich. 534.

Nebraska. — North Bend First Nat. Bank v. Miltonberger, 33 Neb. 847.

New Jersey. — Brown v. Grandin, (N. J. 1888) 13 Atl. Rep. 266.

North Carolina. — Buffalow v. Buffalow, 2 Ired. Eq. (N. Car.) 113.

Tennessee. — Moreau v. Saffarans, 3 Sneed (Tenn.) 595.

Vermont. — Wade v. Pulsifer, 54 Vt. 71.

Wisconsin. — Williams v. Smith, 22 Wis. 594. Compare Stilwell v. Kellogg, 14 Wis. 461; Cary v. Wheeler, 14 Wis. 281.

United States. — Oliver v. Piatt, 3 How. (U. S.) 412, where it is observed that "an appellate court would scarcely entertain the objection if it was not forced upon it by a moral necessity." Compare Barney v. Latham, 103 U. S. 205; Ranger v. Champion Cotton-Press Co., 52 Fed. Rep. 611; Fitchett v. Blows, 74 Fed. Rep. 47.

See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 201.

2. Gilmore v. Sapp, 100 Ill. 302. Compare *Moreau v. Saffarans*, 3 Sneed (Tenn.) 595.

3. Qualification that Court May Raise the Objection on Appeal Sua Sponte. — *Hefner v. Northwestern L. Ins. Co.*, 123 U. S. 747, where, after stating the general rule that the objection must be raised at the hearing, it is said that: "The court, in its discretion, may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed."

Gray v. Payne, 43 Mo. 203, was an attempt to join an action of ejectment with a bill to set aside conveyance.

2. At What Stage of Proceedings in Trial Court—*a.* **IN GENERAL.**—The general rule requires that the objection of multifariousness must not only be raised in the trial court, but also at an early stage in the proceedings there. It must, as a rule, be disposed of before the hearing on the merits, or it will be treated as waived.¹ The objection cannot be considered when first urged after decree,² even though the defendants did not appear in the

No objection was made on this ground in the court below, but nevertheless the Supreme Court said: "As the case is now presented, the only question which will be noticed arises upon the pleadings. That there is a misjoinder of causes of action combined in the petition is patent, and that the objection is fatal is well established by a uniform current of decisions in this court. It is true the point was not raised in the court below by the defendant's counsel, but the matter is apparent upon the face of the record, and will be noticed here on either error or appeal, whether exceptions were saved or not."

See *infra*, X. 2. *The Court Sua Sponte.*

1. Objection Too Late at Hearing—*Connecticut.*—Bissell v. Beckwith, 33 Conn. 357.

Illinois.—Thornton v. Houtze, 91 Ill. 199; Labadie v. Hewitt, 85 Ill. 341.

Indiana.—Bryan v. Blythe, 4 Blackf. (Ind.) 249.

Maryland.—Grove v. Fresh, 9 Gill & J. (Md.) 280; Luckett v. White, 10 Gill & J. (Md.) 490; Gibbs v. Clagett, 2 Gill & J. (Md.) 28.

Michigan.—Payne v. Avery, 21 Mich. 538; Miner v. Wilson, 107 Mich. 57; Childs v. Pellett, 102 Mich. 564; Burnham v. Dillon, 100 Mich. 352; Wales v. Newbould, 9 Mich. 45.

Mississippi.—Darcey v. Lake, 46 Miss. 109.

New Hampshire.—Bell v. Woodward, 42 N. H. 181.

New Jersey.—Cresser v. Security Land Imp. Co., (N. J. 1896) 35 Atl. Rep. 451.

New York.—Watertown v. Cowen, 4 Paige (N. Y.) 510.

North Carolina.—Buffalow v. Buffalow, 2 Ired. Eq. (N. Car.) 118.

Tennessee.—Thurman v. Shelton, 10 Yerg. (Tenn.) 383; Fay v. Jones, 1 Head (Tenn.) 442.

United States.—Nelson v. Hill, 5 How. (U. S.) 127; Oliver v. Piatt, 3 How. (U. S.) 412; Converse v. Michi-

gan Dairy Co., 45 Fed. Rep. 18; Ranger v. Champion Cotton-Press Co., 52 Fed. Rep. 611; Fitchett v. Blows, 74 Fed. Rep. 50; Hefner v. Northwestern L. Ins. Co., 123 U. S. 747.

England.—Wynne v. Callander, 1 Russ. 296; Ward v. Cooke, 5 Madd. 122; Greenwood v. Churchill, 1 Myl. & K. 559; Benson v. Hadfield, 4 Hare 32; Cousens v. Rose, L. R. 12 Eq. 366.

Ireland.—Whaley v. Dawson, 2 Sch. & Lef. 371.

Reason for Rule.—In Payne v. Avery, 21 Mich. 524, the court, in stating the reason for this rule, observed: "Where advantage of multifariousness is desired to be taken by defendants, the desirable practice is for them to present the objection by demurrer, that the court may pass upon it before the expense of reference and testimony is incurred. If, instead of taking this course, they only by their answer reserve the privilege of making the objection at the hearing, when the expenses are already incurred, and when the court is put to the trouble of a full discussion of the case, they cannot complain if the court disregards their objection, unless the nature of the case is such that justice cannot be done to the parties upon the pleadings and evidence as then presented. At that stage of the case the court, instead of the party, is to take the objection of multifariousness, and while it may refuse to render a decree upon multifarious subjects of litigation, in respect to which complete justice cannot be done, it will not, on the other hand, *sua sponte*, take the objection of multifariousness, when it would be merely technical, and when the object for which the parties have incurred their expense and for which the court has been put to the trouble of a hearing and examination can be substantially accomplished on the record as it stands."

2. Labadie v. Hewitt, 85 Ill. 341; Luckett v. White, 10 Gill & J. (Md.) 480, where the decree had been taken

case until that time,¹ nor upon an exception to the master's report,² nor upon preliminary hearing upon bill and answer.³

b. RAISED IN ANSWER. — In some jurisdictions it is optional with the court to consider the objection when first raised in the answer.⁴ But there are many authorities which hold that the objection comes too late when first presented in that form.⁵ At any rate, it is too late when first raised in an amended answer filed on the first day of the hearing.⁶ Under the old English chancery practice a defendant was required to answer as well as demur where the bill charged combination.⁷ But if the answer contained more than a bare denial of confederacy its effect would be to overrule the demurrer for multifariousness.⁸

IX. METHOD OF RAISING THE OBJECTION — 1. Demurrer. — The method of raising the objection of multifariousness or misjoinder which prevails in the greatest number of jurisdictions is by demurrer.⁹ In some decisions the rule is laid down that the

pro confesso. Compare *Oliver v. Piatt*, 3 How. (U. S.) 412.

1. *In Case of Default.* — *Grove v. Fresh*, 9 Gill & J. (Md.) 280, the court saying: "It is insisted that the appellant, never having appeared in the chancery court until after the final decree, could not have used this defense before that tribunal, and should not, therefore, be denied its benefit before this court. This excuse gives to the appellant no such right. A court of equity extends no favors to those who are in default in disobeying its process. Had the appellant appeared in obedience to the mandate of the court, the defense now set up could not have been denied him, but having failed to do so, the consequences of his delinquency are justly visited upon him." Compare *Lockett v. White*, 10 Gill & J. (Md.) 490; *White v. White*, 5 Gill (Md.) 359.

2. *Fitchett v. Blows*, 74 Fed. Rep. 47.

3. *Miner v. Wilson*, 107 Mich. 57.

4. *Labadie v. Hewitt*, 85 Ill. 341. And see cases cited in the preceding notes, *passim*. In *Virginia* the demurrer may be embodied in the answer. *Dunn v. Dunn*, 26 Gratt. (Va.) 291.

5. *Indiana.* — *Bryan v. Blythe*, 4 Blackf. (Ind.) 249.

Maryland. — *Gibbs v. Clagett*, 2 Gill & J. (Md.) 28; *Grove v. Fresh*, 9 Gill & J. (Md.) 280; *Tartar v. Gibbs*, 24 Md. 323.

New Jersey. — *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142.

North Carolina. — *Buffalow v. Buffalow*, 2 Ired. Eq. (N. Car.) 113.

Tennessee. — *Hickman v. Cooke*, 3 Humph. (Tenn.) 640.

United States. — Compare *Nelson v. Hill*, 5 How. (U. S.) 132.

Ireland. — *Whaley v. Dawson*, 2 Sch. & Lef. 367, the court saying: "This can be taken advantage of only by demurrer, because if the defendant answers the expense is in a great degree incurred, and it might be too late for him to complain if he suffered the case to go to a hearing."

6. *Thornton v. Houtze*, 91 Ill. 220.

7. *Powell v. Arderne*, 1 Vern. 416. See also *Wilson v. Wilson*, 23 Md. 162.

8. *Hester v. Weston*, 1 Vern. 463.

9. *Connecticut.* — *Bissell v. Beckwith*, 33 Conn. 362.

Florida. — *Robinson v. Springfield Co.*, 21 Fla. 238.

Illinois. — *Labadie v. Hewitt*, 85 Ill. 341; *Whiteside County v. Burchell*, 31 Ill. 68.

Maryland. — *Grove v. Fresh*, 9 Gill & J. (Md.) 280; *Tartar v. Gibbs*, 24 Md. 337.

Michigan. — *Payne v. Avery*, 21 Mich. 524; *Snook v. Pearsall*, 95 Mich. 534; *Burnham v. Dillon*, 100 Mich. 352; *Childs v. Pellett*, 102 Mich. 558; *Miner v. Wilson*, 107 Mich. 57.

Mississippi. — *Darcey v. Lake*, 46 Miss. 109; *Roberts v. Starke*, 47 Miss. 263.

New Hampshire. — *Bell v. Woodward*, 42 N. H. 181.

New Jersey. — *Hinchman v. Pater-son Horse R. Co.*, 17 N. J. Eq. 83 (misjoinder); *Cressee v. Security Land Imp. Co.*, (N. J. 1896) 35 Atl. Rep. 451.

North Carolina. — *Buffalow v. Buffalow*, 2 Ired. Eq. (N. Car.) 118.

objection must be raised by a special demurrer.¹ In others a general demurrer is said to be the proper practice,² but in most of the cases the precise form of the demurrer is not specified.³ The form and effect of a demurrer for multifariousness are substantially the same as those of a demurrer for misjoinder at common law; both go to the entire pleading.⁴

2. Motion. — In some jurisdictions, especially where the code practice prevails, the objection of multifariousness or misjoinder is properly raised not by demurrer, but by motion.⁵ This is usually a motion to strike out the objectionable parts of the pleading,⁶ but it may also be a motion to compel the plaintiff to elect upon which ground he will prosecute his action.⁷ A motion

Pennsylvania. — *Hill v. Bonaffon*, 2 W. N. C. (Pa.) 356.

Tennessee. — *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383; *Fay v. Jones*, 1 Head (Tenn.) 442.

Virginia. — *Wells v. Sewell's Point Guano Co.*, 89 Va. 708; *Dunn v. Dunn*, 26 Gratt. (Va.) 291.

United States. — *Mackall v. Casilear*, 137 (U. S.) 561; *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18; *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 611; *Hefner v. Northwestern L. Ins. Co.*, 123 U. S. 747.

England. — *Ward v. Cooke*, 5 Madd. 122.

1. Special Demurrer. — *Darcey v. Lake*, 46 Miss. 109; *Fay v. Jones*, 1 Head (Tenn.) 442. Compare *Labadie v. Hewitt*, 85 Ill. 341.

2. General Demurrer. — *Whiteside County v. Burchell*, 31 Ill. 68; *Dunn v. Dunn*, 26 Gratt. (Va.) 291.

In *Virginia* the demurrer may not only be general, but may be contained in the answer. *Dunn v. Dunn*, 26 Gratt. (Va.) 291, the court saying: "In this case there was a demurrer at the beginning of the answer, though the causes of the demurrer are not assigned therein. According to the English practice, and that of many of the other states of our Union, it appears that the causes are assigned in the demurrer; but such is not the general practice in this state. On the contrary, it seems to be usual with us to embody the demurrer in the answer, in general language, as was done in this case; and that practice seems to be recognized, if it be not expressly authorized, by the code, p. 1093, c. 167, § 31, which says that the form of a demurrer or joinder shall be: 'The defendant (or plaintiff) says that the declaration (or plea, etc.) is not (or is) sufficient in law.'"

3. See cases cited in preceding notes.

4. *Boyd v. Hoyt*, 5 Paige (N. Y.) 65.

For Precedents of Demurrers for Multifariousness, see *Jenness v. Smith*, 64 Mich. 91; *Barkley v. Barkley*, 14 Rich. Eq. (S. Car.) 12; *Hayes v. Dayton*, 8 Fed. Rep. 702.

5. Raising Objection by Motion. — *Arkansas.* — *Waldo v. Thwatt*, 64 Ark. 132; *Ashley v. Little Rock*, 56 Ark. 391; *Riley v. Norman*, 39 Ark. 158; *Clements v. Lampkin*, 34 Ark. 598; *Dyer v. Jacoway*, 42 Ark. 186; *Terry v. Rosell*, 32 Ark. 478.

Colorado. — *Brewer v. McCain*, 21 Colo. 382.

Indiana. — *Armstrong v. Dunn*, 143 Ind. 433.

Kentucky. — *Sale v. Crutchfield*, 8 Bush (Ky.) 636. Compare *Dean v. English*, 18 B. Mon. (Ky.) 132; *Hancock v. Johnson*, 1 Metc. (Ky.) 242.

Wisconsin. — *Akerly v. Vilas*, 25 Wis. 703. Compare *Clark v. Langworthy*, 12 Wis. 441.

In *Riley v. Norman*, 39 Ark. 158, the court said: "The defendant attempted to make his objections by demurrer, because the bill was multifarious and that improper parties had been joined. This was properly overruled. The remedy for misjoinder of causes of action is sometimes by demurrer in most of the code states, but in Kentucky and here, as well, I believe, as in Iowa, under special provisions of the code, the remedy is by motion to strike out causes of action improperly joined with others. If that be not done, the objection will be considered as waived."

6. See cases in preceding notes.

7. *Clements v. Lampkin*, 34 Ark. 598; *Sale v. Crutchfield*, 8 Bush (Ky.) 636.

to make the objectionable pleading more specific will also lie.¹ In *Nebraska*, though a code state, the remedy for a misjoinder is a demurrer, and the defect may also be raised by the answer.²

3. *Plea or Answer.* — While, as has already been shown,³ the objection of multifariousness is, under the prevailing rule, treated as waived if presented first in the answer, this is true only where the defect appears upon the face of the bill. If it does not so appear the rule seems to be well established that the objection may be raised by plea or answer.⁴

X. WHO MAY RAISE THE OBJECTION — 1. *The Prejudiced Party.* — It is well settled that the objection of multifariousness or misjoinder is a personal one, and that only a defendant who is prejudiced thereby can be heard to complain of it.⁵ Thus a bill

1. *Clements v. Lampkin*, 34 Ark. 598. See article DEFINITIONS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

2. *Claire v. Claire*, 10 Neb. 54.

3. See *supra*, VIII. 2. *b. Raised in Answer.*

4. *Defect Not Apparent on Face of Bill.* — *Abbot v. Johnson*, 32 N. H. 9, the court saying: "We think it may be found that the term 'multifariousness' has not always been used in the same sense, being in some instances confined to cases where a misjoinder of parties or subjects appears on the face of the bill, and in others extended so as to include cases where the answer or plea shows a misjoinder which was not apparent before. In cases where the answer or plea, by the denial of a fact stated in the bill or by the introduction of a new fact, shows that there is a misjoinder, this is not, perhaps, to be considered as multifariousness in the strict sense of the term, but as a variance from the case stated in the bill. If the variance is material, the plaintiff fails, because he has not made out the case which he stated. If the objection does not appear in the bill, but is shown by the plea or answer, it is, perhaps, not very material whether it is demonstrated multifariousness, or a misjoinder, or a variance; the defendant must be allowed to insist on the objection by his plea or answer, as he would not do it by demurrer. Where multifariousness appears on the face of the bill, the rule is well established by the authorities that the defendant must make the objection by demurrer, and cannot insist on it at the hearing, on plea or answer." See, to the same effect, *Bell v. Woodward*, 42 N. H. 189; *Sims v. Aughtery*, 4 Strobh. Eq. (S. Car.) 103. And compare the following

authorities, where the rule is inferentially laid down: *Oliver v. Piatt*, 3 How. (U. S.) 411; *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 611; *Fitchett v. Blows*, 74 Fed. Rep. 47; *Tartar v. Gibbs*, 24 Md. 323; *Ashton v. Ashton*, 35 Md. 504; *Cressee v. Security Land Imp. Co.*, (N. J. 1896) 35 Atl. Rep. 451; *Benson v. Hadfield*, 4 Hare 32.

5. *Only Prejudiced Party May Complain* — *Alabama.* — *Boyd v. Hunter*, 44 Ala. 718; *Stone v. Knickerbocker L. Ins. Co.*, 52 Ala. 589; *Norwood v. Memphis, etc., R. Co.*, 72 Ala. 563; *Bragg v. Patterson*, 85 Ala. 233; *Bolling v. Vandiver*, 91 Ala. 375; *Toulmin v. Hamilton*, 7 Ala. 362.

Arkansas. — *Gartland v. Nunn*, 11 Ark. 731; *Christian v. Crocker*, 25 Ark. 327.

Maine. — *Bugbee v. Sargent*, 23 Me. 269.

Michigan. — *Torrent v. Hamilton*, 95 Mich. 163; *Sweet v. Converse*, 88 Mich. 1.

Missouri. — *Bogges v. Bogges*, 127 Mo. 324.

New Jersey. — *Bermes v. Frick*, 38 N. J. Eq. 88; *Olds v. Regan*, (N. J. 1895) 32 Atl. Rep. 827; *Couse v. Columbia Powder Mfg. Co.*, (N. J. 1895) 33 Atl. Rep. 297.

New York. — *Whitbeck v. Edgar*, 2 Barb. Ch. (N. Y.) 106; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Crosby v. Berger*, 4 Edw. Ch. (N. Y.) 210.

Pennsylvania. — *Hill v. Bonaffon*, 2 W. N. C. (Pa.) 356.

Tennessee. — *Payne v. Berry*, 3 Tenn. Ch. 154.

United States. — *Fitchett v. Blows*, 74 Fed. Rep. 47; *Buerk v. Imhauser*, 8 Fed. Rep. 457; *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39; *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18.

by an employee of a contractor to compel an accounting of profits which the complainant was to receive by virtue of contracts with different municipalities is not subject to dismissal at the instance of the contractor because it joins the municipalities, though it might be objected to by one of the latter.¹ So where a defendant was liable for each one of the amounts decreed in a suit, it was held that he could not object on the ground of multifariousness.² Generally, moreover, a proper defendant cannot demur for the misjoinder of an improper one.³

2. The Court Sua Sponte. — The rules thus far stated as to the time and method of raising the objection of multifariousness and misjoinder govern only such action on the part of the defendant. They do not interfere with dismissal by the court, which may raise the objection *sua sponte* at any stage of the proceedings.⁴

England. — Atty.-Gen. v. Cradock, 8 Sim. 466; Mole v. Smith, Jac. 490.

1. *Olds v. Regan*, (N. J. 1895) 32 Atl. Rep. 827, where Emery, V. C., said: "The objections of multifariousness and misjoinder of defendants would be valid had they been made by either of the defendants, the city of Newark or the township of Montclair, as neither of these municipalities has any connection whatever with the contracts of the other, and on objection of either of these defendants, properly taken, the court would be at liberty to dismiss the bill for this reason; and it may be that by reason of this multifariousness no decree can be finally made against either of these defendants in this suit. But the defendant Regan cannot object to misjoinder of other defendants, or as to multifariousness which only exists as to other defendants. *Miller v. Jamison*, 24 N. J. Eq. 41; 2 *Daniell's Ch. Prac.* (6th ed.) 337, note 3. As against Regan, the bill prays for an accounting of the amount due complainant under several different contracts; and, so far as appears on the face of the bill itself, I see no reason why, as between the complainant and Regan, the account cannot take in all of the contracts in a single bill as conveniently as the joining of similar claims in a suit at law. The dismissal of a bill for multifariousness in joining distinct claims against one defendant is largely a matter for the discretion of the court, and, in the absence of any reference by counsel to authorities against the joinder of such claims, I am not willing to dismiss the bill for this reason."

2. *Buerk v. Imhaueser*, 8 Fed. Rep.

457, wherein the court said: "The defendant Imhaueser, being liable for each one of the amounts decreed in the one suit, is not in a position to raise the objection of multifariousness, as he is in no worse position by having only one suit against him than if there were three."

3. *Payne v. Berry*, 3 Tenn. Ch. 154.

4. *Alabama.* — *Bean v. Bean*, 37 Ala. 17; *Shepherd's Sel. Cas.* 265; *Felder v. Davis*, 17 Ala. 418.

Florida. — *Mattair v. Payne*, 15 Fla. 682; *Bauknight v. Sloan*, 17 Fla. 288.

Georgia. — *Warthen v. Brantley*, 5 Ga. 571.

Maryland. — *Tartar v. Gibbs*, 24 Md. 337; *Ashton v. Ashton*, 35 Md. 504; *Chew v. Baltimore Bank*, 14 Md. 299.

Michigan. — *Childs v. Pellett*, 102 Mich. 564; *Payne v. Avery*, 21 Mich. 524; *Wales v. Newbould*, 9 Mich. 91.

Mississippi. — *Darcey v. Lake*, 46 Miss. 109.

New Jersey. — *Swayze v. Swayze*, 9 N. J. Eq. 273; *Hendrickson v. Wallace*, 31 N. J. Eq. 604; *Droste v. Hall*, (N. J. 1894) 29 Atl. Rep. 437; *Rockwell v. Morgan*, 13 N. J. Eq. 384.

Ohio. — *State v. Ellis*, 10 Ohio 456.

Pennsylvania. — *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 Pa. St. 22.

South Carolina. — *Sims v. Aughtery*, 4 Strobb. Eq. (S. Car.) 103.

Tennessee. — *Hickman v. Cooke*, 3 Humph. (Tenn.) 640.

Virginia. — *Wells v. Sewell's Point Guano Co.*, 89 Va. 711; *Dunn v. Dunn*, 26 Gratt. (Va.) 291.

United States. — *Oliver v. Platt*, 3 How. (U. S.) 411; *Nelson v. Hill*, 5 How. (U. S.) 132; *Barney v. Latham*,

A master to whom the case is referred seems to have the same powers in this regard as a judge.¹ It has been said that only a very strong case will induce the exercise of this power,² and that it should be employed rarely and with great caution.³ But where the defect is serious and is likely to embarrass the administration of justice, it is not only proper, but desirable, that the court should exercise its prerogative in this particular and dismiss the bill.⁴

XI. CONSEQUENCES AND CORRECTION OF MULTIFARIOUSNESS — 1. In General. — It has frequently been said that the courts do not look with favor upon the objection of multifariousness.⁵ At

103 U. S. 215; *Hefner v. Northwestern L. Ins. Co.*, 123 U. S. 747.

England. — *Greenwood v. Churchill*, 1 Myl. & K. 546.

1. *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 Pa. St. 31.

2. *Ashton v. Ashton*, 35 Md. 496, the court saying: "Where there is no objection to a bill upon this ground raised either by demurrer, answer, or plea, the courts will sometimes, *sua sponte*, notice it at the hearing. But it must be a very strong case which will induce them to do it. If they can get to a final decree without serious embarrassment, so indisposed are they to countenance the objection, the error will generally be disregarded." See *Brown v. Granclin*, (N. J. 1888) 13 Atl. Rep. 266; *Rockwell v. Morgan*, 13 N. J. Eq. 384.

3. *Bean v. Bean*, 37 Ala. 20; *Shepherd's Sel. Cas.* 265; *Felder v. Davis*, 17 Ala. 418.

In *Chew v. Baltimore Bank*, 14 Md. 299, the court observed: "There is no doubt that where a defendant omits to demur for multifariousness, the court may, *sua sponte*, take the objection and dismiss the bill. But whether this will be done or not must depend on the nature of the case, and the course of proceedings at the time of the hearing. Without intimating whether the present bill is obnoxious to the objection, we think it is not a case in which the court should interfere. The trouble and expense which the demurrer, if well taken, would have prevented have been incurred. The case is fully presented on the record, and the reasons for allowing the objection do not apply."

4. **Duty of Court to Object.** — In *Swayze v. Swayze*, 9 N. J. Eq. 273, the court said: "But although this bill is

multifarious, no advantage has been taken of it by the pleadings, nor was the objection stated at the hearing. The objection must be taken by demurrer or plea, or be set up in the answer; and if it is not, the defendant cannot claim any benefit from such defect. But though the party may waive the objection, the court, *proprio jure*, may dismiss the bill, and will do it where the form of the bill embarrasses the court in the administration of justice."

In *Bauknight v. Sloan*, 17 Fla. 284, the court said: "We have here a joinder of equitable and legal causes of action supplemented by different claims against the same defendant by different plaintiffs, and also different and distinct demands by different plaintiffs against different defendants, there being no common interest centering in the point in issue in the cause. There is here a misjoinder of causes of action, misjoinder of parties, and a union of distinct demands, of which the court should have taken notice at the hearing." Compare *Annin v. Annin*, 24 N. J. Eq. 188; *Veghte v. Raritan Water-Power Co.*, 19 N. J. Eq. 144.

5. *Warthen v. Brantley*, 5 Ga. 571; *Nail v. Mobley*, 9 Ga. 278. Compare *Marshall v. Means*, 12 Ga. 61; *Turnipseed v. Goodwin*, 9 Ala. 372.

"It is difficult to apply the rule against multifariousness in practice. The instances are numerous and inharmonious. A suit is not thrown out of court for this fault except in a plain case." *Oney v. Ferguson*, 41 W. Va. 568.

The bill will not be dismissed for this defect unless the court is so embarrassed that it cannot administer appropriate relief. *Annin v. Annin*, 24 N. J. Eq. 184.

most the vice will not render void a decree so that it can be treated as a nullity in a collateral proceeding.¹ Where in other respects the bill is without equity the question of multifariousness will be treated as immaterial,² and the defect may sometimes be avoided by charging combination between the several defendants or in respect to matters introduced into the bill which would otherwise be distinct and unconnected.³

2. Amendment.—In accordance with their disinclination to favor the objection of multifariousness, the courts will generally allow the bill to be amended after sustaining a demurrer on that ground.⁴ So where a demurrer goes to the whole bill the court sometimes withholds its decision thereon and grants leave to amend.⁵ The application to amend should be made in the trial court.⁶ Sometimes, instead of authorizing an amendment, the court will simply put the complainant to his election as to which one of his causes of action he will continue to prosecute.⁷ But it is not always that such leniency will be extended to a litigant who has fallen into the vice of multifariousness. There are instances where amendment would not be allowed anywhere after

¹ *Hefner v. Northwestern L. Ins. Co.*, 123 U. S. 747.

² *Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 399.

³ **Charging Combination.**—*Wilson v. Wilson*, 23 Md. 162, holding also that if combination was denied by the answer the bill became demurrable. In *England*, in such a case, it was necessary both to answer and to demur. *Powell v. Alderne*, 1 Vern. 416.

⁴ **Leave to Amend Usually Granted.**—*Delaware*.—*Reybold v. Herdman*, 2 Del. Ch. 34.

Georgia.—*Bennett v. Woolfolk*, 15 Gr. 222.

Massachusetts.—*White v. Curtis*, 2 Gray (Mass.) 472.

Mississippi.—*Roberts v. Starke*, 47 Miss. 263.

South Carolina.—*McElwee v. Massey*, 10 Rich. Eq. (S. Car.) 377.

Tennessee.—*Jefferson v. Gaines*, 7 Baxt. (Tenn.) 368, in which case the court said: "The chancellor was correct in sustaining the demurrer on ground of misjoinder, but we do not think that the bill should have been dismissed, but the demurrer should have been sustained, and complainant directed or authorized to amend by filing separate bills, without new process as to the parties before the court, in pursuance of section 4326 of the code, or the case separated as might be necessary for the proper litigation and

adjudication of the rights of the parties."

United States.—*Price v. Coleman*, 21 Fed. Rep. 357. Compare *Sioux City First Nat. Bank v. Peavey*, 75 Fed. Rep. 154.

Ireland.—See *Johnston v. Anthony*, 2 Moll. 373.

The practice of allowing amendments for multifariousness or misjoinder prevails also under the code. *Wiesner v. Young*, 50 Minn. 21.

Amendment Abandoning Claim Which Made Bill Multifarious.—See article AMENDMENTS, vol. 1, p. 494.

⁵ *McElwee v. Massey*, 10 Rich. Eq. (S. Car.) 377.

⁶ *McIntosh v. Alexander*, 16 Ala. 87.

⁷ **Putting Complainant to His Election.**—*Marriott v. Givens*, 8 Ala. 694; *Junkins v. Lovelace*, 72 Ala. 303.

Thus, in *Chapin v. Sears*, 18 Fed. Rep. 814, where the bill sought partition and the settlement of a disputed legal title, the court, after deciding that it was multifarious, observed: "My first impression was to allow complainant to amend his bill, conforming it to the requirements of the statute when such a suit is brought, and to try the title in the pending action. But upon reflection I am of the opinion that the more proper course is to order the present bill to stand as a simple partition bill, and to give leave to the com-

such an objection has been sustained.¹ And in some jurisdictions it has never been the practice to allow an amendment as of course.² In any event an amendment which will result in making the bill multifarious will not be allowed.³

3. Dismissal. — Where no amendment is allowed the only course left is to dismiss the bill.⁴ So where the court *sua sponte* raises the objection of multifariousness it will generally dismiss the bill.⁵ When a dismissal is ordered it should be *in toto*, and not as to part of the bill.⁶ Dismissal should, however, as a rule, be without prejudice,⁷ and sometimes without costs.⁸

plaintiff, if he is in the peaceable possession of the premises, to institute another suit, under the provisions of the state statute, to ascertain and determine the title to the land."

1. *Johnston v. Anthony*, 2 Moll. 373; *Emans v. Emans*, 13 N. J. Eq. 205. In the former case the master of the rolls observed: "Upon a special case showing that the multifariousness can be separated, and is not mixed up with the rest of the record, the court gives leave to amend; but it is not a motion of course. A demurrer for multifariousness allowed puts the cause out of court, as it is generally applicable to the whole record; but as in this case the amendment sought is only in the prayer of the bill, and to add parties, this motion may be granted; that plaintiff may amend prayer, and add parties as he may be advised on usual terms, and also paying defendant the costs of this motion."

2. *Johnston v. Anthony*, 2 Moll. 373; *Swift v. Eckford*, 6 Paige (N. Y.) 22; *Boyd v. Hoyt*, 5 Paige (N. Y.) 65; *Shaffer v. Fetty*, 30 W. Va. 248.

"It is not a matter of course to permit a bill to be amended after the allowance of a demurrer for multifariousness, as the multifarious matter is generally such that it cannot be separated from the residue of the bill. And in this case, as the bill is sworn to, it is contrary to the practice of the court to permit it to be altered by striking out, as such an amendment to a sworn bill is not allowable except under very special circumstances. The demurrers must therefore be allowed, and the bill must be dismissed with costs, as to the parties who have demurred, but without prejudice to the future rights of the complainant in a new suit or suits against the proper parties." *Swift v. Eckford*, 6 Paige (N. Y.) 22.

3. Amendment Making Bill Multifarious. — *Jordan v. Jordan*, 16 Ga. 446; *Shaffer v. Fetty*, 30 W. Va. 269. In the latter case it was observed: "It is true, the original bill was perhaps not multifarious, but when amended, as it must be, it necessarily becomes so. And, as we will presently show, all that has been done in the court below must be done over, and none of the depositions or proceedings can be read or used in determining the cause if remanded, inasmuch as, we will presently see, all these depositions and proceedings were taken when the co-heirs with the plaintiff of Alpheus A. D. Fetty were not parties to the cause. As all the proceedings and proofs in the cause are thus useless, and the whole cause is to be started *de novo*, I can see no justice or convenience in permitting the plaintiff to pursue further the wrong course she has adopted by filing an amended bill uniting distinct matters against different defendants."

4. *Swift v. Eckford*, 6 Paige (N. Y.) 29; *Jerome v. Jerome*, 5 Conn. 352; *Wilson v. Wilson*, 23 Md. 162. And see cases cited in note 2, *supra*.

5. *Mattair v. Payne*, 15 Fla. 682; *Darcey v. Lake*, 46 Miss. 109.

6. *White v. White*, 5 Gill (Md.) 359; *Gibbs v. Claggett*, 2 Gill & J. (Md.) 14; *Boyd v. Hoyt*, 5 Paige (N. Y.) 65. See also *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 109.

7. *Williams v. Jackson*, 107 U. S. 478; *Shaffer v. Fetty*, 30 W. Va. 248; *Wilson v. Wilson*, 23 Md. 162.

8. *Wilson v. Wilson*, 23 Md. 162.

Part of Defendants. — In *Johnson v. Brown*, 2 Humph. (Tenn.) 327, it was held that the complainant may, on the sustaining of a demurrer, dismiss as to those defendants whose joinder created the objection.

MULTIPLICITY OF SUITS.

Equity Jurisdiction. — Sometimes where a number of persons have separate and individual claims or rights of action against the same person arising out of the same event or transaction, which involve or depend upon the same questions of law and similar matters of fact, a court of equity will exercise jurisdiction in order to prevent a multiplicity of suits, and thus in one proceeding give more substantial relief than could be afforded in numerous actions at law prosecuted by each individual separately. However, this jurisdiction is only exercised when the legal remedies are inadequate and cannot meet the ends of justice as effectively as those afforded by a court of equity, and a bill for that purpose will not be entertained unless it appears that there is a practical necessity for the interposition of the court to prevent vexatious litigation.¹ See generally article JURISDICTION, vol. 12, p. 162.

1. *Van Auken v. Dammeier*, 27 Oregon 150.

Scope of Article. — The conditions which will justify the interference of a court possessing equity powers to prevent a multiplicity of suits, by the restraint of pending or threatened litigation, cannot be stated with any degree of positiveness; therefore beyond reference to special articles in this work wherein the subject has been or hereafter may be treated, no more will here be attempted than to refer to some points of practice which have been passed on by the courts from time to time.

Consolidation of Actions. — As to the jurisdiction of equity to restrain the prosecution of separate actions, and to have the rights of the parties determined in a single suit, see article CONSOLIDATION OF ACTIONS, vol. 4, p. 690.

As to the Office of Creditors' Bills to prevent a multiplicity of suits by creditors, see article CREDITORS' BILLS, vol. 5, p. 536 *et seq.*

As to the Function of a Bill of Peace to invoke the aid of equity to stay separate suits involving the same right, or to prevent vexatious, inconclusive litigation, and to adjudicate finally the whole controversy, see article BILLS OF PEACE, vol. 3, p. 556.

Distinction between Bills of Peace and Bills to Prevent Multiplicity of Suits.

— A distinction is to be observed between bills for the prevention of multiplicity of suits and bills of peace, whose object is the suppression of useless and vexatious litigation, and cases where the real object of the relief sought is the consolidation of a number of suits of like nature, since in the former class of cases courts of equity may properly enjoin, but in the latter they will refuse to interfere. *Murphy v. Wilmington*, 6 Houst. (Del.) 108.

What Constitutes a Practical Necessity.

— Where the rights of several plaintiffs are purely legal and in themselves perfectly distinct, so that each party's case depends upon its own peculiar circumstances, and the relief demanded is a separate money judgment in favor of each plaintiff and against the defendant, there is no practical necessity for the interposition of a court of equity, and we can find no authority for holding that it will assume jurisdiction simply because the parties are numerous. A defendant is entitled to the constitutional right of trial by jury, of which he cannot be deprived because numerous parties are asserting claims against him, even though such claims may be founded upon the same ques-

Where the Court Has Once Acquired Jurisdiction there seems to be no good reason why suitable relief may not be administered for the final determination of pending or threatened controversies.¹

Each Case Judged by Itself.—It is impossible to set out or to characterize the conditions which will warrant action by a court sitting in equity to prevent a multiplicity of suits, but the necessity for such action must be judged of by the facts presented in each case.²

tions of law and fact. *Fellows v. Spaulding*, 141 Mass. 89.

Enforcement of Agreement to Pay Alimony.—In *Peterson v. Fleming*, 63 Ill. App. 357, a suit to enforce an agreement to pay alimony in definite sums at specified times, it was said: "All reasons that operate to confer jurisdiction in equity in cases where the remedy at law is incomplete or inadequate, or can only be had through a multiplicity of suits, seem to unite in favor of a court of equity being the proper forum for the enforcement of the agreement in question."

1. Where Jurisdiction Has Been Taken for Discovery suitable relief will be administered to avoid a multiplicity of suits. *Yates v. Stuart*, 39 W. Va. 124, adopting the language of *Lafever v. Billimy*, 5 W. Va. 33.

Decision of Matters Not in Issue.—Though the chancellor, having acquired jurisdiction of a subject, may, in order to prevent multiplicity of actions, do full justice between the parties, he is not warranted in deciding other matters between the parties, whether legal or equitable, having no connection with the subject conferring the jurisdiction. *Haggins v. Peck*, 10 B. Mon. (Ky.) 210.

One Decree to Avoid Multiplicity of Suits.—In *Ulman v. Jaeger*, 67 Fed. Rep. 980, a partition suit, the primary object of the bill was to annul and vacate certain tax deeds and thereby remove the cloud from the land sought to be partitioned. It was held that for the purpose of avoiding a multiplicity of suits, one decree could be entered vacating all the tax deeds.

2. See the various articles in the Am. and Eng. Encyc. of Law (2d ed.) wherein this subject is dealt with as a ground of equity jurisdiction.

Separate Demands on Same Instrument.—That one person is sued by two others holding separate demands, evidenced by the personal obligation of the former contained in the same writ-

ing, does not present such a case of multiplicity of suits as will justify equitable interference. *Druon v. Sullivan*, 66 Vt. 609.

Similar Defense to Several Suits.—In *Johnston v. Stone*, 71 Miss. 593, it appeared that, as one transaction, the complainant had sold real estate and personalty. He was sued by the defendant, the vendee, in three several suits, ejectment for the realty, replevin for the personal property, and replevin for the deed of conveyance of the land. The appellate court refused to interfere with the action of the court below in dissolving an injunction restraining the prosecution of the several suits and in consolidating them, although the bill averred a similar defense to all the suits, *i. e.*, a rescission of the sale and an adjustment of all the matters involved.

A Complaint by a Corporation against directors, for loss of corporate property occasioned by their negligence, which alleges that on account of the different periods of time during which the defendants were trustees of the corporation no adequate recovery of damages without a multiplicity of suits, can be had to reimburse the corporation, and that such loss can only be properly apportioned by an accounting, etc., presents a proper case for equitable cognizance to avoid multiplicity of suits, and to apportion the liabilities of the defendants. *Empire State Sav. Bank v. Beard*, 81 Hun (N. Y.) 184.

Where the Claims of the Defendants are derived from the same source, a suit in equity is the proper proceeding in which to litigate their rights, upon the familiar ground that by suing in equity all the defendants can be brought before the court in one action and a multiplicity of suits be thereby avoided. *Ulman v. Jaeger*, 67 Fed. Rep. 980.

Pending Several Suits by property owners against a railroad company to recover for losses sustained by fires set by sparks from one of its engines, the

Requisites of Bill or Complaint. — However, to justify the court in taking jurisdiction on this ground, the bill or complaint must contain specific allegations setting up the facts and circumstances relied on, that there may appear a necessity for equitable interference to prevent unnecessary, annoying, or harassing litigation. Mere conclusions will be insufficient,¹ and in the absence of any

company exhibited its bill to enjoin the prosecution of the suits, to bring in all the plaintiffs therein, and to have all the controversies settled in one suit in equity, and it was held that there was no jurisdiction to entertain the bill, because of the lack of community of interest of the several plaintiffs in the actions against the company. *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212.

Assessments in Numerous Taxing Districts. — In *Western Union Tel. Co. v. Norman*, 77 Fed. Rep. 13, a bill in equity by a telegraph company against the state auditor alleged that it was claimed that the defendant, unless restrained, would apportion and certify to the county clerks of more than sixty-eight counties of the state the proportionate amount of an assessment imposed by statute; that the county clerks would certify to each county, city, town, or taxing district in which the complainant did business, the portion thereof taxable in each of said cities, towns, or taxing districts in each of said counties for collection; that complainant would suffer irreparable injury, and would be subjected to a multiplicity of vexatious suits and prosecutions; and concluded with a prayer that it might not be subjected to the multiplicity of suits which would otherwise be necessary, that it might be spared irreparable injury, and that its property within the state might not be subjected to an illegal cloud and lien, but that an injunction *pendente lite* might be granted commanding the defendant to refrain from certifying the valuation or assessment, or any part thereof, to such clerks, and to refrain from collecting or attempting to collect any of such taxes until the final order, etc. There was held to be enough shown to warrant the interference of the court to prevent a multiplicity of suits.

Necessity of Alleging Defense Against Pending and Threatened Suits. — In *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 634, the bill was filed against three persons to restrain them from further prosecuting certain suits at

law, and it alleged that numerous other persons had announced their intention and were preparing to bring suits against the company for damages because of charges made by it against said persons in excess of the rates fixed by the railroad commission for the transportation of freight and passengers over its road, and that suits would continue to be brought so long as such rates were charged. The court said: "A reading of the bill discloses the fact that no community of title, or right, or joint interest in the subject-matter of the suit is alleged in the persons sought to be enjoined, but it does appear that there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind of relief asked against each individual person insisting on similar claims against appellee. In view of the fact that the bill fails to allege any sufficient defense either at law or in equity on the part of appellee against the suits instituted or threatened, it becomes unnecessary for us to decide whether or not its allegations are sufficient in other respects to justify the interposition of the court of chancery by injunction."

1. Threatened Suits by Others Against Same Defendants. — An allegation in a complaint to enforce a statutory liability of directors, which in substance charges that other parties are about to commence actions against the defendants for the purpose of recovering the amounts of their respective claims as creditors of the corporation, is sufficient to inform the court that a multiplicity of suits is threatened, and may be prevented if an action in equity, broad enough to secure the rights of all the parties, be prosecuted. *Bauer v. Platt*, 72 Hun (N. Y.) 326.

Expected Transfers of Securities for Purpose of Suits Thereon. — In a suit by a municipality to compel the surrender and cancellation of certain bonds issued in aid of the construction of a railroad, and for other relief, an averment in the bill that "there is a determination and expectation on the part

showing to support it, no presumption will be indulged that the complaining party will be prejudiced or will sustain injury because of the existing conditions.¹

of the defendants to make from time to time other collusive, fraudulent, and apparent transfers of the bonds and coupons, or a part of them, with a view of bringing suits thereon in the names of different persons assuming to be the owners thereof, against the complainant, from time to time, for the purpose of harassing and vexing the complainant," was held insufficient in itself to authorize equitable interference for the purpose of preventing a multiplicity of suits. *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46.

Threatened Action in Violation of Law. — If the allegations of the bill show that the threatened action which is sought to be restrained would be in violation of law, then the resort by the complaining party to a court of equity, for the purpose of preventing the commission of such threatened violation of his property rights, may be justified under the well-settled rule that a court of equity may take cognizance of any controversy when necessary to prevent a multiplicity of suits. *Sang Lung v. Jackson*, 85 Fed. Rep. 502.

Failure to Allege Threatened or Intended Vexatious Litigation. — A bill by assignees in insolvency to restrain several defendants from proving their claims against the debtor in the insolvency court, which sets out that numerous creditors have presented their several debts for proof in insolvency, which have not been passed on by the judge, and that they are all controlled and owned by one of the defendants — the same questions of law arising in each case — but which contains no allegation that the defendants threaten or intend to harass the plaintiffs by vexatious litigation, so that practically the whole controversy can be conven-

iently settled in the forum to which it belongs, presents no reason for restraining the defendants from pursuing the remedy provided by statute. *Fellows v. Spaulding*, 141 Mass. 89.

"Other Suits Threatened." — Where it appears that but two suits are pending, as to both of which clear and unembarrassed defenses at law are shown to exist, a bare statement in the bill that "other suits are threatened" is too vague and indefinite to add anything to the alleged ground for equitable interference, *i. e.*, the restraint of a multiplicity of suits. *Attalla Min., etc., Co. v. Winchester*, 102 Ala. 184.

Compensation Recoverable Only by Numerous Suits. — In *Lake Erie, etc., R. Co. v. Young*, 135 Ind. 426, an action to restrain a railroad company from making a construction which it was alleged would flood the plaintiff's land, the complaint, after detailing facts as to the location, the proposed construction, and its probable effect, stated that the damage would be continuous from year to year, and that the plaintiff would be compelled, in order to recover from the defendant compensation for the damage thus sustained, to bring numerous suits against the defendant. The complaint was held to be sufficient.

Exposure to Multiplicity of Suits. — A statement in a complaint against a state commissioner of excise to restrain the enforcement of a statute respecting the sale of intoxicating liquors, that such enforcement will expose the plaintiff to a multiplicity of suits, is not a statement of fact, but is a conclusion on the part of the pleader which is unavailable. *Balogh v. Lyman*, 6 N. Y. App. Div. 271.

1. *Balogh v. Lyman*, 6 N. Y. App. Div. 271.

MUNICIPAL CORPORATIONS.

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As to *Counties*, see article *COUNTIES*, vol. 5, p. 294.

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And consult the General Index to this work, title *MUNICIPAL CORPORATIONS*.

I. ACTIONS AND SUITS GENERALLY — 1. Form of Action. — A municipal corporation may sue and be sued in any form appropriate to the cause of action. Its liability does not, as respects the form of action, differ from that of a private corporation or an individual.¹

1. *Winslow v. Perquimans County*, 64 N. Car. 218. In this case the court said: "What will be the effect of the judgment, and how it is to be enforced, are questions not before us for decision and having no bearing on the form of the action. * * * The diverse forms of actions arose out of the diversity in the nature of the rights claimed and not out of any difference in the quality or kind of the defendants; if that difference is of any consequence at all, it only becomes so after the right has been ascertained by judgment and when the question is as to enforcing it. Of course, it is not disputed by any one that a corporation may be sued. But in the case of a corporation authorized to sue and be sued generally, why limit the quality to a single form of action? I do not think there is any authority for doing so, and this court has at least once sustained another action than mandamus against express municipal corpo-

rations, such as counties now are." *Citing Meares v. Wilmington*, 9 Ired. L. (N. Car.) 73; *Brown v. Washington*, 63 N. Car. 514.

Assumpsit. — In *Columbia v. Harrison*, 2 Treadw. (S. Car.) 215, it is held that the law implies a promise by every member of a corporation to pay all the sums required by its rules and by-laws, and where the corporation has not the means of enforcing payment it may maintain an assumpsit in the courts of law.

Upon City Orders. — In *Peterson v. Manistee*, 36 Mich. 8, it is held that an assumpsit will not lie against a city upon city orders if the charter provides that no money shall be drawn from the city treasurer unless it shall have been previously appropriated to the purpose for which it shall be drawn and also requires all orders to specify the purposes of the payment.

Quantum Meruit. — "There is no

2. Pleading Charter — Judicial Notice of Public Act. — Where a charter of a municipal corporation is a public act it need not be specially pleaded, since the court will take judicial notice thereof,¹ and in fact, according to some decisions, courts will take judicial notice of a charter of a municipal corporation without any recital of its provisions in the pleading, not only when such charter is a public law, but when its nature or purpose is public or general.²

Special Act Must Be Pleading. — According to other decisions, however, where a charter of a municipal corporation is not a public act, the court cannot take judicial notice thereof, and it should be specially pleaded.³

difficulty in bringing actions for *quantum meruit* against corporations any more than against individuals, so far as they are not guarded by charter against them. Where the city has had money or property belonging to others it may doubtless be compelled to answer." *Detroit v. Michigan Paving Co.*, 36 Mich. 335.

1. *Alabama*. — *Montgomery v. Wright*, 72 Ala. 411; *Albrittin v. Huntsville*, 60 Ala. 486; *Smoot v. Wetumpka*, 24 Ala. 121; *Case v. Mobile*, 30 Ala. 538; *Perryman v. Greenville*, 51 Ala. 510; *Montgomery v. Hughes*, 65 Ala. 201; *Selma v. Perkins*, 68 Ala. 145; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Montgomery v. Wright*, 72 Ala. 411.

Illinois. — *Potwin v. Johnson*, 108 Ill. 70; *People v. Wilson*, 3 Ill. App. 368.

Minnesota. — *State v. Tosney*, 26 Minn. 262.

Missouri. — *Wisdom v. Wabash, etc.*, R. Co., 19 Mo. App. 324; *Butler v. Robinson*, 75 Mo. 194; *Hopkins v. Kansas City, etc.*, R. Co., 79 Mo. 98; *O'Brien v. Wabash, etc.*, R. Co., 21 Mo. App. 12; *Savannah v. Dickey*, 33 Mo. App. 522.

Texas. — *Dwyer v. Brenham*, 65 Tex. 526.

Wisconsin. — *Durch v. Chippewa County*, 60 Wis. 227; *Smith v. Janesville*, 52 Wis. 680.

2. *People v. Wilson*, 5 Johns. (N. Y.) 368. See also *State v. Tosney*, 26 Minn. 262.

Acceptance of Charter. — Where the original charter of a town provided that it should take effect when accepted by the vote of citizens and a mandatory act was subsequently passed wherein the incorporation of the town was expressly referred to, the latter act being

declared to be a public act, it was held that the charter granted by the original act was virtually declared to have been accepted by the citizens of the town, and of this courts would take judicial notice. *People v. Wilson*, 3 Ill. App. 368.

Presumption as to Incorporation. — In *Indiana*, where a city is a party to a suit, and nothing is shown to the contrary, the presumption is indulged that such city is incorporated under the law of the state for the incorporation of cities. *House v. Greensburg*, 93 Ind. 533. See also *Lowrey v. Delphi*, 55 Ind. 250; *Brazil v. McBride*, 69 Ind. 244; *Bessonies v. Indianapolis*, 71 Ind. 189.

Striking Out Recital of Provisions. — In *Durch v. Chippewa County*, 60 Wis. 227, it is held that since a city charter is a public law of which courts take judicial notice, a recitation of its provisions in a complaint may be stricken out as redundant.

3. *Wisdom v. Wabash, etc.*, R. Co., 19 Mo. App. 324; *O'Brien v. Wabash, etc.*, R. Co., 21 Mo. App. 12; *Butler v. Robinson*, 75 Mo. 194; *Hopkins v. Kansas City, etc.*, R. Co., 79 Mo. 98. See also *Mitchell v. Clinton*, 99 Mo. 153.

Averment of Organization under Particular Act. — In *Swamp Land Dist. No. 121 v. Haggin*, 64 Cal. 204, it is held that a swamp land district organized under the Act of 1868 is governed by that act and cannot levy and collect assessments in the manner provided by the political code, and in an action by such district, the right to proceed under a particular act being jurisdictional, it must be shown by the complaint. In this case the court said: "If the mode of levying the assessment must be found in the statute, and if the

3. Use of Corporate Name — a. IN GENERAL. — In actions by or against municipal corporations, the corporate name conferred by the charter of such municipal corporation must be used,¹ unless exceptions are made by statute.² A substantial misnomer in the pleading will be fatal on demurrer.³

A Suit Against a Municipal Corporation should not be brought against its officers or agents, but against it in its corporate name.⁴

Names of Officers Stricken Out. — Where, however, both a corporate name and individual names are set forth, the individual names may properly be stricken out as surplusage.⁵

mode differs in case the corporation was formed under one statute from that which may be pursued by a corporation formed under another statute, it would seem to follow that a complaint is insufficient unless it appears from it that the corporation was formed under the law which authorizes the levy of the assessment in the manner in which it is alleged to have been levied. The power is measured by the mode, since the statute under which the corporation exists limits the exercise of the power to the mode therein provided. The right to proceed under any particular act is jurisdictional, and must be pleaded."

1. *Powers v. Decatur*, 54 Ala. 214; *Porter v. Blakely*, 1 Root (Conn.) 440; *Boon v. Jackson*, 98 Ga. 490; *Romeo v. Chapman*, 2 Mich. 179; *Barker v. Phelps*, 39 Mo. App. 288; *Young v. Barden*, 90 N. Car. 424; *Brittain v. Newland*, 2 Dev. & B. L. (N. Car.) 363; *Wilson v. Huntingdon County*, 7 W. & S. (Pa.) 197; *Cambridge University v. York*, 10 Mod. 208.

Names of Officials. — In *Powers v. Decatur*, 54 Ala. 214, which was an action by a town, the complaint was demurred to on the ground that it did not set forth the names of the individuals who filled the offices of mayor and councilmen of the town indicated. The appellate court held that such demurrer was properly overruled, saying: "The plaintiff, * * * being created by statute a corporation, is in contemplation of law a person, and like a natural person may sue and be sued in its proper name. And its suit, in this instance, was correctly brought in the name conferred upon it by its charter of incorporation. The officials in this municipal body were not the individuals who composed it. It embraced the whole community of citizens. The demurrer was, therefore, properly overruled."

"Town of Jackson." — A city created under the name and style of "The Town of Jackson," with power to contract and be contracted with, and to sue and be sued, plead and be impleaded under such name, cannot be sued under the name of "The Mayor and Council of the Town of Jackson," and a declaration describing the defendants in the words last quoted, though it may have been designed as an action against the municipality, should be dismissed on demurrer. *Boon v. Jackson*, 98 Ga. 490.

"Village of Romeo." — In *Romeo v. Chapman*, 2 Mich. 179, it was held that under an act incorporating the village of Romeo a suit to recover a penalty should have been brought in the name of "The Village of Romeo," instead of in the name of the president and trustees of the village.

2. *Merrill v. Kalamazoo*, 35 Mich. 211.

3. *Boon v. Jackson*, 98 Ga. 490. See also *Powers v. Decatur*, 54 Ala. 214.

4. *Young v. Barden*, 90 N. Car. 424; *Wilson v. Huntingdon County*, 7 W. & S. (Pa.) 197.

Officers Are Mere Agents. — In *Young v. Barden*, 90 N. Car. 424, the court, in holding that the action was improperly brought against the officers of a town, said: "The action is not against the corporation, but against the individuals whose officers and agents they are. Any judgment that might be rendered in it would not be against the corporation, because it has not been sued."

5. *Shoudy v. School Directors*, 32 Ill. 290; *Botkin v. Osborne*, 39 Ill. 101, in which latter case it was held that where a suit was instituted against the individual directors of a school district, but they were described as a body politic and corporation, and their corporate name was also given, such action was not improperly brought, but that the

b. IN ACTION ON OBLIGATION EXECUTED IN WRONG NAME.

— **A Municipal Corporation May Sue in Its True Name** on an obligation executed to it by a wrong name, but should aver in its pleading that the defendant bound himself to the plaintiff by the name contained in such obligation.¹

c. AFTER CHANGE OF NAME — **Action in New Name.** — After a lawful change of the corporate name not affecting the corporation's identity, a suit by or against a municipal corporation should as a rule be brought in the new name.²

4. Corporate Existence — *a.* **AVERMENT OF** — **The General Rule Stated.** — In accordance with the general rule that judicial notice will be taken of the incorporation of a municipality, in an action by or against a municipal corporation described by its corporate name, it is unnecessary to aver its corporate existence.³

individual names might be regarded as surplusage.

In *Yocum v. Waynesville*, 39 Ill. 220, an action under a penal statute was commenced by named persons describing themselves as "commissioners of highways of the town of Waynesville," and it was held that the Circuit Court properly allowed the plaintiff to strike out, as surplusage, all the description preceding the words "the town of Waynesville."

Misnomer Cured by Rendition of Judgment Without Objection. — In *Kingfisher v. Pratt*, 4 Okla. 284, it is held that while a municipal corporation should always be sued in its proper name, yet a defect in suing a municipality by an incorrect name is cured by the defendant answering, going to trial without objection, and the rendition of judgment against it in its proper name.

1. *Ft. Wayne v. Jackson*, 7 Blackf. (Ind.) 36.

2. *Ft. Wayne v. Jackson*, 7 Blackf. (Ind.) 36; *Colchester v. Seaber*, 3 Burr. 1866; *Reg. v. Ipswich*, 2 Ld. Raym. 1232.

Illustration. — Where the corporation of "The President and Trustees of the Town of Fort Wayne" is merged in the corporation of "The City of Fort Wayne," a bond executed to the former corporation is transferred to and vested in the latter; and a suit on such bond should be brought in the name of "The City of Fort Wayne." *Ft. Wayne v. Jackson*, 7 Blackf. (Ind.) 36.

3. *Montgomery v. Wright*, 72 Ala. 411; *Crockett v. Barre*, 66 Vt. 269; *Rock Island v. Cuinely*, 126 Ill. 408.

Reorganized City. — In *Rock Island*

v. Cuinely, 126 Ill. 408, which was an action for personal injuries against a city reorganized under the City and Village Act of Illinois, art. 1, § 6, the court said: "We are required to take judicial notice of the municipality, under the general incorporation law, whether originally organized thereunder or a change has been effected from its incorporation by special charter to organization under this general act for the incorporation of cities and villages. And it can make no difference whether the city is seeking to enforce some municipal right in the exercise of its franchise, or it is sought to charge the failure to perform its corporate duty."

Description by Corporate Name Sufficient. — In *Montgomery v. Wright*, 72 Ala. 411, it is held that as a general rule, in an action against a municipal corporation which is described by its corporate name, it need not be averred that the defendant is a body corporate, since the court will take judicial notice of that fact and of the identity of the defendant as such corporation.

Incorporation of School Township. — In *Morris v. School Trustees*, 15 Ill. 266, it was held that it is unnecessary in an action of attachment by the trustees of a school township to allege in the declaration that the township has been regularly incorporated, if the suit is brought in the corporate name of the township. In this case the court said: "It is alleged that the declaration was defective in not averring the incorporation of the township. The statute provides that a township, upon the election of trustees, 'shall be a body corporate and politic, by the name and

Date of Incorporation. — If, however, a city alleges that it is a municipal corporation, and has been for a certain number of years, this does not fix the date of the incorporation nor prevent proof of the true date.¹

b. ADMISSION OF. — By Appearing and Defending in its corporate name a municipal corporation admits its corporate existence.²

Admission by the Plaintiff. — The mere fact that an action is brought against a town in its corporate name to enjoin the collection of taxes does not admit the legal existence of the defendant.³

style of trustees of schools,' etc. This suit was brought in the corporate name of the township, and the declaration was upon a note made to the use of the township, with an averment that the defendant became liable to pay the same to the plaintiffs. That was sufficient. It was not necessary to allege that the township had been regularly incorporated. It was enough to sue in the name of the corporation, without showing on the face of the declaration how it came into existence. Even if the suit had been contested, it would have required a plea of *nul tiel corporation* to put in issue the corporation of the township." *Citing McIntire v. Preston*, 10 Ill. 48.

Sufficient Averment of Corporate Existence — Description of Village. — In *Crockett v. Barre*, 66 Vt. 269, the court held that the corporate existence of the defendant was sufficiently alleged by a declaration describing the defendant as "the village of Barre, a corporation existing under the laws of this state." In this case the court said: "A distinct and positive averment of the existence of an artificial person is usually all that is required."

In an action against a village a declaration which describes the defendant as "the village of North Muskegon, a municipal corporation of the state of Michigan," sufficiently alleges its corporate existence. *Clark v. North Muskegon*, 88 Mich. 308.

A Complaint by a Town alleging that the defendant sold liquor within the corporate limits of such town sufficiently avers that the plaintiff is a municipal corporation. *Smith v. Warrior*, 99 Ala. 481.

In an Action Against a City, its organization and corporate existence are sufficiently alleged by a statement as to the public use of streets therein "ever since the organization of said city, in August, A. D. 1887, as a city of

the third class." *Lewis v. Eskridge*, 52 Kan. 282, 51 Kan. 376.

1. *Eustis v. Henriette*, (Tex. Civ. App. 1896) 37 S. W. Rep. 632.

2. *Eubank v. Edina*, 88 Mo. 650. In this case the court said: "Where a public municipal corporation appears and makes an affirmative defense based upon the fact that it is a corporation, we see no reason why the general rule as to private corporations should not be applied. Besides this, the mayor and other officers testified as to their official capacity; a pamphlet purporting to be the ordinances of the city was put in evidence. All this was done without question or objection. These ordinances show that the defendant has a mayor, board of aldermen, and such other officers as cities of the fourth class have, and the proof was ample, not only that defendant was a municipal corporation, but that it was a city of the fourth class, though better evidence might have been offered if called for."

As to the effect of appearance as an admission, see article APPEARANCES, vol. 2, p. 588.

3. *Hornbrook v. Elm Grove*, 40 W. Va. 543, wherein the court said: "Counsel for appellees suggests that this suit is wrongly brought against the town, and should be only against its officers, and that in suing the town its continued existence is admitted. *People v. Spring Valley*, 129 Ill. 169, supports this contention. But reputable authorities cited in it say that there is a distinction between private and municipal corporations in this respect, and that an information against a municipal corporation by its corporate name, even where its corporate existence is challenged, is rightly brought, as it is a corporation *de facto*, though not *de jure*. *State v. Bradford*, 32 Vt. 50; *People v. Riverside*, 66 Cal. 288. In the latter case other California cases are cited justifying that rule. In *State v.*

c. COLLATERAL ATTACK UPON — Can Be Made by Quo Warranto Only. — If a municipal corporation is acting under color of law, and is recognized as such by the state, the question as to its corporate existence cannot be questioned collaterally,¹ even though the incorporation may be affected by constitutional provisions.² This question can be raised only in an action or proceeding in the nature of quo warranto.³

Brown, 31 N. J. L. 355, an action to have it adjudged that a corporation was never legally constituted, it was held that the proceeding must be one that will bring the corporation itself directly before the court. It occurs to me that, even in a proceeding to directly test the existence of a corporation, it ought to be a party by its assumed corporate name, as its existence as such is the very thing to be tried — its right to live and act in that name — and that its lawful existence is not admitted simply by impleading it in that name, when the pleading denies it. If so, a suit like this to enjoin taxes assessed in the name of a corporation is more properly brought against it as a party, and it does not estop the plaintiff from contesting its validity, so far as this objection goes."

1. *Arkansas*. — *State v. Leatherman*, 38 Ark. 81; *Searcy v. Yarnell*, 47 Ark. 269.

Illinois. — *Tisdale v. Minonk*, 46 Ill. 9; *Kettering v. Jacksonville*, 50 Ill. 39; *Geneva v. Cole*, 61 Ill. 397; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257.

Kansas. — *Matter of Short*, 47 Kan. 250; *Voss v. Union School Dist. No. 11*, 18 Kan. 467; *School Dist. No. 25 v. State*, 29 Kan. 57; *Back v. Carpenter*, 29 Kan. 349; *Ritchie v. Mulvane*, 39 Kan. 241; *Mendenhall v. Burton*, 42 Kan. 570.

Michigan. — *People v. Maynard*, 15 Mich. 470; *Stuart v. School Dist. No. 1*, 30 Mich. 69; *Bird v. Perkins*, 33 Mich. 28.

Missouri. — *Certain Slough Ponds v. Shields*, 62 Mo. 247; *State v. Fuller*, 96 Mo. 165; *Fredericktown v. Fox*, 84 Mo. 59; *Pierce v. Lutesville*, 25 Mo. App. 317.

Nebraska. — *Arapahoe v. Albee*, 24 Neb. 242.

New Hampshire. — *Bow v. Allentown*, 34 N. H. 351.

North Carolina. — *Henderson v. Davis*, 106 N. Car. 88.

Tennessee. — *Speck v. State*, 7 Baxt.

(Tenn.) 46; *Ford v. Farmer*, 9 Humph. (Tenn.) 152.

Wisconsin. — *Sherry v. Gilmore*, 58 Wis. 324; *Swain v. Comstock*, 18 Wis. 463.

United States. — *Austrian v. Guy*, 21 Fed. Rep. 500; *Hill v. Kahoka*, 35 Fed. Rep. 32.

Illustration. — Thus, for example, in a prosecution for assault with the intent to kill the marshal of a city of the fourth class, the defendant can not interpose the defense that such city was not legally incorporated. *State v. Fuller*, 96 Mo. 165.

Denial of Corporate Existence under Oath. — In *Pierce v. Lutesville*, 25 Mo. App. 317, the court said: "There is no force in the objection that the plaintiff failed to prove that the defendant had been duly incorporated. The defendant was sued as a corporation, and the allegation that it was a corporation was not denied on oath, as required by the Act of March 15, 1883, amending Revised Statutes, § 3653. The view that the statute applies only to private corporations is not sound. The reason of the rule which prohibits the existence of a *de facto* corporation from being contested in a private action of this kind, and which prescribes that it can only be done in a proceeding by quo warranto by the state, applies with equal force to municipal as to private corporations; and our Supreme Court, in stating and applying the rule, cite adjudications in respect of both kinds of corporations indifferently."

2. *Certain Slough Ponds v. Shields*, 62 Mo. 247. In this case the court said: "The rule would not be different if the constitution itself prescribed the manner of incorporation. Even in such a case proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state; and private parties could not enter upon any question of regularity."

3. *State v. Leatherman*, 38 Ark. 81; *Searcy v. Yarnell*, 47 Ark. 269; *Matter*

II. ACTIONS AGAINST MUNICIPAL CORPORATIONS — 1, Jurisdiction and Venue — a. IN GENERAL — Venue. — Actions against municipal corporations, being local and not transitory, must be brought in the courts of the county where such corporations are situated.¹ Courts of other counties have no jurisdiction of suits

of Short, 47 Kan. 250; *Voss v. Union School Dist. No. 11*, 18 Kan. 467; *Certain Slough Ponds v. Shields*, 62 Mo. 247; *Pierce v. Lutesville*, 25 Mo. App. 317; *People v. Carpenter*, 24 N. Y. 86. 1. *California*. — *Buck v. Eureka*, 97 Cal. 135.

Michigan. — *Pack v. Greenbush Tp.*, 62 Mich. 122.

New York. — *Getman v. New York*, 66 Hun (N. Y.) 236; *Brooklyn v. New York*, 25 Hun (N. Y.) 612.

North Carolina. — *Jones v. Statesville*, 97 N. Car. 86; *Alexander v. McDowell County*, 67 N. Car. 330; *Johnston v. Cleveland County*, 67 N. Car. 101; *Jones v. Bladen County*, 69 N. Car. 412; *Steele v. Rutherford County*, 70 N. Car. 137.

Pennsylvania. — *Heckscher v. Philadelphia*, (Pa. 1887) 9 Atl. Rep. 281; *Lehigh County v. Kleckner*, 5 W. & S. (Pa.) 181; *Oil City v. McAboy*, 74 Pa. St. 249; *Potts v. Pittsburgh*, 14 W. N. C. (Pa.) 38.

Washington. — *North Yakima v. Superior Ct.*, 4 Wash. 655.

Residence of Municipal Corporations. — In *Buck v. Eureka*, 97 Cal. 135, the court, in holding that a municipal corporation is a resident of the county wherein its territory lies and all its constituents reside, said: "It is argued that a municipal corporation cannot be said to reside anywhere, because it is an entity incapable of having a residence. This is undoubtedly true in the ordinary and restricted sense of the word 'residence.' But in this respect a municipal corporation occupies a position at least as favorable as an ordinary trading corporation, and it is settled law in this state that a domestic trading corporation, within the meaning of this statute, resides in the county where it has its principal place of business; * * * and if so, a municipal corporation *a fortiori* resides where its territory is, and where all its constituents reside."

Venue Local in Action Against County. — The county can only be sued in the courts of the county itself; the courts of other counties have no jurisdiction.

Lehigh County v. Kleckner, 5 W. & S. (Pa.) 181.

Confession on Warrant of Attorney. — A borough in Venango county, Pennsylvania, was authorized to contract a debt and issue bonds for its payment; it issued bonds with warrants of attorney, and judgment was entered on one in the District Court of Allegheny county. It was held that, the defendant being a municipal corporation, that court had no jurisdiction and the judgment was invalid, although the warrant was to "any attorney of any court of record," etc. This did not authorize the entry, it being a question of the jurisdiction of the court, and consent could not give jurisdiction. *Oil City v. McAboy*, 74 Pa. St. 249.

Distinction Between Suits By and Against Municipalities. — In *Lehigh County v. Kleckner*, 5 W. & S. (Pa.) 181, the court said: "This is the first time, at common law, a right has been asserted to sue a public municipal corporation except in the county where it is located. Although the action may be transitory, yet the forum where suit is brought against the corporation is local. At a very early period after the adoption of the constitution, it was ruled by the courts of the United States that a state was subject to suit by a citizen of another state; and yet it never entered into the mind of any person that the state of Maine, for example, was amenable to the courts of the United States in the state of Georgia. And this may serve to show the distinction between a suit brought against or in favor of a corporation. The latter must be brought against the person wherever he resides or may be found, whereas there is no necessity to apply the principle to the latter, because a corporation is local in its character. It does not follow that because they may bring a suit in another county the same rule may be applied to them when defendant. The reason is not the same, and therefore the law has always been understood to be otherwise. The argument derived from the act

against them unless such jurisdiction is conferred by express legislative provision.¹

Municipality in Two Counties. — Where a municipality is located partly in each of two counties it may be sued in either at the plaintiff's election.²

b. CHANGE OF VENUE — Municipal Corporation May Demand. — When an action which should have been brought against a municipal corporation in the county of its residence is brought outside of such county, the municipal corporation has a right to demand a transfer of the cause to the county of its residence.³

which makes counties and townships bodies corporate, with power to sue and be sued, amounts to nothing; for it only, in these respects, places them on the same footing of other municipal corporations, which have never been liable to action except in the courts of the county where situated. But it is said that a county ought to be an exception because the jurors and some of the judges are or may be interested. But the interest of each individual, in a great majority of cases, is so trifling, that experience has taught us that this objection is more fanciful than real."

1. *North Yakima v. Superior Ct.*, 4 Wash. 655.

Jurisdiction Does Not Follow Person of Officers. — In *Pack v. Greenbush Tp.*, 62 Mich. 122, it was said: "There is no provision of law that we are aware of, and certainly our attention has been called to none, making the right of service and jurisdiction of the court follow the persons of public officers wherever they may go, beyond the municipalities for which they were elected or chosen. Until the legislature shall otherwise direct, a township cannot be sued by service of the writ made upon its supervisor outside of the county in which the township is located. Public policy, as well as public convenience, requires that when claims are to be prosecuted against a township it should be done at least within the county whereof the township constitutes a part. Were it otherwise, a township located in the southeast corner of the state might find itself compelled to litigate a claim made against it by a party or private corporation located in the extreme northwestern corner of the upper peninsula, if the supervisors of the former should, for any reason, chance to be found sojourning in the county of Ontonagon."

Remedy by Writ of Prohibition. — Mu-

nicipal corporations being subject to suit only in the county in which they are situated, where the court of another county attempts to proceed in such action, since it has jurisdiction neither of the subject matter nor of the person of the defendant, the defendant against whom such proceeding is had is clearly entitled to a writ of prohibition. *North Yakima v. Superior Ct.*, 4 Wash. 655. In this case, which was a proceeding by which the petitioner sought to prohibit the Superior Court of King county from proceeding in a certain action therein pending against the city of North Yakima, on the ground that said court had no jurisdiction, the court, in holding that such writ must issue, said: "Some attempt is made in the argument of the respondent to show that there had been such an appearance and waiver of its rights on the part of the defendant in said action as to estop it from asserting its rights in this proceeding, but we are unable to agree with his contention in this regard. We think the proceedings, fairly construed, show that from the first the defendant in said action objected to the jurisdiction of the court, and has been constantly objecting thereto. It follows that the Superior Court of King county is attempting to proceed in an action wherein it has neither jurisdiction of the subject matter nor of the person of the defendant, and in such case the party against whom such a proceeding is had is clearly entitled to the writ of prohibition." And see generally article PROHIBITION.

2. *Fox v. Fostoria*, 14 Ohio Cir. Ct. Rep. 471.

3. *Buck v. Eureka*, 97 Cal. 135; *Clarke v. Lyon County*, 8 Nev. 185; *Getman v. New York*, 66 Hun (N. Y.) 236; *Brooklyn v. New York*, 25 Hun (N. Y.) 612; *Jones v. Statesville*, 97

Dismissal for Want of Jurisdiction. — According to some decisions it is held that if suits against a municipal corporation are commenced in any other county than that of its residence, they will be dismissed on motion for want of jurisdiction.¹

Waiver of Error as to Venue. — If no motion for change of venue is made, the action, though local, may be tried in the county designated in the complaint as the place of trial.²

c. JURISDICTION AS AFFECTED BY CHANGE OF CORPORATION — **Change of Town into City.** — Where, pending an action against a town, such town is changed into a city by an act of the legislature, the court has the same jurisdiction over the city as it would have had over the town.³

2. Parties — Individual Inhabitants Not Parties. — In an action against a municipal corporation, the individual inhabitants thereof are not proper parties,⁴ even though their property may be taken to satisfy any judgment which may be rendered against the corporation.⁵

Right to Appear and Defend. — Such individual inhabitants have not the right to appear in defense of an action against the municipal

N. Car. 86; Johnston v. Cleaveland County, 67 N. Car. 101; Alexander v. McDowell County, 67 N. Car. 330; Jones v. Bladen County, 69 N. Car. 412; Steele v. Rutherford County, 70 N. Car. 137. See also, in general, article CHANGE OF VENUE, vol. 4, p. 373.

Change of Venue Not Discretionary with Court. — In Jones v. Statesville, 97 N. Car. 86, where an action was brought in C. county against the town of S., situated in I. county, to recover damages for injuries sustained in that county through the negligence of the defendant's officers and agents, it was held that the court "must," upon a written demand of the defendant, change the place of trial to the proper county, although the Code N. Car., § 195, reads "may."

1. North Yakima v. Superior Ct., 4 Wash. 655.

2. Getman v. New York, 66 Hun (N. Y.) 236.

Waiver of Change of Venue. — Where a county was sued in a judicial district of which it did not form a part, and appeared and answered without presenting any objection, it thereby waived its right to a change of venue and trial in its own judicial district. Clarke v. Lyon County, 8 Nev. 181. In this case the court said: "An action against a county is a civil suit, and all the proceedings had therein, in the absence of any special provision in the

act giving the right to sue, are to be governed by the provisions of the Civil Practice Act. Section 21 of this act provides that 'if the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county.' The defendant, when served with process, appeared and answered plaintiff's complaint without presenting any objection to the jurisdiction of the court, thereby waiving its right to avail itself of the privileges given in said section."

3. Olney v. Harvey, 50 Ill. 453.

4. Chandler v. Railroad Com'rs, 141 Mass. 208; Lane v. Fourth School Dist., 10 Met. (Mass.) 462.

Members of School Districts. — In Lane v. Fourth School Dist., 10 Met. (Mass.) 462, it is held that individual parties of a school district have no right to appear and be heard in defense of an action against the district.

5. Chandler v. Railroad Com'rs, 141 Mass. 208. In this case the court said: "In a suit against a town or other municipal corporation, the individual inhabitants are not parties and cannot be made parties, although their property may be taken to satisfy the judgment, if any, that is rendered against the corporation."

Actions Against. MUNICIPAL CORPORATIONS. Process Against.

corporation.¹

3. Process Against Municipal Corporations — a. FORM. — All process against a municipal corporation should run against it in its corporate name, where its charter so requires.²

b. SERVICE — (1) Necessity of. — As in the case of individuals, process against municipal corporations must be properly served in order to confer jurisdiction,³ and a defective service of process confers no jurisdiction so as to support a judgment against the corporation by default.⁴

Elusion of Process. — The fact that service of process upon a municipal corporation is impossible, by reason of the intentional elusion of the proper officers, will not prevent the running of the statute of limitations.⁵

(2) Waiver. — It has been held that even where there is no proper service of process upon a municipal corporation, a general appearance to the suit by the proper officer or corporation

1. *Lane v. Fourth School Dist.*, 10 Met. (Mass.) 462.

Actions Against Town. — Since the town council is a continuing body, it is not necessary to bring into a suit against it members newly elected. *Matteson v. Whaley*, 19 R. I. 648.

2. *Menominee v. Menominee Circuit Judge*, 81 Mich. 577, holding that "the filing and serving of the declaration is in the nature of process to bring the defendant into court."

3. *Mariner v. Waterloo*, 75 Wis. 438; *Watertown v. Robinson*, 69 Wis. 230.

4. *Mariner v. Waterloo*, 75 Wis. 438; *Watertown v. Robinson*, 69 Wis. 230; *Cloud v. Pierce City*, 86 Mo. 357.

Suit Commenced by Declaration. — In *Michigan* it is held that suits may be commenced by declaration against municipal corporations, even where the charter of a city provides that all process against the city shall be served by leaving a certified copy with one of three designated officers the prescribed time before the day of appearance mentioned therein, the declaration in such a case being held to be "process" within the meaning of the city charter. *Menominee v. Menominee Circuit Judge*, 81 Mich. 577. In this case the court applied to municipal corporations a section of the Michigan statute which provides that suits against corporations may be commenced by original summons or by declaration in the same manner that personal actions may be commenced against individuals.

5. *Amy v. Watertown*, 130 U. S. 320; *Knowlton v. Watertown*, 130 U. S. 327.

"Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in case where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. *Wilkinson on Limitation* 40; *Hall v. Wyborn*, 1 Show. 98. This difficulty was remedied by the Act of 4 and 5 Anne, c. 16, § 19, which declares that if any person against whom there shall be any cause of action be at the time of such action accrued beyond the seas, the action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of inability to serve process occasioned by the defendant's absence from the state. It has provided for no other case of inability to make service. If this is an omission, the courts cannot supply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping

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operates as a waiver of service of process, and is binding upon the corporation.¹

(3) *Upon Whom Served* — **Mayor or Other Chief Officer.** — In the absence of statutory provision regulating the service of process upon municipal corporations, the manner of service remains as at common law, and in suits against cities or towns must be upon the mayor or other chief officer.²

Statute and Charter of Corporation. — As a rule, however, the statutes of the state, as well as the charter of the corporation itself, designate the proper persons upon whom service of process in suits against a municipal corporation may be made.³

Statutory Method Must Be Followed. — The mode of service thus prescribed is exclusive,⁴ and jurisdiction of a municipal corporation

it alive." *Amy v. Watertown*, 130 U.S. 320.

1. *North Lawrence v. Hoysradt*, 6 Kan. 170. See also *Mariner v. Waterloo*, 75 Wis. 438.

Appearance by Mayor. — In *North Lawrence v. Hoysradt*, 6 Kan. 170, suit was brought in a justice's court against a municipal corporation, and there was no regular service of summons, but instead thereof the mayor appeared to such suit in behalf of the corporation, and it was held that such appearance was authorized by law and bound the city. In this case the court held that "whether summons is served upon the mayor of a city and such city is thereby duly brought into court, * * * or whether such mayor, in his official capacity, goes into court and makes an appearance for the city, as it would seem might be done under said section 9, and thereby binds the city, the result is and cannot be otherwise than practically the same. The city is in court, either by and through the service of process made upon or by the official, voluntary act of the same officer, according as the one course or the other be followed. What difference or disadvantage then can result to the city from the employment of the one way or the other of getting her into court? The notice to the city is certainly no more effective by the service of summons, regularly issued, than it is if such summons be waived and an appearance be entered by the officer upon whom such service would otherwise be made; nor would the court be better advised as to the fact of notice having been given in the former case than he would be in the latter."

2. *People v. Cairo*, 50 Ill. 154; *Cloud*

v. Pierce City, 86 Mo. 357; 1 Tidd's Pr. 116.

Record Must Show Relation of Officer to Corporation. — In *Cloud v. Pierce City*, 86 Mo. 357, the court said: "At common law, process was served on a corporation through its mayor or other head officer (1 Tidd 121), as being the 'most visible part of the corporation.' The judgment rendered in this case was by default. In order to support such a judgment, it must appear of record that the person who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667. Nothing of this kind appears in this record going to show the service of process valid; and clearly it possesses no validity unless shown to be warranted by statute."

3. *Cloud v. Pierce City*, 86 Mo. 357; *Weil v. Greene County*, 69 Mo. 281; *Glencoe v. People*, 78 Ill. 382; *North Lawrence v. Hoysradt*, 6 Kan. 170; *Pack v. Greenbush Tp.*, 62 Mich. 122; *Watertown v. Robinson*, 69 Wis. 230; *Mariner v. Waterloo*, 75 Wis. 438; *Stabler v. Alexandria*, 42 Fed. Rep. 490.

Effect of Charter Provision on General Law. — In *Stabler v. Alexandria*, 42 Fed. Rep. 490, it is held that, as the charter of the village of Alexandria provides that in any suit against the village service of process shall be made by leaving a copy with the recorder, the general law of the state of *Minnesota*, providing that service of summons may be made on the mayor or chief executive officer of the corporation, does not apply.

4. *Weil v. Greene County*, 69 Mo. 281.

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cannot be acquired by service of process upon any other than the prescribed officer,¹ or, where service is required upon two or more designated officers, by service upon one of them only.²

1. *Watertown v. Robinson*, 69 Wis. 230; *Glencoe v. People*, 78 Ill. 382; *Charleston v. Lunenburg*, 21 Vt. 488; *Amy v. Watertown*, 130 U. S. 301; *Alexandria v. Fairfax*, 95 U. S. 774; *Sacramento v. Fowle*, 21 Wall. (U. S.) 119.

Vacancy in Office of Mayor.—In *Watertown v. Robinson*, 69 Wis. 230, it was held that since under the charter of the city of Watertown, the mayor is the only officer upon whom service of process against the city can legally be made, when there is a vacancy in that office, and there is no president or presiding officer of the common council, a service of process upon the chairman of the board of street commissioners and upon the city clerk will not confer jurisdiction of the city so as to support a judgment by default against it. In this case the court said: "The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made by unwarrantable construction not contemplated by the statute."

Service on Citizen Insufficient.—"An incorporated city is not an individual, and service of notice or process on one of its citizens is not service on it. It has its officers who speak and act for it by authority of law; and some one of these officers, either by an express statutory provision or by the nature of their functions, is the proper person on whom all notices and processes necessary to bind it by judicial proceedings must be served." *Alexandria v. Fairfax*, 95 U. S. 774.

Service upon Officers After Resignation.—Where it is provided by statute that officers shall continue to perform the duties of their office until their successors are qualified, service of process may be made upon municipal officers whose terms have expired, but whose successors have not been elected. *Jones v. Jefferson*, 66 Tex. 576, in which case the object of the failure to elect officers of the city regularly, as required by its charter, was to defeat the collection of debts owing by the city; *Badger v. U. S.*, 93 U. S. 599.

These cases must, however, be distinguished from those in which the

proper officer has resigned and his resignation has taken effect. *Amy v. Watertown*, 130 U. S. 301. In this case the court said: "The case is different from those in which we have held that a resignation of an officer did not take effect until it was accepted or until another was appointed. In those cases either the common law prevailed or the local law provided for the case and prevented a vacancy. Such were the cases of *Badger v. U. S.*, 93 U. S. 599; *Edwards v. U. S.*, 103 U. S. 471; *Salamanca Tp. v. Wilson*, 109 U. S. 627. In *Badger v. U. S.* the law of Illinois was in question, and it appeared that by the constitution of that state the officers elected were to hold their offices until their successors were elected and qualified. In *Edwards v. U. S.* the case arose in Michigan, and it was held that the common-law rule prevailed there, by which the resignation of a public officer is not complete until the proper authority accepts it or does something tantamount thereto, such as appointing a successor."

Service upon Officers Who Have Not Qualified or Who Have Removed.—The fact that town officers may have refused to qualify, or have removed from the township, although remaining in the county, will not necessarily render service of process upon them invalid. *Dempsey v. Oswego Tp.*, 51 Fed. Rep. 97. See also *Salamanca Tp. v. Wilson*, 109 U. S. 627, in which it is held that the removal of a treasurer of a township in the state of Kansas from the limits of the township into the limits of an adjoining township, without resigning his office, does not vacate the office so as to invalidate service of summons upon him in his official capacity for the purpose of commencing an action against the township.

Service upon Corporations Located in Two Counties.—In *Fox v. Fostoria*, 14 Ohio Cir. Ct. Rep. 471, it is held that service of a summons against a municipal corporation located partly in each of two counties, in a suit commenced in one of them, upon a mayor at his office in the other county, is sufficient to give jurisdiction.

2. *Mariner v. Waterloo*, 75 Wis. 438. In this case, in an action against a town, the proof of service of the sum-

(4) *Manner of Service* — *Delivery of Copy of Process.* — Service of process upon municipal corporations is properly made by delivering a certified copy to the proper officer or officers.¹ It has been held, however, that where service is made upon the proper officers by reading, instead of by a certified copy of the summons, there being enough in the summons and service thereof to inform the corporation that an action has been instituted against it in court, the term at which it will stand for trial, and who the plaintiffs are, the service is at most only irregular, and a judgment rendered as upon default will not be set aside.²

(5) *By Whom Served* — *Interested Officer.* — In some jurisdictions it has been held that an officer cannot serve process in favor of, or against, the town of which he is a ratable inhabitant, or in which he is rated and taxed,³ nor, if the officer is so interested, can the process be served by his deputy.⁴

Defective Service Not Void. — Such service is not, however, void, but only voidable by plea in abatement.⁵ *Audita querela* to set aside the judgment for such defect will not lie.⁶

(6) *Time of Service* — *Regulation by Statute.* — The number of days which must intervene between the day of service and the return day of a summons, in an action against a municipal corporation, is, as a rule, fixed by statute in each state.⁷

In the Absence of Statutory Provisions, however, it has been held in some jurisdictions that the common-law practice in a court of King's Bench, which provides that at least fifteen days must intervene between the day of service and the return day, prevails.⁸

c. *RETURN* — *Service upon Proper Officer.* — A return that a summons against a municipal corporation was executed by delivering a true copy thereof to the proper officer of the corporation, nam-

mons and complaint was to the effect that they were served upon the chairman of the town and upon "E. C., the clerk of said town elected at the last annual town meeting, who claims he was not qualified, and upon Ida L., who has charge of the records of said town and is the acting town clerk of the town, and upon W. D. S., clerk of said town, who was elected and who qualified as such clerk, and who is the last clerk of said town who was elected who qualified." It was held that there was no service upon the clerk of the town, as required by Rev. Stat. Wis., § 2637.

1. *Cicero Tp. v. Shirk*, 122 Ind. 572; *Watertown v. Robinson*, 69 Wis. 230; *Mariner v. Waterloo*, 75 Wis. 438; *Amy v. Watertown*, 130 U. S. 301.

2. *Cicero Tp. v. Shirk*, 122 Ind. 572. This decision was under a section of the *Indiana* statute which provides that no summons, or the service

thereof, shall be set aside or be adjudged insufficient when there is sufficient substance about either to inform the party on whom it will be served that there is an action instituted against him in court, the name of the plaintiff and the court, and the time when he is required to appear.

3. *Essex v. Prentiss*, 6 Vt. 47; *Charlotte v. Webb*, 7 Vt. 38; *Fairfield v. Hall*, 8 Vt. 68; *Evarts v. Georgia*, 18 Vt. 15; *Huntley v. Henry*, 37 Vt. 165.

4. *Fairfield v. Hall*, 8 Vt. 68.

5. *Essex v. Prentiss*, 6 Vt. 47; *Fairfield v. Hall*, 8 Vt. 68; *Evarts v. Georgia*, 18 Vt. 15.

6. *Essex v. Prentiss*, 6 Vt. 47.

7. *Menominee v. Menominee Circuit Judge*, 81 Mich. 577; *Phillipsburg v. Raub*, 37 N. J. L. 48. See also *McNeal v. Gloucester City*, 51 N. J. L. 444.

8. *McNeal v. Gloucester City*, 51 N. J. L. 444.

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ing him and giving him his official title, is a sufficient return without evidence *aliunde* that the person named was in fact such official.¹ Though a return should show on what officer the summons has been served,² its failure to do so is a defect which may be waived.³

4. Declaration, Petition, or Complaint — *a. AVERMENT OF PRESENTATION OF CLAIM* — (1) *Necessity of Averring*. — Where the presentation of a claim or the filing of a notice is required, such notice or presentation of claim is a condition precedent to the right to maintain an action against a municipal corporation,⁴ and must be averred by the plaintiff.⁵

1. *Meridian v. Trussell*, 52 Miss. 711. In this case it was held that a summons executed "by delivering to E., mayor, * * * a true copy," was a sufficient return to warrant a judgment by default against the city, without evidence *aliunde* that the person named in the return was in fact mayor.

2. *Dugan v. Baltimore*, 70 Md. 1.

3. *Service Admitted by City Solicitor*. — In *Dugan v. Baltimore*, 70 Md. 1, a subpoena against the city of Baltimore was returned indorsed "summoned," and service was admitted by the city solicitor. The city solicitor appeared to the suit, and the proper officers of the city received the city's share of the proceeds of sale and executed a release therefor. The court said: "The return of the sheriff, we agree, ought to show upon what person or officer the process was served, so that the court may judge whether it was in law a valid service on the company, otherwise that would be left to depend upon the judgment or discretion of the sheriff. * * * But the record shows that the solicitor for the city appeared to the suit, and further that the proper officers of the city received the city's share of the proceeds of sale, and executed therefor a release. Whatever defects there may have been in the summons and the irregularities in passing the decree must, under such circumstances, be considered as having been waived."

4. *Hastings v. Foxworthy*, 45 Neb. 676; *Foley v. New York*, 1 N. Y. App. Div. 586; *Patterson v. Brooklyn*, 6 N. Y. App. Div. 127; *Sowle v. Tomah*, 81 Wis. 349.

5. *Georgia*. — *Maddox v. Randolph County*, 65 Ga. 216.

Iowa. — *Pardey v. Mechanicsville*, 101 Iowa 266.

Maine. — *Low v. Windham*, 75 Me. 113.

Nebraska. — *Hastings v. Foxworthy*, 45 Neb. 676; *Lincoln v. Grant*, 38 Neb. 369; *Dayton v. Lincoln*, 39 Neb. 74.

New York. — *Reining v. Buffalo*, 102 N. Y. 308; *Patterson v. Brooklyn*, 6 N. Y. App. Div. 127; *Foley v. New York*, 1 N. Y. App. Div. 586; *Norton v. New York*, 16 Misc. Rep. (N. Y. Supreme Ct.) 303; *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25; *Arthur v. Glens Falls*, 66 Hun (N. Y.) 136; *New York v. Dimick*, 20 Abb. N. Cas. (N. Y. Supreme Ct.) 15; *Russell v. New York*, 1 Daly (N. Y.) 263; *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106; *Porter v. Kingsbury*, 5 Hun (N. Y.) 597; *Minick v. Troy*, 83 N. Y. 516; *Denair v. Brooklyn*, (Brooklyn City Ct.) 5 N. Y. Supp. 835.

North Carolina. — *Frisby v. Marshall*, 119 N. Car. 570.

Wisconsin. — *Sowle v. Tomah*, 81 Wis. 349; *Susenguth v. Rantoul*, 48 Wis. 334; *Plum v. Fond du Lac*, 51 Wis. 393; *Wentworth v. Summit*, 60 Wis. 281; *Dorsey v. Racine*, 60 Wis. 292; *Hiner v. Fond du Lac*, 71 Wis. 74; *Flieth v. Wausau*, 93 Wis. 446; *Koch v. Ashland*, 83 Wis. 361; *Vogel v. Antigo*, 81 Wis. 642; *Watson v. Appleton*, 62 Wis. 267; *Sheel v. Appleton*, 49 Wis. 125; *Benware v. Pine Valley*, 53 Wis. 527.

Action for Unliquidated Damages. — In *Frisby v. Marshall*, 119 N. Car. 570, it was held that actions for unliquidated damages, as in case of personal injuries, are not within Code N. Car., § 757, providing that no person shall sue any city unless he shall have made a demand upon the proper municipal authorities, and that the complaint shall be verified and show that the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they have neglected to act upon or have disallowed it, and that, therefore, a complaint against a municipal corporation for

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Lapse of Time Since Presentation.—The declaration or complaint should, according to some decisions, allege that the time prescribed by law has elapsed since presenting the claim.¹

(2) *How Defects Taken Advantage of*—(a) **By Demurrer.**—The fact of the service of notice or presentation of claim is a material allegation in order to state a sufficient cause of action,² and must not only be averred, but, if controverted, must be proved on the trial,³ and in the absence of such averment the declaration or complaint is demurrable for failure to state facts sufficient to constitute a cause of action.⁴

personal injuries was not demurrable for failure to comply with this section.

Action to Recover Illegal Taxes Paid.—In *Flieth v. Wausau*, 93 Wis. 446, it is held that an action for the recovery of illegal taxes paid to a municipal corporation sounds in tort, and under a charter provision requiring the presentation of claims, a complaint which fails to aver such presentation is demurrable.

1. *Reining v. Buffalo*, 102 N. Y. 308; *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25; *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106. See also *Maddox v. Randolph County*, 65 Ga. 216.

Averment of Second Demand.—Laws N. Y. 1860, c. 379, § 2, provided that no action or special proceeding should be prosecuted or maintained against the mayor, etc., of New York, unless the complaint or necessary moving papers alleged that at least twenty days had elapsed since the claim or claims upon which the action or special proceeding was founded had been presented to the comptroller for adjustment, and that the complaint or moving papers should allege that upon a second demand in writing upon the comptroller, he had neglected or refused to make an adjustment or payment thereof. *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106.

Allegation of Filing and Appeal from Disallowance.—Where it is provided that all claims against a city must be filed with the city clerk, to be determined upon by the comptroller, and that, upon disallowance thereof, an appeal may be had to the Circuit Court, a complaint which merely alleges the giving of notice to the city, but fails to allege notice to the city clerk or appeal from the disallowance of the claim, is insufficient to give the Circuit Court jurisdiction. *Koch v. Ashland*, 83 Wis. 361. See also *Watson v. Apple-*

ton, 62 Wis. 267, in which the court held that "when the nonaction of the common council had worked a disallowance of the plaintiff's claim, she should have taken her appeal to the Circuit Court within the time prescribed by the charter; and then the complaint filed therein should have alleged the facts made requisite by the charter to give that court jurisdiction, or rather to show that the plaintiff had the right, or had not waived the right, to maintain her action in that forum."

2. *Pardey v. Mechanicsville*, 101 Iowa 266.

3. *Sowle v. Tomah*, 81 Wis. 349; *Low v. Windham*, 75 Me. 113.

Pleading and Proof.—In *Pardey v. Mechanicsville*, 101 Iowa 266, the court held that since the petition did not allege the fact of notice it did not state a cause of action, and that therefore there was no basis for the evidence offered and admitted to show that a notice was given, and that it was error to admit such evidence.

4. *Georgia.*—*Maddox v. Randolph County*, 65 Ga. 216.

New York.—*Reining v. Buffalo*, 102 N. Y. 308; *Porter v. Kingsbury*, 5 Hun (N. Y.) 597; *Minick v. Troy*, 83 N. Y. 516.

Wisconsin.—*Sowle v. Tomah*, 81 Wis. 349; *Susenguth v. Rantoul*, 48 Wis. 334; *Plum v. Fond du Lac*, 51 Wis. 393; *Wentworth v. Summit*, 60 Wis. 281; *Dorsey v. Racine*, 60 Wis. 292; *Hiner v. Fond du Lac*, 71 Wis. 74; *Koch v. Ashland*, 83 Wis. 361; *Steltz v. Wausau*, 88 Wis. 618; *Benware v. Pine Valley*, 53 Wis. 527.

General Demurrer.—In *Koch v. Ashland*, 83 Wis. 361, it was held that the objection is properly taken by general demurrer to the complaint for insufficiency of facts, since the complaint should show the presentation of the claim and the appeal from its disallowance.

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(b) **Motion to Dismiss.** — According to some decisions such defect may be taken advantage of by a motion to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action.¹

(3) **When to Be Taken Advantage of.** — A failure to allege the fact of presentation of a claim is a defect which can be taken advantage of by the defendant at any stage of the action.²

(4) **Waiver.** — According to some decisions it is held that the provision requiring the allegation of the presentment of the claim being for the benefit of the defendant, a municipal corporation may waive the omission of such allegation,³ and that a failure to take advantage of such an omission by answer or demurrer will be regarded as an express waiver.⁴

Demurrer Ore Tenus. — In *Hiner v. Fond du Lac*, 71 Wis. 74, the judgment was reversed because the court refused to sustain the demurrer *ore tenus* to a complaint which failed to aver the presentation of a claim in an action against a city.

1. *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25; *Russell v. New York*, 1 Daly (N. Y.) 263.

Motion in Arrest of Judgment. — In *Pardey v. Mechanicsville*, 101 Iowa 266, it was held that where a petition did not plead the fact of notice it did not state a cause of action, and that a motion to arrest the judgment on that ground would be sustained.

2. *Olmstead v. Pound Ridge*, 71 Hun (N. Y.) 25.

Not Such a Defense as Must Be Plead. — In *Reining v. Buffalo*, 102 N. Y. 308, it was said: "The court in *Nagel v. Buffalo*, 34 Hun (N. Y.) 1, in considering the statute in question, seemed to think its requirement was in the nature of a condition subsequent or proviso, having no necessary connection with the proper statement of a cause of action, but we think they erred in their conception of the nature of the provision. Neither its language or object is analogous to those provisions authorizing the defense of the statute of limitations, or other special and particular defenses constituting conditions subsequent, which may or may not occur in particular cases, and must, therefore, be averred to authorize the court to take cognizance of them. Here the requirement exists, independent of proof, in every case, and is made to precede the institution of any suit whatever. Its performance cannot for any purpose be presumed, but

must, to be availed of, be alleged and proved. The language is 'that no action' 'shall be brought' until, etc., and constitutes an express prohibition against the action, until performance of the condition. A noncompliance with this requirement can be raised by the defendant, at any stage of the action, when it is called upon to act in the case."

3. *Russell v. New York*, 1 Daly (N. Y.) 263; *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106; *Sheel v. Appleton*, 49 Wis. 125.

Omission to Allege Demand Not Jurisdictional. — In *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106, the court said: "We do not, however, regard either the omission to make the demand or the omission to allege the demand in the complaint as jurisdictional, * * * and think that, like other statutory provisions which are made for the benefit of a party to the action, both the demand and its non-allegation may be waived."

4. *Sheel v. Appleton*, 49 Wis. 125.

Failure to Take Advantage by Answer. — In *Russell v. New York*, 1 Daly (N. Y.) 263, the court said: "As this provision is obviously for the benefit of the defendants, and to save them from unnecessary expense in respect to claims which would be paid or adjusted if brought to their notice and a reasonable time given for their examination, it follows that they may waive it if they choose to do so; and as the omission of the allegation would constitute a valid defense, it also follows that if they fail to take advantage of it by their answer they should be regarded as having expressly waived it."

Contra. — In *Pardey v. Mechanics-*

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(5) *Amendment.* — Where the required notice has really been given, but the plaintiff fails to allege such fact in his complaint, it would seem, according to some decisions, that the plaintiff should have opportunity to apply for permission to amend his complaint.¹

b. IN ACTIONS ARISING FROM TORTS — (1) Averment of Corporate Duty. — In a large class of cases no action for damages arising from a tort will lie against municipal corporations, and no fixed rule can be laid down which will embrace every character of tort for which a private action will lie against such a corporation.²

Allegation of Special Facts. — Whenever a municipal corporation is not uniformly liable for torts of the character which the plaintiff attempts to set forth, he should set out in his declaration, petition, or complaint, the special facts on which the liability in the particular case is claimed.³

Insufficient to Allege Legal Conclusions. — In actions against a municipal corporation for damages arising from a failure to perform a duty alleged to be owed by the corporation to the plaintiff, the facts from which the conclusion may be drawn that the defendant's duty to the plaintiff is as charged should be set out. It is not sufficient merely to state the duty as a legal conclusion,⁴ and a mere averment that the act done was unlawful, without averring how, and in what its illegality consisted, is not sufficient.⁵

Action Brought After Merger of Corporations. — Where a cause of action arises against a corporation and afterwards it and another corporation are merged into a new corporation, each of the old corporations losing its identity, the complaint in an action against one of the old corporations should state facts showing that the cause of action arose against the particular corporation sued.⁶

Failure to Keep Appliances in Repair. — In an action to recover dam-

ville, 101 Iowa 266, it was held that where a petition does not allege the fact of notice it does not state a cause of action, and that such defect is not waived by a failure to demur.

1. *Denair v. Brooklyn*, (Brooklyn City Ct.) 5 N. Y. Supp. 835.

2. *Dargan v. Mobile*, 31 Ala. 469; *Stewart v. New Orleans*, 9 La. Ann. 461; *Hill v. Boston*, 122 Mass. 344; *Lloyd v. New York*, 5 N. Y. 369; *Conway v. Beaumont*, 61 Tex. 10; *Richmond v. Long*, 17 Gratt. (Va.) 375.

3. *Conway v. Beaumont*, 61 Tex. 10.

4. *Mitchell v. Clinton*, 99 Mo. 153.

5. *Conway v. Beaumont*, 61 Tex. 10.

6. *Adams v. Minneapolis*, 20 Minn. 484. In this case, in which the cause of action arose against the corporation of Minneapolis, and an action was brought after the merger of the two

corporations of Minneapolis and St. Anthony, the court, after stating that the plaintiff's right of action was preserved by the charter of the new corporation, said: "As the defendant is not identical with the old city of Minneapolis, and upon the face the complaint does not (for the reason given above) appear to have been itself guilty of the negligence complained of, the complaint should (if it is sought to charge the defendant) state facts showing liability on the part of the old city of Minneapolis, from which the liability of the defendant, if the view which we take hereafter is correct, is to be inferred as a conclusion of law. For its failure to state such facts, the complaint fails to state a cause of action against defendant, and the demurrer should therefore have been sustained."

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ages for injuries arising from failure to keep public works or appliances in proper condition, facts must be alleged by the plaintiff showing that it is within the scope of the defendant's corporate powers to maintain such works or appliances, because, without such power, no duty on the part of the defendant is shown, and, consequently, no liability for failure to discharge it.¹

1. *Mitchell v. Clinton*, 99 Mo. 153.

In Particular Cases.—For the essential averments of a declaration, petition, or complaint against municipal corporations in particular cases, see the articles *BRIDGES*, vol. 3, p. 701; *NUISANCES*; *STREETS AND HIGHWAYS*.

Injuries from Defective Public Scales.

—A petition in an action for damages against a city for its failure to keep weighing scales and the approaches thereto in a reasonably safe condition is defective on demurrer where it fails to aver facts from which the conclusion can be drawn that it was within the scope of the defendant's corporate power to erect and maintain such scales. *Mitchell v. Clinton*, 99 Mo. 153. In this case the court said: "The fault with the petition in this case is that the pleader, instead of stating the facts from which the legal conclusion might be drawn that defendant's duty to the plaintiff was as charged therein, contents himself with simply stating that duty as a legal conclusion. A conclusive fact may and ought to be stated. Facts from which the ultimate and conclusive fact may be inferred are evidence, and need not be stated. But the facts from which a legal conclusion is to be drawn upon which depends the plaintiff's right of action must be stated, in order to show a cause of action, under our system of pleading."

Improperly Constructed Public Pound.

—In *Greencastle v. Martin*, 74 Ind. 449, it was held that a complaint against a city alleging that its pound fence was not high enough, that an animal impounded by the city was improperly tied, and that thereby, without the plaintiff's fault, the animal sustained injuries, contains a good cause of action. Municipal corporations are responsible to the same extent and in the same manner as natural persons for injuries caused by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government.

Allegation of Knowledge of Defective Machinery.—A complaint by an em-

ployee against a city, for personal injuries, averred that the injuries resulted from defects in the fire engine of which he had charge, which were known to the defendant and unknown to the plaintiff. It was objected on demurrer that it should have been alleged that the defects were known to some proper officer of the city. It was held that the objection was insufficient; that the knowledge of the defendant and the absence of all fault in the plaintiff were sufficiently averred. *Lafayette v. Allen*, 81 Ind. 166.

Allegation of Authorization by Council.

—In an action against a municipality and others for damages for injury to property of the plaintiffs alleged to have resulted from the building of an embankment, the complaint alleged that the defendants wrongfully and unlawfully constructed, and caused to be constructed, the embankment. It was held on demurrer for want of sufficient facts that the above allegation was sufficient to charge the city with liability, and that it was not necessary to aver that the alleged wrongful action of the city was authorized by its common council.

Jeffersonville v. Myers, 2 Ind. App. 532. In this case the court said: "It is contended, on behalf of the appellant, that the complaint is defective because of the want of an allegation that the alleged wrongful action of the city was authorized by its common council. We think this objection, which is the only one urged against the complaint, is not well taken. It is alleged that the defendants wrongfully and unlawfully constructed, and caused to be constructed, the embankment, etc. This, we think, was sufficient to withstand the city's demurrer for want of sufficient facts."

Sufficient Averment of Duty and Refusal to Perform Same.—In *Clayburgh v. Chicago*, 25 Ill. 535, which was an action on the case against a city for neglect of duty in failing to collect special assessments levied to compensate the plaintiff for damages awarded to him for the opening of a street over his lot, the court said: "We regard the

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(2) *Averment of Means to Perform Duty.* — In an action against a municipal corporation for injuries arising from unsafe public structures, if the charter is pleaded by its title and the date of its approval the court will judicially notice all of its provisions, and unless, by the terms of the charter, the possession of means to keep such public structures in repair is a condition precedent to its liability, the complaint need not aver its possession of such means.¹

(3) *Actions for Injuries by Mobs — Negating Exceptions.* — Where by statute a right of action is given against a municipal corporation for injury to property caused by a mob,² in an action under such statute the exceptions in the statute must be negated, but the plaintiff need not attempt to anticipate any defense which the defendant may raise under a proviso or exception in a separate substantive clause of the statute.³

Necessity to Allege Location of the Property. — The omission to set out in the declaration or complaint where the ward in which the property injured was located, while a defect, is one which is cured by the verdict.⁴

rule well settled that the party injured may maintain an action against a corporation for a neglect of any duty imposed by their charter. In this case the law has imposed the duty upon the city, where they have appropriated private property for the use of the city in widening or extending streets, to have the damages assessed, and to have the benefits resulting to others from the improvement also assessed and collected, and compensation made for the damage sustained. This duty is clearly imposed, and the declaration avers that plaintiff's property was appropriated, his damages ascertained and allowed, but that the city, although they have had the benefits resulting to others from this improvement assessed, have wholly neglected and wilfully refused to cause the assessments to be collected. Here a duty to the plaintiff is averred, and a wilful refusal to perform that duty. This, we think, brings this case clearly within the rule established by the adjudged cases, and presents a case, if sustained by the evidence, entitling the plaintiff to a recovery."

1. *Shurtle v. Minneapolis*, 17 Minn. 308. See also *Erie City v. Schwingle*, 22 Pa. St. 384, in which it is held that it is not necessary, in a suit against a corporation, for negligence in repairing a street, to recite in the declaration the Act of Assembly which binds the corporation to keep its streets in repair, nor to aver that the corporation had

funds to do so. See likewise the articles BRIDGES, vol. 3, p. 701; STREETS AND HIGHWAYS.

2. See the American and English Encyclopædia of Law, titles *Counties; Municipal Corporations*.

3. *Clark Thread Co. v. Chosen Freeholders*, 54 N. J. L. 265.

Denial of Neglect or Carelessness of Plaintiff. — In *Wolfe v. Richmond*, 11 Abb. Pr. (N. Y. Supreme Ct.) 270, the court said: "It is not necessary for the plaintiff to aver in the complaint that he did not aid in, assist, or permit the destruction of the property. He avers that the act was done by the mob, and there is nothing in the statute which requires any other averment. It is never necessary, in a complaint for injury to the person or to property, to aver that the act did not occur through the negligence or carelessness of the plaintiff. That may be shown by the defendant as matter of defense upon the trial; but it is not necessary to be averred in the complaint, any more than it is necessary upon the trial for the plaintiff, in making his case, to prove in the first instance that he was not at fault, either through carelessness or negligence. The defendant may prove it, and if any proof of that character is offered, the plaintiff then, and not before, is required to show that he was free from such fault."

4. *Donoghue v. Philadelphia County*, 2 Pa. St. 230.

(4) *Variance — Misfeasance and Nonfeasance.* — In an action against a municipal corporation, if the declaration alleges misfeasance and the plaintiff proves nonfeasance, the variance is fatal and the plaintiff may be nonsuited.¹

c. IN ACTIONS ON CONTRACT — (1) Generally — Ordinary Rules of Pleading Apply. — When a municipal corporation makes a contract within the scope of its power which is not against public policy, and not fraudulent, it must be enforced the same as an ordinary contract of a business corporation or individual,² and the averments of the declaration, petition, or complaint should, generally speaking, be the same as those in an action upon ordinary contracts.³

(2) *Averment of Authority.* — The declaration, petition, or complaint should aver that the contract sued upon was entered into pursuant to proper authority on the part of the municipal corporation.⁴

Approved Precedent. — For a complaint which was held to state a sufficient cause of action, see *Davidson v. New York*, 2 Robt. (N. Y.) 230.

1. *Flanagan v. Wilmington*, 4 Houst. (Del.) 548.

Amendment of Declaration. — In an action for death by wrongful act against a municipal corporation, if the declaration contains but one count alleging misfeasance, and nonfeasance merely, on the part of the corporation, is proved, the plaintiff will be nonsuited; and after argument of the motion for a nonsuit, leave to amend the declaration by adding another count alleging simply nonfeasance will not be granted. *Flanagan v. Wilmington*, 4 Houst. (Del.) 548.

2. *Indianapolis v. Indianapolis Gas-Light, etc., Co.*, 66 Ind. 396.

3. See the article *CONTRACTS*, vol. 4, p. 916.

4. *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142; *Galveston v. Devlin*, 84 Tex. 319; *Over v. Greenfield*, 107 Ind. 231.

Details as to Passage of Resolution. — In an action upon the price of a fire engine purchased by a city it is not necessary to aver that the resolution to accept the proposition to purchase such engine, adopted by the common council, was passed by the ye and nay vote. In such case all presumptions ought to be indulged in favor of the regularity of the proceeding. *Over v. Greenfield*, 107 Ind. 231.

Names of Officers Who Entered into Contract. — Where an action is brought against a city upon a contract made

with its board of public works, the names of the individuals constituting such board need not be set out in the complaint; nor is it necessary to state the names of officers who have agreed to the modification of a contract previously entered into. *Burnham v. Milwaukee*, 69 Wis. 379.

Authority of Officers to Execute Note. —

In an action against a municipal corporation, upon its note for the price of an article purchased by the corporation, it is sufficient to allege a contract between the corporation by its accredited agents and the plaintiff; that the note was given as part purchase money; that it was issued under and by authority of the council; that the plaintiff is the owner and holder of the note; that certain payments have been made by the issuance of warrants; and that there is still due a certain sum, which claim has been presented to the defendant, and that the latter has repudiated said note and refused to pay it. *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142. In this case the court said: "It is also urged by respondent that no authority existed in respondent, or any of its officers in its behalf, to make such a note. The complaint shows that this was a simple contract between the city of Mt. Vernon, by its accredited agents, and the appellant, and that the note was given as part purchase price of the engine purchased; that it was issued under and by authority of the council of said city of Mt. Vernon; that the appellant is now the owner and holder of said note; that certain payments have

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(3) *Contract Executed Pursuant to Statute.* — Where by statute a municipal corporation is liable for work done for it upon certain conditions only, *e. g.*, where it has expressly contracted to pay for such work out of its funds, the plaintiff must allege facts showing the existence of such conditions.¹ As in the case of other complaints, a mere allegation of the corporation's liability is a conclusion of law, and is insufficient.²

(4) *Averment of Promise to Pay.* — In an action against a municipal corporation for work done under a contract, a promise to pay need not be expressly averred, since the contract includes a promise to pay.³

been made by the issuance of warrants upon the treasury of said city; and that there is now due and owing the sum of \$1,460, which said claim has been duly presented to the defendant's council; and that the defendant, by and through its council, repudiated said note and obligation, and refused to pay the same. It seems to us that a plain contract is stated by this complaint; that if it had not been reduced to writing, or had not been in the shape of a note, which it is claimed the respondent had no authority to make, a good and enforceable contract is, notwithstanding, pleaded; that the claim was presented and refused; and that appellant's only remedy would be to sue the respondent and obtain a judgment."

1. *McBean v. San Bernardino*, 96 Cal. 183, which case was decided under Act Cal., March 18, 1885, providing that a city shall not be liable for work done in the construction of sewers, unless it has expressly contracted to pay for such work out of its own funds, or unless the assessment upon any lot shall exceed one half the assessed valuation of such lot. The defendant did not bind itself to pay for any part of the work, and it was not alleged that in order to collect sufficient money to pay for the work by an assessment, it would be necessary to assess any lot for an amount exceeding one half of its assessed valuation; and it was held that the complaint therefore failed to show any liability on the part of the city.

2. *McBean v. San Bernardino*, 96 Cal. 183. In this case it is held that an allegation in such complaint that a sum specified is "chargeable to said city, to be paid out of the municipal treasury of said city," where the other facts alleged do not disclose a liability upon the part of the corporation, is to be regarded simply as the statement of a

conclusion of law which is not admitted by a demurrer.

3. *Galveston v. Devlin*, 84 Tex. 319. In this case the court said: "Appellant insists that the petition is defective, because it 'fails to allege or show any promise on the part of the defendant to the plaintiff in respect of the debt or the claim for work or labor and material sued for, and therefore not any liability in law for the same.' We are of opinion that the demurrer was properly overruled. The facts alleged disclose an express contract in September, 1888, on the part of the defendant, to pay plaintiff for the labor and material applied by him to the building which were not included in the original contract of May, 1888. A contract includes a promise, and the allegation of the one is the averment of the other. The petition alleges 'the execution of a contract, the performance of labor thereunder by the plaintiff, the acceptance of the work by the defendant, and the amount due thereon, together with the usual prayer for judgment.' This, we think, was sufficient." See also *Davenport v. Jennings*, 25 Neb. 87.

Necessity of Alleging Provision to Pay Debt. — In *Waco v. McNeill*, (Tex. Civ. App. 1895), 29 S. W. Rep. 1109, which was an action on a contract for constructing a number of cisterns for the city of Waco, the petition alleged that when the work was done the city agreed and promised to pay cash therefor. It was held on demurrer that this allegation did not dispense with the requirement of the constitution that a contract of this character, to be valid, must at the time of its creation be provided for in the manner there stated; and that the petition should have alleged that at the time the debt was created the city had provided for its payment.

5. The Answer — Necessity for Positive Answer. — The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations as well as to natural persons.¹

Denial of Knowledge or Information. — An answer that the defendant, a municipal corporation, has "no knowledge or information" in respect to the allegations of a count in a verified complaint, and "therefore denies the same," is insufficient.²

Necessity of Pleading Defense of *Ultra Vires*. — When a municipal corporation seeks to avoid its contract on the ground of its want of power to contract, and the contract is not upon its face necessarily beyond the scope of its authority, its authority to make such contract will be presumed, and in an action on the contract the defense of *ultra vires* must be both pleaded and proved.³

Effect of Sworn Answer by Municipal Corporation. — Where a case is submitted on bill and answer, the sworn answer of a municipality, signed by its attorney, in his official capacity, must be taken as true.⁴

III. JUDGMENTS — 1. Rendition and Form. — Judgments in actions by or against municipal corporations do not differ essentially, as regards their rendition and form, from those in actions between individuals or other corporations.⁵

1. San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

2. San Francisco Gas Co. v. San Francisco, 9 Cal. 453. In this case the court said: "On the first hearing, it was held by my associates that the answer was sufficient to raise an issue and that the rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, does not apply to municipal corporations. I did not then concur in the opinion of my associates. I do not concur now. I think the answer fatally defective in not denying any of the allegations of the second count, either positively or according to information and belief—the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and cannot have any legal effect. The answer is that the defendant has 'no knowledge or information' in respect to the allegations of the second count, 'and therefore denies the same.' But the statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. Such knowledge or information will be obtained before trial, if a defense is interposed, and there is no good reason why it should not be obtained before answer. In the case at bar, the facts alleged are presumptively within the knowledge of the officers of the corporation, and the denial should have been made positively. Any other form of denial in such cases is an evasion of the statute."

3. Brown v. Board of Education, 103 Cal. 531. In this case the court said: "It is contended by respondent that the defendant had no power to make the contract sued on; but surely when a corporation seeks to avoid its own contract on the ground of its want of power to contract, it must make good its defense of *ultra vires* by plea and proof."

4. Seligman v. Santa Rosa, 81 Fed. Rep. 524.

5. See article JUDGMENTS, vol. II, p. 796.

Judgment by Default. — Since the rules of pleading are general and designed to embrace all persons, natural or artificial, capable of suing or being

2. Enforcement — *a.* BY EXECUTION — Levy upon Corporate Property.

— According to numerous decisions, which, as will be hereinafter seen, are outnumbered by decisions to the contrary, where a judgment is rendered against a municipal corporation, an execution may be ordered to issue against it as against a private person, and under such an execution the private property of a municipal corporation not useful or used for corporate purposes may be seized and sold.¹

sued, a default may be taken as well against municipal corporations as against a private individual. *Hunt v. San Francisco*, 11 Cal. 250.

1. *Birmingham v. Rumsey*, 63 Ala. 352; *Holladay v. Frisbie*, 15 Cal. 630; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Louisville v. Com.*, 1 Duv. (Ky.) 295; *New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61; *Municipality Number Three v. Hart*, 6 La. Ann. 570; *McEnery v. Pargoud*, 10 La. Ann. 497; *Laredo v. Benavides*, (Tex. Civ. App. 1894) 25 S. W. Rep. 482; *Brown v. Gates*, 15 W. Va. 131; *Hart v. New Orleans*, 12 Fed. Rep. 292; *New Orleans v. Morris*, 3 Woods (U. S.) 103.

Execution May Be Issued Though Not Always Levied. — In *Birmingham v. Rumsey*, 63 Ala. 352, the court said: "It is also assigned as error, and here urged as ground of reversal, that the Circuit Court, after rendering judgment against the city, ordered execution to issue for its collection. We do not hesitate to declare that city property owned or used by the corporation for public purposes, such as public buildings, public markets, hospitals, cemeteries, engine-houses, fire-engines and their apparatus, and other property, real or personal, of kindred utility, cannot be taken in execution for debts of the city. But if the city owns private property, not useful or used for corporate purposes, such property may be seized and sold under final process, precisely as similar property of individuals is seized and sold." 2 *Dillon's Mun. Corp.*, § 446. If there be none, or an insufficient amount of such property to satisfy the debts of the corporation in judgment, then the creditor's coercive remedy is mandamus to compel a levy, assessment, and collection of a tax to pay the judgment. 2 *Dillon's Mun. Corp.*, § 685; *Herman on Executions*, § 364. The Circuit Court did not err in ordering execution to issue on the judgment rendered in this

case. Should the process be abused by a levy on property of the corporation used for public purposes, the law affords the city ample means for arresting such unauthorized use of the execution."

Functions Exercised for Private Purposes and Advantage. — In *Gooch v. Gregory*, 65 N. Car. 142, the court, after holding that since a county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, such property cannot be sold under execution for the advantage of an individual, said: "These rules of law are not applicable to a municipal corporation created by a charter which is voluntarily accepted by the corporation for private emolument and advantage. Such corporations are sometimes charged with the performance of public duties, but so far as the grant is for private purposes and advantage they are regarded as private corporations and subject to like liabilities." See also *Bailey v. New York*, 3 Hill (N. Y.) 531.

Bonds Issued by Corporation. — In *New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61, it was held that bonds issued by a corporation and owned by the city of New Orleans do not constitute a part of the franchises of the city, nor are they essential to the existence or proper exercise of the functions of the corporation, and that a judgment creditor of the city may, therefore, cause such bonds to be seized and sold in satisfaction of his debt.

City's Interest in Beach and Water-lot Property. — In *Holladay v. Frisbie*, 15 Cal. 630, it is held that the interest of the city of San Francisco in her beach and water-lot property, under the Act of March 26, 1851, is a legal estate for ninety-nine years, not qualified by any conditions, or subject to any specific uses, and therefore a leviable interest liable to sale on execution. *Affirmed* in *Wheeler v. Miller*, 16 Cal. 125.

Levy on Property Used for Public Purposes. — In all of these decisions, however, it is held that municipal property owned or used by the corporation for public purposes, such for instance as public buildings, markets, hospitals, cemeteries, engine houses, fire engines, etc., cannot be taken in execution for debts of the corporation.¹

Authorities Holding All Property Exempt and that Execution Cannot Issue. — Although this would seem to be the more reasonable rule, there are many decisions laying down the unqualified rule that municipal property is exempt from levy and sale under execution issued

1. *Birmingham v. Rumsey*, 63 Ala. 352; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Loring v. Small*, 50 Iowa 271; *Charnock v. Colfax*, 51 Iowa 70; *State v. Tiedemann*, 69 Mo. 306; *Foster v. Fowler*, 60 Pa. St. 27; *Monaghan v. Philadelphia*, 28 Pa. St. 210; *Lyon v. Elizabeth*, 43 N. J. L. 158; *Brown v. Gates*, 15 W. Va. 131; *New Orleans v. Morris*, 105 U. S. 600; *Klein v. New Orleans*, 99 U. S. 149.

Waterworks. — In *New Orleans v. Morris*, 105 U. S. 600, it is held that the waterworks of a city are not subject to sale for its ordinary debts under execution.

Hospital Buildings. — In *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276, it was held that a judgment against a city was not a lien upon the premises owned by it and used for hospital purposes.

Wharves and Levees. — In *Klein v. New Orleans*, 99 U. S. 149, it is held that since lands held by municipal corporations for public purposes, and ground rents which are part of the public revenues, cannot be levied on or sold on execution, public land on a navigable river in a city, used by the public for wharves and public uses, is not subject to seizure and sale on execution.

Property Held for Future Public Use. — In *Curry v. Savannah*, 64 Ga. 290, it is held that the property of a municipal corporation in the use of the municipality for the public, or held for future use for the public, is not subject to levy and sale under execution.

In Maryland all the property held by a municipal corporation is considered as being held for public uses and purposes. *Darling v. Baltimore*, 51 Md. 1.

Mechanics' Lien. — The mechanics' lien law is framed with reference only to property which can be sold under execution, and therefore, in the absence of an express statutory provision

authorizing it, a mechanics' lien cannot be enforced against the real estate of a municipal corporation held for public uses. *Parke County v. O'Conner*, 86 Ind. 531; *Loring v. Small*, 50 Iowa 271; *Charnock v. Colfax*, 51 Iowa 70; *Ripley v. Gage County*, 3 Neb. 397; *Leonard v. Brooklyn*, 71 N. Y. 498; *Wilson v. Huntingdon County*, 7 W. & S. (Pa.) 197.

In *Leonard v. Brooklyn*, 71 N. Y. 498, the court said: "If judgments in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly a judgment obtained under the lien law, which is the mere foreclosure of the notice which had previously been served and filed for work done for the benefit of the city, should stand in no better position. The act in question confers no special advantage, nor does it give a preference to a lien in any such case, and nothing is to be intended in favor of an enactment which interferes with a well-established principle, and changes a rule which has long been settled. To make such a material alteration, the law should be plain, explicit, and clear, and there is no ground for holding that it was the intention of the lawmakers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect. The statute does not include such a case either in terms or by necessary implication."

In Louisiana it has been held that a contractor who furnishes the material and builds a jail for a parish, under a contract with the police jury of the parish, has a mechanics' lien to secure the payment of what is due him under the contract, and may foreclose his lien and sell the jail, but not the ground on which it stands. *McKnight v. Grant*, 30 La. Ann. 361.

upon a judgment against such corporation;¹ and in several of these decisions it is specifically held that, in the absence of a statute expressly authorizing it, it is error to award or issue an execution to enforce a judgment against a municipal corporation.²

The Principle on Which Rest the Decisions holding that municipal property is exempt from execution would seem to be that such corporations have control of the corporate property only for corporate purposes, and may use and dispose of it to promote such purposes, and such only.³ All municipal corporations are merely the local agency of the government by which they are created. They are the embodiment of such political power as is considered necessary by the legislature granting the charter for the proper government of the people within their corporate limits and for

1. *California*. — *Emeric v. Gilman*, 10 Cal. 404; *Gilman v. Contra Costa County*, 8 Cal. 54.

Georgia. — *Curry v. Savannah*, 64 Ga. 290.

Illinois. — *Chicago v. Hasley*, 25 Ill. 595; *King v. McDrew*, 31 Ill. 418; *Elrod v. Bernadotte*, 53 Ill. 368; *Cairo v. Allen*, 3 Ill. App. 398; *Bloomington v. Brokaw*, 77 Ill. 194; *Morrison v. Hinkson*, 87 Ill. 587; *Odell v. Schroeder*, 58 Ill. 353; *Viriden v. Fishback*, 9 Ill. App. 82; *Pekin v. McMahon*, 154 Ill. 141; *Danville v. Mitchell*, 63 Ill. App. 647; *People v. Superior Ct.*, 55 Ill. App. 376; *Kinmundy v. Mahan*, 72 Ill. 462; *Cumberland County v. Edwards*, 76 Ill. 544.

Indiana. — *Parke County v. O'Conner*, 86 Ind. 531.

Maryland. — *Darling v. Baltimore*, 51 Md. 1.

Texas. — *McGregor v. Cook*, 4 Tex. App. Civ. Cas., § 141.

United States. — *Amy v. Galena*, 7 Fed. Rep. 163.

Award of Execution Reversible Error. — In *Danville v. Mitchell*, 63 Ill. App. 647, it is held that an award of execution against a municipal corporation in a judgment is an error for which the judgment will be reversed, and the cause remanded with directions to the clerk of the court below to amend it by striking out the clause awarding such execution. See also *Viriden v. Fishback*, 9 Ill. App. 82; *Morrison v. Hinkson*, 87 Ill. 589.

Execution as Foundation for Mandamus Proceedings. — In *Lyon v. Elizabeth*, 43 N. J. L. 158, the court said: "The practice in this state has uniformly been to issue execution against the municipal body, not to seize and sell its public property, but for the purpose

of laying a foundation for mandamus proceedings."

Judgment as Lien. — A judgment against a municipal corporation is not a lien upon its real estate, since no execution can issue against the defendant's land on such a judgment. *Schaffer v. Cadwallader*, 36 Pa. St. 126.

A judgment against a municipal corporation is not a lien upon anything, nor can it be enforced by execution. *People v. Superior Ct.*, 55 Ill. App. 376.

2. *California*. — *Emeric v. Gilman*, 10 Cal. 404; *Gilman v. Contra Costa County*, 8 Cal. 54.

Illinois. — *Chicago v. Hasley*, 25 Ill. 595; *Elrod v. Bernadotte*, 53 Ill. 368; *Cairo v. Allen*, 3 Ill. App. 398; *Bloomington v. Brokaw*, 77 Ill. 194; *Morrison v. Hinkson*, 87 Ill. 587; *Odell v. Schroeder*, 58 Ill. 353; *Viriden v. Fishback*, 9 Ill. App. 82; *Pekin v. McMahon*, 154 Ill. 141; *Danville v. Mitchell*, 63 Ill. App. 647; *People v. Superior Ct.*, 55 Ill. App. 376.

Texas. — *McGregor v. Cook*, 4 Tex. App. Civ. Cas., § 141, in which case the court said: "As a general rule execution cannot be awarded to enforce a judgment against a municipal corporation, and this general rule must obtain, as we have no statute providing otherwise."

Statute Prohibiting Execution—Illinois. — In *Cumberland County v. Edwards*, 76 Ill. 544, the court said: "The judgment in this case was against the county for costs, and in the teeth of the statute awards execution against the county. This is palpable error, caused by carelessness or inattention of the clerk."

3. *Chicago v. Hasley*, 25 Ill. 595.

the efficient administration of local affairs, and to permit the seizure of their property under execution would, in many cases, work serious injury to them and thus destroy the government.¹ The property of such corporations and the taxes collected by them for public purposes are a constituent part of their public power, and are no more liable to seizure and sale than the whole power itself would be, and the power, if conceded, to seize the property of the corporation would involve the right to seize its revenues, and this involves the right to destroy the corporation.²

1. *Chicago v. Hasley*, 25 Ill. 595; *Cairo v. Allen*, 3 Ill. App. 398; *Darling v. Baltimore*, 51 Md. 1; *Brown v. Gates*, 15 W. Va. 131; *Klein v. New Orleans*, 99 U. S. 149.

2. *Private and Municipal Corporations Contrasted*. — *Chicago v. Hasley*, 25 Ill. 595. In this case the court said: "There can be no doubt that the property of a private corporation may be seized and sold under a *f. fa.* for the payment of its debts, as in the case of an individual, such corporation being bound to provide for its just debts, whether payment is made by a forced sale of its property for that purpose, or with money from its safe. The nature, objects, and liabilities of political, municipal, or public corporations we think stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary, by the legislature granting the charter, for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes, the authorities can raise revenue by taxation, make public improvements and defray the expenses thereof by taxation, exercise certain judicial powers, and generally act within their limited spheres, as any other political body, restrained only by the charters creating them — beyond them, they cannot go. This power of taxation is plenary, and furnishes, ordinarily, the only means such corporations possess by which to pay their debts. They cannot be said to possess property liable to execution in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and dis-

posed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city. * * * The property of such corporations, and the taxes collected by them for public purposes, are a constituent part and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be. If not so, a party obtaining a judgment against the city would be able to do indirectly what no power short of the legislature can do — destroy the corporate powers and franchises by taking away the aliment which sustains them. Under our constitution it cannot be admitted that any power or any individual possesses, directly or indirectly, such an overwhelming influence over other powers as would enable either of them to put an end to their functions and thus disorganize the government. It cannot be so. The power, if conceded, to seize the property of the corporation would involve the right to seize its revenues, and this involves the right to destroy the corporation. * * * It is true, by the charter of the city it can sue and be sued, but it is not an inference that if sued and a judgment passes against it, an ordinary writ of *fi. fa.* can issue, under which its corporate property can be seized and sold. Nor is there any necessity for such writ. On a debt being ascertained by judgment against the city, and a refusal to pay it, a mandamus can issue to compel payment or to compel a levy of taxes sufficient to discharge the judgment. This is the only legal way in which payment can or ought to be enforced. Some adjudged cases have been referred to by appellant as having a bearing on this, but we do not deem it necessary to consider them very carefully — they appear to have been decided upon some statutory provisions. We decide

b. BY MANDAMUS — *No Remedy by Execution.* — In those jurisdictions in which it is held that an execution may be issued to be levied on certain classes of property, a writ of mandamus will lie to compel the levy of a tax to be devoted to the payment of the judgment, when there is no property of the class which is allowed to be taken; and in those jurisdictions in which it is not permissible to issue an execution, the levy of a tax may also be compelled by mandamus.¹

this on principle, and in so doing reverse the judgment of the Superior Court and remand the cause, with directions to that court to enter an order quashing the execution."

All Property Held for General Benefit and Advantage. — In *Darling v. Baltimore*, 51 Md. 1, the court, after citing a number of cases apparently holding that an execution may issue against property not held as purely public, said: "Notwithstanding the distinction just stated, all the property held by the corporation is, as we have seen, when considered in an enlarged sense, held for public uses and benefits. It is not pretended, of course, that it would be competent, under an execution against the corporation, to seize any property held in trust by it; and all other property that it holds, not used in the exercise of its public municipal functions, is held for the general benefit and advantage of the population, subject to the municipal jurisdiction. In the case of *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322, before referred to, it was held that the city funds invested in a loan to the railroad company were exempt from taxation, under the United States revenue law, upon the distinct grounds that the loan itself was a municipal act, and that the money due the city was public municipal property; and as the municipal corporation was an agency and a part of the state governmental power itself, it could not, therefore, be taxed. But without saying that all the property held by the city is of a strictly municipal character, that is to say, essential to the performance of public municipal functions, yet, if the city funds invested in a loan to a railroad company can be so far regarded as public property, because belonging to a municipal corporation, as to be exempted from taxation, *a fortiori* should that property and all other property held by the municipality be exempt from execution on judgment

against the corporation. Indeed, it would be attended with the most serious consequences, and involve the greatest amount of inconvenience, to lay it down as a rule that any property belonging to a municipal corporation, not actually used in the discharge of its public functions, could be levied upon and sold under ordinary execution, as upon judgment against a private corporation. Both upon principle and the reason of the thing, therefore, we conclude that an execution on judgment against a municipal corporation will not lie."

1. *Alabama.* — *Tallapoosa v. Tarver*, 21 Ala. 661; *Eufaula v. Hickman*, 57 Ala. 338.

Arkansas. — *Graham v. Parham*, 32 Ark. 676.

California. — *People v. San Francisco*, 21 Cal. 680.

Colorado. — *People v. Rio Grande County*, 7 Colo. App. 229; *Grand County v. People*, 8 Colo. App. 43; *Leadville Illuminating Gas Co. v. Leadville*, 9 Colo. App. 400.

Florida. — *Duval County v. Fries*, 22 Fla. 303; *State v. Jacksonville*, 22 Fla. 21; *State v. Jackson County*, 19 Fla. 17.

Georgia. — *Brunswick v. Dure*, 59 Ga. 803; *Curry v. Savannah*, 64 Ga. 290.

Illinois. — *Cairo v. Everett*, 107 Ill. 75; *Chicago v. Hasley*, 25 Ill. 595; *Olney v. Harvey*, 50 Ill. 453; *Elrod v. Bernadotte*, 53 Ill. 368; *Bloomington v. Brokaw*, 77 Ill. 195; *Cairo v. Allen*, 3 Ill. App. 398; *Odell v. Schroeder*, 58 Ill. 353; *Rogers v. People*, 68 Ill. 154; *Peoria County v. Gordon*, 82 Ill. 435.

Indiana. — *Parke County v. O'Conner*, 86 Ind. 531.

Iowa. — *Boynton v. District Tp.*, 34 Iowa 510; *Stevenson v. District Tp.*, 35 Iowa 462; *Coy v. Lyons City*, 17 Iowa 1; *Palmer v. Jones*, 49 Iowa 405; *Kane v. Independent School Dist.*, 82 Iowa 5; *Charnock v. District Tp.*, 51 Iowa 70; *Loring v. Small*, 50 Iowa 271.

Jurisdiction of Federal Courts. — It is well settled that a United States Circuit Court may issue a writ of mandamus to compel the levy of a tax which is necessary for the payment of a judg-

Kansas. — *Stevens v. Miller*, 3 Kan. App. 192; *State v. King*, 29 Kan. 607.

Kentucky. — *Maddox v. Graham*, 2 Metc. (Ky.) 56.

Louisiana. — *Bassett v. School Directors*, 9 La. Ann. 513; *State v. O'Kelly*, 48 La. Ann. 28; *State v. New Orleans*, 49 La. Ann. 946; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *McKnight v. Grant*, 30 La. Ann. 361; *State v. Pilsbury*, 30 La. Ann. 705.

Michigan. — *Pack v. Presque Isle County*, 36 Mich. 377.

Mississippi. — *Warren County v. Klein*, 51 Miss. 807; *Klein v. Smith County*, 54 Miss. 254.

Missouri. — *State v. Holt County Ct.*, 135 Mo. 533; *State v. Hug*, 44 Mo. 116.

Montana. — *State v. Great Falls*, 19 Mont. 518.

Nebraska. — *State v. School Dist. No. 7*, 22 Neb. 700; *Boasen v. State*, 47 Neb. 245.

New Hampshire. — *Boody v. Watson*, 64 N. H. 162.

New Jersey. — *Munday v. Rahway*, 43 N. J. L. 338; *Gabler v. Elizabeth*, 42 N. J. L. 79; *Clarke v. Jersey City*, 42 N. J. L. 94.

New Mexico. — *Raton Waterworks Co. v. Raton*, (N. Mex. 1897) 49 Pac. Rep. 898.

New York. — *People v. Ulster County*, 30 Hun (N. Y.) 146.

North Carolina. — *Cromartie v. Bladen County*, 85 N. Car. 211; *Johnston v. Cleveland County*, 67 N. Car. 101; *Winslow v. Perquimans County*, 64 N. Car. 218; *Gooch v. Gregory*, 65 N. Car. 142; *Lutterloh v. Cumberland County*, 65 N. Car. 403; *Fry v. Montgomery County*, 82 N. Car. 304.

Ohio. — *Gorgas v. Blackburn*, 14 Ohio 252.

Oregon. — *Goldsmith v. Baker City*, 31 Oregon 249; *Portland Lumbering, etc., Co. v. School Dist. No. 1*, 13 Oregon 283.

Pennsylvania. — *Brown v. Rush Tp. No. 1*, 18 Pa. Co. Ct. Rep. 394, 5 Pa. Dist. Rep. 517; *Allen v. Dubois Borough*, 5 Pa. Dist. Rep. 585; *Com. v. Pittsburgh*, 34 Pa. St. 496; *O'Donnell v. Cass Tp. School Dist.*, 133 Pa. St. 162; *Com. v. Perkins*, 43 Pa. St. 400; *Com. v. Allegheny County*, 37 Pa. St. 277; *Foster v. Fowler*, 60 Pa. St. 27;

Wilson v. Huntingdon County, 7 W. & S. (Pa.) 197; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *Com. v. Pittsburgh*, 88 Pa. St. 66.

South Dakota. — *Howard v. Huron*, 6 S. Dak. 181.

Tennessee. — *Memphis v. Memphis*, 9 Baxt. (Tenn.) 76.

Texas. — *Sherman v. Langham*, (Tex. 1897) 40 S. W. Rep. 140; *Houston v. Voorhies*, 70 Tex. 356; *Denison v. Foster*, (Tex. Civ. App. 1896) 37 S. W. Rep. 167; *Corpus Christi v. Woessner*, 58 Tex. 462.

Utah. — *Taylor v. Salt Lake County Ct.*, 2 Utah 405.

Washington. — *German-American Sav. Bank v. Spokane*, 17 Wash. 315.

West Virginia. — *State v. County Ct.*, 37 W. Va. 808; *Fisher v. Charleston*, 17 W. Va. 595, 628; *Wells v. Mason*, 23 W. Va. 456, 7 Am. & Eng. Corp. Cas. 562.

Wisconsin. — *State v. Madison*, 15 Wis. 30; *State v. Beloit*, 20 Wis. 79; *Watertown v. Cady*, 20 Wis. 501; *State v. Milwaukee*, 20 Wis. 87; *State v. Gates*, 22 Wis. 210; *State v. Racine*, 22 Wis. 258; *State v. Milwaukee*, 25 Wis. 122; *State v. Elba*, 34 Wis. 169; *State v. Manitowoc*, 52 Wis. 423; *Crane v. Fond du Lac*, 16 Wis. 196.

United States. — *Board of Liquidation v. McComb*, 92 U. S. 531; *Barkley v. Levee Com'rs*, 93 U. S. 258; *U. S. v. New Orleans*, 98 U. S. 395; *Memphis v. Brown*, 97 U. S. 300; *Memphis v. U. S.*, 97 U. S. 293; *U. S. v. Clark County*, 95 U. S. 769; *Block v. Bourbon County*, 99 U. S. 686; *Hartman v. Greenhow*, 102 U. S. 672; *Greene County v. Daniel*, 102 U. S. 187; *Wolff v. New Orleans*, 103 U. S. 358; *Ex p. Rowland*, 104 U. S. 604; *Davenport v. Dodge County*, 105 U. S. 237; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Louisiana v. Jumel*, 107 U. S. 711; *Hawley v. Fairbanks*, 108 U. S. 543; *Louisiana v. New Orleans*, 108 U. S. 568; *Louisiana v. Police Jury*, 111 U. S. 716; *Labette County v. U. S.*, 112 U. S. 217; *Davies v. Corbin*, 112 U. S. 36; *Mobile v. Watson*, 116 U. S. 289; *East St. Louis v. Amy*, 120 U. S. 600; *Harshman v. Knox County*, 122 U. S. 306; *Currie v. U. S.*, 129 U. S. 44; *Taxing Dist. v. Loague*, 129 U. S. 493; *Chanute City v. Trader*, 132 U. S. 210; *Bass v. Taft*,

ment rendered by such court, not as an exercise of original jurisdiction, but whenever the issuance of the writ is necessary for the enforcement of such judgment; and the writ may be directed for such purpose to state officers.¹

137 U. S. 458; *U. S. v. Labette County*, 7 Fed. Rep. 318, 2 McCrary (U. S.) 25; *Moran v. Elizabeth*, 9 Fed. Rep. 72; *Beaulieu v. Pleasant Hill*, 14 Fed. Rep. 222; *U. S. v. Cape Girardeau County*, 16 Fed. Rep. 836; *U. S. ex rel. Gaines v. New Orleans*, 17 Fed. Rep. 483; *U. S. v. Elizabeth*, 24 Fed. Rep. 851; *Laird v. De Soto*, 25 Fed. Rep. 76; *U. S. v. Oswego Tp.*, 28 Fed. Rep. 55; *Devereaux v. Brownsville*, 29 Fed. Rep. 742; *Shelley v. St. Charles County*, 30 Fed. Rep. 603; *U. S. v. New Orleans*, 31 Fed. Rep. 539; *Moore v. Edgefield*, 32 Fed. Rep. 498; *U. S. v. Judges*, 32 Fed. Rep. 714; *Loague v. Taxing Dist.*, 36 Fed. Rep. 149; *U. S. v. Macon County Ct.*, 45 Fed. Rep. 400; *U. S. v. Green*, 53 Fed. Rep. 769; *In re Copenhaver*, 54 Fed. Rep. 661; *Marlon County v. Coler*, 75 Fed. Rep. 352, 41 U. S. App. 515; *U. S. v. Key West*, 78 Fed. Rep. 88, 41 U. S. App. 726; *Morton v. Kirk*, 79 Fed. Rep. 290; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *U. S. v. Vernon County Ct.*, 3 Dill. (U. S.) 281; *U. S. v. Silverman*, 4 Dill. (U. S.) 224; *U. S. v. Buchanan County*, 5 Dill. (U. S.) 285; *U. S. v. Lee County*, 2 Biss. (U. S.) 77; *U. S. v. Badger*, 6 Biss. (U. S.) 309; *Smith v. Tallapoosa County*, 2 Woods (U. S.) 596; *Clews v. Lee County*, 2 Woods (U. S.) 474; *Hitchcock v. Galveston*, 4 Woods (U. S.) 308; *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Apperson v. Memphis*, 2 Flipp. (U. S.) 363; *Wisdom v. Memphis*, 2 Flipp. (U. S.) 285; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Rock Island County v. U. S.*, 4 Wall. (U. S.) 435; *Walkley v. Muscatine*, 6 Wall. (U. S.) 481; *Weber v. Lee County*, 6 Wall. (U. S.) 210; *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Benbow v. Iowa City*, 7 Wall. (U. S.) 313; *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Davenport v. Lord*, 9 Wall. (U. S.) 409; *Washington County v. Durant*, 9 Wall. (U. S.) 415; *Bath County v. Amy*, 13 Wall. (U. S.) 244; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *U. S. v. Muscatine County*, 2 Abb. (U. S.) 53, *sub nom. Klein v. New Orleans*, 99 U. S. 149; *Galena v. Amy*, 5 Wall. (U. S.) 705; *U. S. v. Brooklyn*,

10 Biss. (U. S.) 466; *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130; *Britton v. Platte City*, 2 Dill. (U. S.) 1; *U. S. v. Ottawa*, 28 Fed. Rep. 407; *King Iron Bridge, etc., Co. v. Otoe County*, 27 Fed. Rep. 800.

Right to Payment Out of Specific Tax. — A judgment creditor of a municipal corporation, entitled by his original contract to be paid out of specific tax levies, which agreement the corporation failed to comply with, is entitled, in mandamus proceedings, to a writ ordering the levy and collection of a sufficient tax to pay his judgment according to the assessment roll of the year in which the levy is made. *Louisiana v. Police Jury*, 111 U. S. 716.

After Repeal of Charter. — If the charter of a city be repealed, and the territory and inhabitants reorganized into "taxing districts," under the control of commissioners to whom the power of taxation for current expenses and compromise bonds is given, such "taxing district" is the successor of the city in the municipal obligations, and mandamus to the commissioners will lie to enforce by taxation the payment of judgments against the original corporation. *Devereaux v. Brownsville*, 29 Fed. Rep. 742; *State v. Police Jury*, 39 La. Ann. 979.

Jurisdiction of District Court. — The District Court has the power to compel by mandamus the mayor and council of a city of the second class to levy a tax for the payment of a judgment rendered against such city. *Stevens v. Miller*, 3 Kan. App. 192.

1. *Riggs v. Johnson County*, 6 Wall. (U. S.) 166.

Not an Original and Independent Remedy. — In *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655, the court said: "Mandamus is essentially and exclusively a common-law remedy and is unknown to the equity practice. But if this were otherwise, it is the well-settled doctrine of this court that the Circuit Courts cannot use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes. In fact, in the class of cases in which it is here sought

Remedy in Nature of Execution. — Mandamus to enforce the collection of a tax to pay a judgment against a municipal corporation is a remedy in the nature of an execution,¹ and nothing can be alleged by the respondent to contradict the record of the judgment.²

Levy Need Not Have Been Demanded. — In order that the writ may issue to compel the levy and collection of a tax for the payment of a judgment against a municipal corporation it is not necessary that the creditor shall first demand the levy of such tax, as the demand of payment is held to include a demand to do any particular thing necessary to such payment.³

Mandamus Will Not Issue to Compel the Levy of a Tax to Pay a Judgment Against a Municipal Corporation Where the Facts Necessary to the Action of the Court are Not Proved,⁴ or Where the Judgment has Been Obtained by Fraud or is Dormant.⁵

IV. MANDAMUS AGAINST MUNICIPAL CORPORATIONS — Application of General Principles. — In actions for mandamus against municipal

it is a writ in execution of the judgment of the court already rendered, and can only be used because it is an appropriate process for that purpose.

After Injunction from State Court. — After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a state statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the Circuit Court will lie against the county officers to levy a tax, even although prior to the application for the mandamus a state court has perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment. The state court, therefore, is not to be regarded as in prior possession of the case. *Riggs v. Johnson County*, 6 Wall. (U. S.) 166.

1. *Harshman v. Knox County*, 122 U. S. 306; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Washington County v. Durant*, 9 Wall. (U. S.) 415; *Thompson v. U. S.*, 103 U. S. 480; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Greene County v. Daniel*, 102 U. S. 187; *Bath County v. Amy*, 13 Wall. (U. S.) 244.

Bond for Costs Unnecessary. — Mandamus to a municipal corporation to levy a tax for the purpose of paying a

judgment against such corporation is in the nature of an execution to enforce such judgment, and does not require a bond for costs where such has already been given in the original action. *Stevens v. Miller*, 3 Kan. App. 192.

2. *Harshman v. Knox County*, 122 U. S. 306.

3. *Cairo v. Everett*, 107 Ill. 75; *State v. Jacksonville*, 22 Fla. 21.

At What Time Demand Made. — In *Cairo v. Campbell*, 116 Ill. 305, it is held that a demand upon a city council for the payment of a judgment recovered against the city, if made at any time before the day fixed by law for the adoption of the ordinance for the levy of the municipal taxes, will be sufficient to justify a proceeding by mandamus to compel the levy of taxes with which to satisfy the judgment.

To Enforce Judgment Upon Bonds or Coupons. — Where the law authorizing city bonds made it the duty of the council from time to time to levy a tax to pay interest and principal, and did not make that duty contingent upon a demand being made, it was held in *State v. Racine*, 22 Wis. 259, that after judgment upon the bonds or coupons, mandamus would lie to compel the levy of a tax to pay the judgment without demand made. See also *Fisher v. Charleston*, 17 W. Va. 595.

4. *U. S. v. Elizabeth*, 24 Fed. Rep. 851.

5. *State v. School Dist. No. 2*, 25 Neb. 301.

corporations and their officers, to compel the levy of a tax to be directed to the payment of judgments or other indebtedness, or to compel the performance of other duties, the same rules of pleading and practice govern as in actions for mandamus generally, as will be seen by the notes and the article MANDAMUS, vol. 13, p. 479, to which the practitioner is referred.¹

1. Averment of Relator's Title to Bonds.

— An alternative mandamus requiring a municipal corporation to provide for the payment of the interest on its bonds need not set forth the relator's title to such bonds. The averment of ownership is sufficient to show his right to ask the interference of the court by mandamus. The ownership of such bonds necessarily includes the ownership of the right to the interest secured by them and of the coupons attached which are part of the securities. *Com. v. Pittsburgh*, 34 Pa. St. 496.

Particulars Must Be Stated. — In *People v. Westchester County*, 15 Barb. (N. Y.) 607, it was held that in an alternative writ of mandamus alleging that the relators have been unjustly assessed, a general assertion that injustice has been done to the relators in assessing their property, or that they have been unjustly assessed, and that the defendants have refused to correct the erroneous assessment, is not sufficient to entitle the relators to any relief; they should go beyond that and state the particulars in order that it may be seen from them that the charge was well founded and that the defendant may be aided specifically to answer the complaint.

Mandamus to Compel Levy of Taxes to Pay County Warrant. — A petition for a writ of mandamus which sets out a county warrant *in his verbis*, alleging that it was issued in pursuance of an order of the board of police of the county duly made and entered; that, before suit, the petitioner presented it to the county treasurer and requested payment, which was refused on the ground that the board of supervisors were in session and there was no money in the county treasury to pay the warrant; that he demanded of the board to levy a tax to pay the same, they being in session for the purpose of levying taxes for the fiscal year; that they refused, failed, and neglected to levy the tax or to make any provision for the payment of the warrant; and that the petitioner is interested in the performance of the duty requested

of the board, and will be damaged by reason of their not performing the same, sets forth the petitioner's claim with sufficient precision and fullness. *Klein v. Smith County*, 54 Miss. 254.

Issuance of Execution and Return of Nulla Bona. — Although in an application for mandamus to enforce a judgment against a town it should appear that the relator has no other adequate remedy, he need not allege the issue of an execution and that the same has proved unavailing. It will be sufficient to state that such town has no property on which an execution may be levied and that it has no money in the treasury subject to the payment of the judgment in question. *Hambleton v. Dexter*, 89 Mo. 188. See also *Com. v. Pittsburgh*, 34 Pa. St. 496; *Hambleton v. Dexter*, 89 Mo. 188; *Rex v. Margate Pier Co.*, 3 B. & Ald. 220, 5 E. C. L. 266.

Petition to Compel Auditing of Bonds.

— A petition for mandamus to compel a board of town auditors to audit bonds which fails to allege the presentation of such bonds to the board, or its refusal to audit them, is fatally defective. *People v. Mt. Morris*, 145 Ill. 427.

Payment of Warrants. — In an application for a mandamus to compel a county treasurer to pay warrants, an averment that the auditor drew the warrants is sufficient, as the law will presume that he drew them properly; but the treasurer is at liberty to prove any illegality in such warrants as a defense. *Connor v. Morris*, 23 Cal. 447.

Averment as to Incorporation. — In *Wilson v. Bristley*, 13 Tex. Civ. App. 200, the petition was for a mandamus to compel the authorities of the town to count the votes and declare the result of an election. Such petition showed that the town had a superficial area of over twenty-seven square miles and alleged no facts to show that the incorporation of such town might not be void for including a greater area than allowed by statute. It was held on demurrer that the mere averment in the

Where Any Discretion Is to Be Exercised by officers of the municipal corporation as to the manner in which an act may be done, or rather when the thing desired to be done depends upon the judg-

petition that the town was duly incorporated was insufficient. In this case the court said: "It was alleged in the petition that the town of Liberty had been duly incorporated under title 17 of the Revised Statutes of Texas, but there is nothing further to show whether it was incorporated as a town of less than ten thousand inhabitants or of more than that number, or to show whether or not the corporation might not be void as including territory within its boundaries not permitted by law. Ordinarily the allegation that the town had been duly incorporated would be sufficient, on general demurrer, to show that it was so incorporated; but the petition shows further that the territory included within the limits of the town is of a superficial area extending 18,886 varas east and west, and 5,340 varas north and south, making an area of 27.8 square miles. In the absence of the allegation of facts to show that this large scope of territory was legally incorporated, it must be held that the allegation that the town of Liberty was duly incorporated is not sufficient, even on general demurrer, when taken in connection with the allegation as to the limits of the town. If the town was not lawfully incorporated there was no authority to hold the election, or to have the returns counted and the result declared, nor, indeed, any occasion therefor."

An Alternative Writ of Mandamus to enforce a judgment against a town must set out facts showing the incorporation of the town and the power of its trustees to levy taxes. Hambleton v. Dexter, 89 Mo. 188.

Necessity of Setting Out Ordinance.—In Hyde Park v. Thatcher, 13 Ill. App. 613, it was held that a petition for mandamus to compel a village to levy a tax to pay a judgment rendered in condemnation proceedings for opening a street is defective if it fails to set forth the ordinance showing that compensation was to be made by the collection of a general tax.

Averment of Demand and Refusal.—In accordance with the usual rule in mandamus proceedings, the application for mandamus against a municipal corporation for the nonperformance of a duty should show a demand and re-

fusal by the municipal corporation to perform such duty. Crandall v. Amador County, 20 Cal. 72; Jefferson County v. Arrghi, 51 Miss. 667. But see U. S. v. Brooklyn, 8 Fed. Rep. 473, in which case a demand and refusal were considered useless.

Sufficient Averment of Demand and Refusal.—In State v. Milwaukee, 20 Wis. 87, the petition of the relator was accompanied by the affidavit of his agent, stating in substance that said Sherman (the relator) recovered in 1861, in the County Court of said county, a judgment against the city of Milwaukee for \$302.75, which was docketed on the same day and still remained in force, but no part of it paid; that "said Sherman * * * has demanded payment of said judgment of the treasurer of said city and the said treasurer has failed and refused to pay the same or any part thereof; that the common council of said city have failed to make any provision, by the assessment of taxes or otherwise, to pay or satisfy said judgment, but refuse so to do." Upon a motion to discharge and set aside a rule to show cause why a peremptory writ of mandamus should not issue, the court held that a sufficient demand and refusal was alleged by the relator.

Averment of Refusal to Provide Funds.—A writ of mandamus to compel the assessment and levy of a tax to provide for the payment of interest upon bonds of a municipal corporation will be sufficient if it avers that the defendants have refused to make any provision for the payment of the interest. It need not show that a demand was made upon them to do so. The grant of the power to assess and collect taxes for the payment of the interest on the bonds imposes upon the defendants the duty of exercising such power. Com. v. Pittsburgh, 34 Pa. St. 496.

Allegation of Power to Levy Taxes.—In an action by mandamus against the mayor and aldermen of a municipal corporation, where the writ alleges the failure and refusal of the respondents upon request to provide for the assessment or collection of a tax, there is sufficient allegation of demand and refusal, and it is unnecessary for the relator to allege that the respondents

ment of the officer, the writ in such case will not control his discretion, but will only command him to act, without interference with the manner of such action.¹

Order in Which Judgments Should Be Paid. — A writ of mandamus issued on the application of a judgment creditor of a municipal corporation to enforce the payment of such judgment need not, where other judgments have been recorded, order such judgments to be paid in their due order, where the other judgment creditors have not applied for the writ.²

had not exhausted their power to levy taxes. *State v. Jacksonville*, 22 Fla. 21.

Alternative Writ Must Be Certain in Its Command. — An alternative writ commanding the defendant to pay a judgment, or issue bonds for its payment, or levy a tax to pay it, should be quashed. *State v. Milwaukee*, 22 Wis. 397. In this case the court said: "The rule seems to be well settled that the mandatory clause of the writ should expressly state the duty required of the defendant. * * * Here the command is that the defendant pay the judgment therein mentioned, or issue bonds for its payment, or proceed and levy a tax upon the taxable property of the city for its payment. These acts are distinct in their nature and the defendant may not know which to perform."

In *State v. Pacific*, 61 Mo. 155, it is held that a writ of mandamus ordering town authorities to pay certain warrants or levy a tax for that purpose is improper and that the command should be limited to one of the requirements.

Amendment of Alternative Mandatory Clause. — In *State v. Milwaukee*, 22 Wis. 397, it was held that an alternative writ commanding the municipal corporation to pay a judgment or issue bonds for its payment or levy a tax to pay it may be amended upon leave being granted.

1. *Humboldt County v. Churchill County*, 6 Nev. 30; *People v. Dutchess County*, 1 Hill (N. Y.) 50; *Rader v. Union Tp.*, 43 N. J. L. 518.

Auditing Demands Against Municipal

Corporations. — Where the writ issues to compel municipal authorities or boards to audit and pass upon demands against the municipality, it should be limited in form to merely starting the officers in motion, requiring them to act, without directing them to act in any particular manner or interfering with their discretion. *People v. Delaware County*, 45 N. Y. 196; *San Francisco Gas Co. v. San Francisco*, 11 Cal. 42; *People v. New York*, 32 N. Y. 473; *People v. Macomb County*, 3 Mich. 475.

Mandamus to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne County v. Stanislaus County*, 6 Cal. 440.

2. *New Orleans v. U. S.*, 49 Fed. Rep. 40. See also *State v. New Orleans*, 37 La. Ann. 13, in which case the court said: "We are not called upon to consider the rights of other judgment creditors whose judgments rank that of relators in order of registry. The record does not advise us whether their judgments are based on contracts or whether they rest upon causes of action arising prior to the constitutional amendment of 1874. It may be that none of them can compete with relators in the relief sought. But at all events the unexhausted power of taxation is ample to satisfy all; and if they are entitled to like rights with relators and have neglected to exercise them, there is no reason why relators should suffer."

MUNICIPAL SECURITIES.

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I. ACTIONS ON MUNICIPAL ORDERS OR WARRANTS — 1. When Brought — Presentment for Payment. — A municipal order or warrant must be presented to the treasurer upon whom it is drawn before an action on such order or warrant can be maintained, unless facts exist which will excuse such presentation.¹

1. *Central v. Wilcoxon*, 3 Colo. 566; *v. Carmel*, 8 Me. 110; *East Union Tp. v. Varner v. Nobleborough*, 2 Me. 121; *Ryan*, 86 Pa. St. 459. See also *Beals Pease v. Cornish*, 19 Me. 191; *Benson v. Evans*, 10 Cal. 459.

Actions on Municipal *MUNICIPAL SECURITIES*. Orders or Warrants.

Action Regardless of Want of Funds.—Where the order or warrant has been presented and payment has been refused an action thereon may be instituted at once in the case of general warrants or orders not drawn on a special fund,¹ even though there may be no money in the treasury to pay.²

Production and Exhibition Unnecessary.—Upon the refusal by the treasurer of a town to pay an order drawn upon him by the selectmen, payable on demand, it is not necessary that it be produced and exhibited; it is sufficient that the person making the demand have it with him, that it may, upon payment, be delivered up and cancelled. *Pease v. Cornish*, 19 Me. 191.

1. *International Bank v. Franklin County*, 65 Mo. 105; *Allison v. Juniata County*, 50 Pa. St. 353. See also *Central v. Wilcoxon*, 3 Colo. 566.

2. *Mills County Nat. Bank v. Mills County*, 67 Iowa 697; *Clark v. Des Moines*, 19 Iowa 199; *Campbell v. Polk County*, 3 Iowa 467; *International Bank v. Franklin County*, 65 Mo. 105; *Paddock v. Symonds*, 11 Barb. (N. Y.) 117; *Terry v. Milwaukee*, 15 Wis. 490; *Markwell v. Waushara County*, 10 Wis. 74; *Savage v. Crawford County*, 10 Wis. 49; *Pelton v. Crawford County*, 10 Wis. 69; *Packard v. Bovina*, 24 Wis. 382; *Lyell v. Lapeer County*, 6 McLean (U. S.) 446.

In *Clark v. Des Moines*, 19 Iowa 199, the court said: "There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is as absolutely and unconditionally liable as for other debts. This liability cannot be controlled or varied by the form in which warrants may be drawn or worded by the municipal officers."

In the case of *International Bank v. Franklin County*, 65 Mo. 105, it was held that a county warrant, payable out of any money in the treasury appropriated for county expenditures, is a written acknowledgment of indebtedness by the county, and if not paid when presented, may be sued on by the legal holder, although there is no money in the treasury to pay. See also, to the same effect, *Wilson v. Knox County*, (Mo. 1894) 28 S. W. Rep. 896; *Moody v. Cass County*, 74 Mo. 308; *Valleau v. Newton County*, 81 Mo. 594.

In *Arkansas* it is held that the statute

of limitations begins to run against a county warrant, issued in payment for public works, from the date of delivery, and that therefore an action can be maintained upon such warrants without regard to whether an appropriation adequate to pay them has been made. *Thompson v. Searcy County*, 57 Fed. Rep. 1030. In this case the court, after citing several cases holding that the statute begins to run immediately upon its delivery, said: "In view of these rulings, we conclude that a suit could be maintained on the warrants as soon as they were delivered to the contractors, without reference to the question whether the fund against which they were drawn had or had not been depleted. It would be the height of injustice to hold that a suit could not be maintained on the warrants, for the purpose of reducing them to a judgment, until there was an appropriation adequate to pay them, and at the same time to hold that, without reference to an appropriation, the statute of limitations begins to run from the date of delivery. It is clear, we think, that no error was committed in overruling the first point of demurrer." See also the case of *Crawford County v. Wilson*, 7 Ark. 214, in which it was taken for granted that the holder of county warrants issued for building a court-house, could maintain an immediate suit thereon against the county, and reduce the audited demand to a judgment, although the particular fund on which the warrants were drawn was exhausted.

In *Nebraska* it is held that the cause of action on a county warrant does not accrue when the warrant is issued, but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed. *Brewer v. Otoe County*, 1 Neb. 373. In this case the court said: "Whoever deals with a county and takes in payment of his demand a warrant of the character of these, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait

Actions on Municipal *MUNICIPAL SECURITIES*. Orders or Warrants.

Unnecessary to Request Levy of Tax. — The holder of such order or warrant need not request the levy of a tax to raise a fund before bringing suit.¹

Failure to Pursue Steps Prescribed by Statute. — The fact that the plaintiff may not have followed and exhausted all the modes prescribed by statute for obtaining money from the municipal treasury, is not a bar to his action on a municipal order or warrant.²

Orders Payable Out of Special Fund. — According to some decisions, a municipal order or warrant payable out of a special fund, not otherwise appropriated, is not due until such a fund shall exist;³ and in such cases it would seem that an action thereon can be maintained only after such presentation and lapse of time as will give opportunity to raise the fund from which it is to be paid.⁴

until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed."

1. *Mills County Nat. Bank v. Mills County*, 67 Iowa 697.

2. *Gibson County v. Rains*, 11 Lea (Tenn.) 20.

3. *Brown v. Johnson County*, 1 Greene (Iowa) 486.

4. *East Union Tp. v. Ryan*, 86 Pa. St. 459. In this case, which was an action on warrants to be paid out of a special tax, the court said: "The construction of this highway was to be paid for out of a designated fund, to consist of a tax of two per cent on the assessed valuation of the property of each township. The treasurer had no authority to appropriate to the payment of the warrants of the commissioners any moneys outside of the fund to be thus raised. Some reasonable notice by the holders of those warrants, conveyed by a demand of payment or in some other form, was requisite in order to fasten a liability upon the township officers. An action for the recovery of the amount of any warrant could only be maintained against them after such notice, and after the lapse of such a period of time as would enable them to collect this tax 'at the same time,' in the language

of the act, 'and in like manner as other county and township rates and levies are made and collected.' These warrants could only be payable after such presentation as would give opportunity to provide the fund exclusively dedicated to their liquidation."

Action on Swamp-land Warrant. — In *Wetmore v. Monona County*, 73 Iowa 88, which was an action on a swamp-land warrant, the plaintiff averred that at no time since the execution and delivery of the warrant was there any swamp-land money in the defendant's treasury, not otherwise appropriated, until Jan. 1, 1878. The defendant's demurrer to the petition on the ground that the plaintiff's cause of action appeared to be barred by the statute of limitations was sustained. Upon appeal the court said: "The question raised by the demurrer to the petition is as to whether the plaintiff's cause of action accrued earlier than January 1, 1878. In our opinion it did not. The warrant was made payable out of a special fund, and the defendant was not liable to an action on the warrant until the fund out of which it was made payable came into existence. We think that the demurrer was improperly sustained."

Failure to Provide Fund Before Statute of Limitation Intervenes. — Where a city has issued a warrant payable out of a special fund, which it has agreed to provide for the payment of such warrant, its failure to provide such fund, until the bar of the statute of limitations intervenes, will entitle the holder of the warrant to bring an action thereon for the purpose of procuring payment out of the general fund, or the

Actions on Municipal MUNICIPAL SECURITIES. Orders or Warrants.

2. Who May Maintain — Holder of Negotiable Warrant. — Where municipal orders or warrants are negotiable and transferable by delivery, so as to divest the payee of the legal interest, an action against the municipal corporation may be maintained by the transferee in his own name.¹

Action by Assignee in Name of Original Owner. — In some jurisdictions it is held that such orders and warrants are but evidences of indebtedness, and that the assignee obtains a mere equitable title such as he would take from the assignment of an ordinary chose in action, on which he cannot maintain an action in his own name.² His remedy, if a *bona fide* holder of such orders or warrants, is by an action in the name of the person to whom they were issued, as in the case of a suit by the assignee of an ordinary chose in action.³

Action by Assignee in His Own Name. — The general rule in this country would seem to be that the holder or transferee of a

issuance of a warrant to him upon the general fund. *British Columbia Bank v. Port Townsend*, 16 Wash. 450.

1. *Crawford County v. Wilson*, 7 Ark. 219; *Kelley v. Brooklyn*, 4 Hill (N. Y.) 263; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Clarke v. School Dist. No. 7*, 3 R. I. 199. See also *Justices v. Orr*, 12 Ga. 137.

County Warrants. — County warrants issued in the form prescribed by the state, payable to an individual or bearer, are negotiable, and transferable by delivery so as to divest the payee of the legal interest. When such warrants are issued to an individual for a debt due him by the county, and he transfers them, the legal interest passes to the transferee, who may bring an action against the county for the amount of them, and the county is discharged from obligation to the original payee. *Crawford County v. Wilson*, 7 Ark. 214.

2. *Smith v. Cheshire*, 13 Gray (Mass.) 318; *Klein v. Warren County*, 51 Miss. 878; *Allison v. Juniata County*, 50 Pa. St. 353; *Hyde v. Franklin County*, 27 Vt. 185.

County Orders. — An order drawn by the judges of the county court upon the county treasurer, payable to the order of the person in whose favor it is drawn, is not negotiable so as to enable the indorsee to maintain an action on it in his own name. *Hyde v. Franklin County*, 27 Vt. 185.

3. *Smith v. Cheshire*, 13 Gray (Mass.) 318. In this case it was held that orders for money, made payable to

bearer, drawn by the selectmen of a town and accepted by the town treasurer, without express authority of the town, will not render the town liable to an action in the name of any one other than the person to whom they were issued.

In *Pennsylvania* it was at one time held that a city could pay warrants only to the person named therein, and that the word "bearer" must be disregarded. *O'Donnell v. Philadelphia*, 7 Phila. (Pa.) 234. See, however, the later case of *Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382, in which it was held that when a warrant is negotiable in form, and shows on its face that it has been audited and is correct, the holder may maintain an action in his own name.

Real Ground of Indebtedness to be Shown. — In *Polk v. Tunica County*, 52 Miss. 422, it is held that a county warrant is not alone a foundation for an action; the real ground of the indebtedness must be shown.

Suit Must Be on Original Claim. — In *Allison v. Juniata County*, 50 Pa. St. 353, it is held that a county order or warrant is not a bill, note, check, or contract, nor is it a satisfaction of the original indebtedness, and no action lies upon it; the suit must be upon the original claim.

In *Port Royal v. Graham*, 84 Pa. St. 426, it is held that while a county warrant is not *per se* a proper subject of an action, it may contain other matters which make it a contract and evidence of a debt, and, if so, an action may be maintained upon it.

Actions on Municipal *MUNICIPAL SECURITIES*. Orders or Warrants.

municipal order or warrant may maintain an action on such securities in his own name.¹

Defenses Which May Be Interposed.—In an action by a holder in his own name the assignee stands in no better position than the original holder, and the defendant can interpose any defenses which would be proper against such original holder.²

3. Declaration, Petition, or Complaint — a. AVERMENT OF AUTHORITY TO ISSUE — Execution of Instrument.—The allegation that a municipal order or warrant sued upon was duly and legally issued is sufficient.³

1. *Beals v. Evans*, 10 Cal. 459; *Campbell v. Polk County*, 3 Iowa 467; *Dively v. Cedar Falls*, 21 Iowa 565; *Clark v. Polk County*, 19 Iowa 248; *Floyd County v. Day*, 19 Ind. 450; *Leavenworth County v. Keller*, 6 Kan. 510; *Emery v. Mariaville*, 56 Me. 315; *Sturtevant v. Liberty*, 46 Me. 459; *International Bank v. Franklin County*, 65 Mo. 105; *Matthis v. Cameron*, 62 Mo. 504; *Andover v. Grafton*, 7 N. H. 298; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Kelley v. Brooklyn*, 4 Hill (N. Y.) 265; *Clarke v. School Dist. No. 7*, 3 R. I. 199; *Garner v. State*, 5 Lea (Tenn.) 216; *Gibson County v. Rains*, 11 Lea (Tenn.) 20; *Bradley County v. Surgoine*, 6 Baxt. (Tenn.) 108; *Gallatin Bank v. Baber*, 6 Lea (Tenn.) 273.

2. *Matthis v. Cameron*, 62 Mo. 504, and cases in preceding note.

In *Dively v. Cedar Falls*, 21 Iowa 565, it is held that without express authority in the charter so to do, municipal corporations have no power to bind themselves by negotiable paper with all the incidents of negotiability; and such paper issued without such authority has no other binding effect upon the corporation, in the hands of a *bona fide* indorsee for value, before maturity, than it would have in the hands of the original holder. *Citing* *Clark v. Des Moines*, 19 Iowa 199; *Clark v. Polk County*, 19 Iowa 248.

Form of Assignment.—No assignment of a county warrant will transfer the title unless made in the form prescribed by statute. *International Bank v. Franklin County*, 65 Mo. 105.

Necessity of Assignment.—In *People v. Gray*, 23 Cal. 125, the court said: "It has been repeatedly held by this court that warrants of this kind do not possess the qualities of negotiable paper, like bills of exchange, promissory notes, and the like. * * * The fact that the warrant is payable to

bearer will not, therefore, make it transferable by delivery, like a promissory note thus payable. In *Martin v. San Francisco*, 16 Cal. 285, it was held that even where there was a regular assignment of such a warrant by the person to whom it was issued, the assignee could not maintain an action on it without an assignment of the original indebtedness. But in *Dana v. San Francisco*, 19 Cal. 486, it was intimated that an assignment of the warrant might be deemed in equity an assignment of the debt on which the warrant issued, and an authority to the assignee to receive the money. In the case of *Martin* the warrant was payable to the payees or bearer, and in the case of *Dana* it was made payable to the order of the payee. It is clear that the county treasurer cannot be compelled to pay a county warrant to any other person than the one in whose favor it is drawn, without at least an assignment of the warrant by the payee."

Indorsement or Written Assignment.—In *Bradley County v. Surgoine*, 6 Baxt. (Tenn.) 108, it is held that holders of county warrants negotiable by indorsement or written assignment, can bring no suit in their own names to enforce their collection unless vested with the legal title by indorsement or written assignment.

Proof of Consideration.—In *Minnesota* it seems that the assignee cannot sue in his own name without proof of the consideration, which must be such as the municipality is authorized to incur. *School Dist. No. 7 v. Thompson*, 5 Minn. 280; *Goodnow v. Ramsey County*, 11 Minn. 31.

3. *Stephens v. Spokane*, 11 Wash. 41. In this case it was contended that it was necessary to allege the proceedings of the city council by virtue of which the person signing the warrants sued upon became acting mayor. The

Actions on Municipal *MUNICIPAL SECURITIES*. Orders or Warrants.

b. AVERMENT OF PRESENTATION — Presentation and Nonpayment Must Be Alleged. — Since an action on municipal orders or warrants will not lie until they have been presented for payment to the proper officer, a declaration, petition, or complaint, in an action on such securities, should allege their presentation and nonpayment, or facts excusing the holder from presenting them.¹

c. AVERMENT OF FUNDS WITH WHICH TO PAY. — In an action on a general municipal order or warrant, the plaintiff need not allege or prove the existence of any fund out of which it is payable.²

d. DESCRIPTION OF SECURITY SUED ON. — Where several municipal warrants are sued on, the plaintiff need not, where he sets out the aggregate amount of such warrants, give a full description of them. The date, amount, and the payee of each warrant may be shown by an exhibit attached to the pleading.³

Averment of Indorsement or Assignment. — Where holders of municipal

court held this unnecessary in these words: "This also, we think, is a matter of evidence, and not of pleading, and the allegation that the warrant was duly and legally issued was sufficient."

Averment of Written Warrant. — In *Stephens v. Spokane*, 11 Wash. 41, it was held that where an ordinance requires a municipal warrant to be in writing, it is not necessary to allege that the contract was in writing, but that the written contract is admissible under a general allegation that the parties contracted. See, however, *East Union Tp. v. Ryan*, 86 Pa. St. 459, in which it was held that in an action on warrants authorized by statute it should appear that all the acts required by the statute were performed before such warrants were issued.

1. *Central v. Wilcoxon*, 3 Colo. 566; *East Union Tp. v. Ryan*, 86 Pa. St. 459. See *International Bank v. Franklin County*, 65 Mo. 105.

2. *Campbell v. Polk County*, 3 Iowa 467; *International Bank v. Franklin County*, 65 Mo. 105; *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650. See also *Floyd County v. Day*, 19 Ind. 450; *Clark v. Des Moines*, 19 Iowa 199.

In *Campbell v. Polk County*, 3 Iowa 467, which was a suit on county warrants drawn payable out of any money not otherwise appropriated, it was claimed on behalf of the county that the creditor, in order to recover, should allege and show that there was money in the treasury; but the court said:

"It is as clear to us as any proposition can be, that he should not be held to this. He is obliged to have his claim settled by the county judge; the judge cannot pay the money, but is obliged to draw a warrant on the treasurer for it. Now, is there any reason or justice in saying that the creditor must allege and prove funds to be in the treasury, because he took a warrant, or because he took such an one? Upon a refusal to pay, he might return the warrant and sue on the original consideration, and then he would be relieved from that responsibility. In the opinion of this court, these warrants were payable."

In *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650, which was an action on county warrants, the petition alleged the absolute refusal by the county to pay such warrants, and the payment by the county of other warrants of the same class and of a later date. Upon demurrer it was held that such petition need not allege the existence of funds in the possession of the county treasurer to pay the warrants in question.

Contra. — A petition alleging the issue and nonpayment of a county warrant without alleging that there is money in the treasury for its payment, or that time has elapsed for the collection of the money by taxation, will be dismissed without prejudice. *Brewer v. Otoe County*, 1 Neb. 373. See also *Cramer v. Sacramento*, 18 Cal. 385.

3. *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650.

orders or warrants can maintain no action thereon in their own names unless vested with the legal title, by indorsement or written assignment, a declaration setting out such securities as the foundation of an action by the holders thereof by delivery merely, is defective and demurrable.¹

4. Answer — In General. — Where an officer is authorized to issue municipal orders or warrants, such order or warrant is presumed to be upon a consideration, and makes a *prima facie* cause of action, and any defense must be pleaded and proved.²

5. Enforcement of Judgment — Remedy by Mandamus. — Municipal orders or warrants are to be paid in the manner provided by charter or statute, and the judgment-creditor in an action on such securities may have a writ of mandamus to compel the proper officers of the municipality to do their duty in the matter of their payment.³

II. ACTIONS ON MUNICIPAL BONDS AND COUPONS — 1. When Brought. — Actions on municipal bonds must be brought within the statutory period after maturity, and actions on coupons of such bonds within such period after the maturity of the coupons, without

1. *Bradley County v. Surgoine*, 6 Baxt. (Tenn.) 108; *International Bank v. Franklin County*, 65 Mo. 105. See also *People v. Gray*, 23 Cal. 125.

2. *Floyd County v. Day*, 19 Ind. 450.

Allegation that Debt Exceeded Constitutional Limit. — In *Wilder v. Rio Grande County*, 41 Fed. Rep. 512, which was an action on county warrants given to satisfy a judgment against the county, the defendant alleged that when such judgment was rendered the debt of the county exceeded the limit of indebtedness fixed by the constitution of the state. The answer was held demurrable, as it did not state that such excess of the county debt existed when the contract on which the judgment in question was rendered was made. In this case the court, in sustaining the demurrer, said: "The answer seems to proceed upon the assumption that the date of the judgments, or of the warrants on which the suit is founded, is to be taken as the time of contracting the indebtedness, within the meaning of the constitution. This is clearly wrong. In civil actions on contract, the contract necessarily precedes the judgment; and the question under the constitution is whether, at the time of making the contract, the indebtedness of the county exceeded the constitutional limit. That question is not presented by this answer. The answer

should refer to the county's financial condition at the time when the indebtedness was contracted for which the judgments were obtained."

Plea of Nonpresentation for Registration. — In *Taylor v. Chickasaw County*, (Miss. 1895) 16 So. Rep. 907, which was an action on county warrants, the defendant averred that the warrants therein named and described were not presented to the county treasurer for registration within one year from the date when they were respectively issued, nor within one year from the passage of the Mississippi Act, approved Feb. 25, 1842, requiring presentation, and providing that all claims not so presented should be forever barred. This plea was demurred to and the demurrer was sustained. Upon appeal the court said: "The demurrer to the second plea of the defendant should have been overruled. * * * We fail to perceive why this plea does not present a complete defense, as against all claims not dealt with as directed by this statute."

3. See article *MUNICIPAL CORPORATIONS*, III. *Judgments*, 2 *Enforcement*, *ante*, p. 244 *it seq.*; *Carroll County v. U. S.*, 18 Wall. (U. S.) 71; *U. S. v. County Ct.*, 3 Dill. (U. S.) 281; *Shirk v. Pulaski County*, 4 Dill. (U. S.) 215, note. See also *Summit County v. People*, 10 Colo. 14; *U. S. v. Brown*, 41 Fed. Rep. 481.

regard to the date of maturity of the bond;¹ and this, too, whether the coupons remain attached to the bonds or have been detached therefrom.²

2. Who May Maintain — Action by Holder. — A municipal bond may be sued upon by the holder thereof, in his own name.³ So also, the holder of a coupon originally attached to a municipal bond may maintain an action in his own name on such coupon, separate from and without producing the original bond.⁴

3. Against Whom Brought — Corporate Existence of Maker of Bond. — An action on municipal bonds should be brought against the cor-

1. *Amy v. Dubuque*, 98 U. S. 474; *Clark v. Iowa City*, 20 Wall. (U. S.) 583, *explaining* *Kenosha City v. Lamson*, 9 Wall. (U. S.) 477; *Lexington v. Butler*, 14 Wall. (U. S.) 282. See also *Koshkonong v. Burton*, 104 U. S. 668.

2. *Amy v. Dubuque*, 98 U. S. 470; *Nash v. El Dorado County*, 24 Fed. Rep. 252.

In *Amy v. Dubuque*, 98 U. S. 470, where it was insisted that the conclusion that the holder of a coupon had a complete cause of action upon its non-payment at maturity was in conflict with the decisions in *Kenosha City v. Lamson*, 9 Wall. (U. S.) 477; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Clark v. Iowa City*, 20 Wall. (U. S.) 583, the court said: "The right of the plaintiff in error to sue upon the coupons was complete after their non-payment at maturity, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit, from the time 'their causes accrue;' that is, from the time the right to sue for a breach attaches. We adhere, therefore, to our decision in *Clark v. Iowa City*, 20 Wall. (U. S.) 583, that the statute of limitations began to run, under the Iowa statute, from the time the coupons respectively matured."

3. *Savings Soc. v. New London*, 29 Conn. 175; *Johnson v. Stark County*, 24 Ill. 75.

Suit by Guardian. — In *Catron v. La Fayette County*, 106 Mo. 659, it is held that one may sue in his own name on

county bonds assigned to him as guardian of his ward.

4. *Cicero v. Clifford*, 53 Ind. 191; *Johnson v. Stark County*, 24 Ill. 75; *Donaldson v. Butler County*, 98 Mo. 163; *Nashville v. Potomac Ins. Co.*, 2 Baxt. (Tenn.) 296; *North Bennington First Nat. Bank v. Mt. Tabor*, 52 Vt. 87; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Walnut v. Wade*, 103 U. S. 695; *Burlington, etc., R. Co. v. Otoe County*, 1 Dill. (U. S.) 338; *Kenosha City v. Lamson*, 9 Wall. (U. S.) 478; *Murray v. Lardner*, 2 Wall. (U. S.) 110. See *Stewart v. Lansing*, 104 U. S. 505; *McCoy v. Washington County*, 3 Phila. (Pa.) 290.

Production of Bond Unnecessary in Action on Coupon. — In *National Exch. Bank v. Hartford, etc.*, R. Co., 8 R. I. 375, the court said: "A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest; and at the same time to permit complete evidence of the payment of the interest to the makers of the obligation."

In *Kenosha City v. Lamson*, 9 Wall. (U. S.) 477, it is held that a holder of coupons which have been cut off from the bond to which they were originally attached, may bring suit on them if they represent interest already due, notwithstanding he be no longer holder of the bond to which they belonged. He need not, if he declares properly, produce the bond.

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porate body issuing them. Thus where a school board that issued certain bonds had, at the time of issue, a separate corporate existence, an action on such bonds is properly brought against the school board, although since the issue the city originally constituting the school board has by its increase in population become a city of a class in which a school board has not a separate corporate existence.¹

4. Declaration, Petition, or Complaint — *a*. AVERMENT OF AUTHORITY — When Special Authority Should Be Alleged. — Where there is no general authority in a municipal corporation to issue negotiable paper, the special authority should be alleged by the plaintiff in an action on municipal bonds or coupons, or he should allege the recital of the bonds in that respect.²

Allegation of Execution. — A complaint against a municipal corporation upon its bonds, alleging that it, by its duly elected and qualified officers, and under their hands and seals, executed the bonds, constitutes a sufficient averment of the execution of the bonds.³

1. *Atchison Board of Education v. De Kay*, 148 U. S. 591. See also *Knowles v. Board of Education*, 33 Kan. 692.

2. *Catron v. La Fayette County*, 106 Mo. 659; *Donaldson v. Butler County*, 98 Mo. 163; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; *Thayer v. Montgomery County*, 3 Dill. (U. S.) 389; *Nashville v. Ray*, 19 Wall. (U. S.) 468; *Hopper v. Covington*, 118 U. S. 148; *Harshman v. Knox County Ct.*, 122 U. S. 306.

Actions on Coupons. — A declaration, petition or complaint in an action on municipal bonds or coupons should show the authority for their issuance. *Donaldson v. Butler County*, 98 Mo. 163; *Cotton v. New Providence Tp.*, 47 N. J. L. 401; *Morrison v. Bernards Tp.*, 36 N. J. L. 219.

Actions Against County. — In *Kennard v. Cass County*, 3 Dill. (U. S.) 147, which was a suit on municipal coupons, the court after citing several cases to the effect that the holder of such coupons separately and without producing the bond, said: "But where the maker is a county or other corporate body which has no inherent or general power to make such instruments, and can make them only by virtue of special authority, the principles of pleading require that such authority should appear either by distinct averment of the special act conferring it, or by stating the recital of the bond in that respect. The coupons, though detached, are related to the bonds to

which they originally belonged, and by way of inducement or recital this relation ought to appear on the face of the declaration or petition." *Citing Kenosha City v. Lamson*, 9 Wall. (U. S.) 477.

Averment of Authority of City to Issue. — In *Texas Water, etc., Co. v. Cleburne*, 1 Tex. Civ. App. 580, which was a suit to enforce a contract by which the city agreed to issue and deliver certain bonds, it was held that where a city is sued on a contract such as could have been lawfully made only by a city of over 10,000 inhabitants, the plaintiff's petition will be bad, on special exception, if it fails to allege that the defendant is incorporated as a city of over 10,000 inhabitants.

3. *Wiley v. Board of Education*, 11 Minn. 371.

Averment of Election, etc. — Where a county by public statute has the power to issue negotiable bonds on certain conditions, and its bonds are issued and in the hands of *bona fide* holders, such a holder is not bound to allege in his declaration the election or other facts showing a compliance with the conditions on which the issue of the bonds is authorized. *Burlington, etc., R. Co. v. Otoe County*, 1 Dill. (U. S.) 338.

Complaint Need Not Show Record of Election. — In an action on municipal bonds, if the complaint avers the holding of the election made necessary by statute to the issuing of such bonds, it need not aver that a record of the elec-

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Issuance for Authorized Purpose. — It should appear that the bonds were issued for some authorized purpose or object.¹

tion was made. *Wiley v. Board of Education*, 11 Minn. 371.

Averment of Power to Subscribe. — In *Weil v. Greene County*, 69 Mo. 281, it is held that in an action on bonds issued to pay a subscription by a county to a railroad company, every essential element of the power given to the county to make such a subscription must be stated in the petition.

Averment of Power to Issue Railroad Aid Bonds. — In a suit on obligations issued under the "Act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union, to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company," approved April 9, 1868, the declaration must show that the commissioners who issued the bonds were appointed and had given security in the manner provided by the act; and that the consent of such a proportion of the taxpayers of the town had been given and evidenced in the manner required by the act for the issue of the obligations; and in general must show the power of the commissioners to issue the obligations. *Cotton v. New Providence Tp.*, 47 N. J. L. 401. In this case the court said: "It is first insisted that the declaration does not show that the commissioners, who by the act are authorized to issue bonds, were appointed in the prescribed manner. All that is averred on the subject is, that the bond was signed, etc., by two commissioners 'appointed for that purpose.' By whom or how they were appointed does not appear. But the act gives authority only to commissioners appointed by the Circuit Court of the county. The power to appoint is not one ordinarily exercisable by that court; it is to be exercised only on a specified application. On the principle settled in *Morrison v. Bernards Tp.*, 36 N. J. L. 219, it is plain that the declaration is in this respect defective, and that it ought to show that the commissioners were in fact appointed in the manner by the act. It is next urged that the declaration fails to show the authority of the commissioners in another respect. The act provides that before the commissioners can discharge any duty under the act they shall give bond to the township whose obligations they are to issue, with security to be ap-

proved by the township committee or the judge of the Circuit Court. The bonds are to be filed with the township clerk. The giving of such security and its due approval are evidently conditions without the performance of which the commissioners acquired no power to do aught to bind the township, and the declaration should aver that such acts were done as were essential to endow them with power to issue the obligations in question."

Defect Cured by Answer. — In *Donaldson v. Butler County*, 98 Mo. 163, which was an action upon a municipal coupon, the court, while holding that the petition should show authority for the issuance of the instruments in suit, said: "The petition in this case is so defective that it would not support a judgment as against a motion in arrest, unless aided by the answer. The question then is, whether the answer cures the defect? It denies that plaintiff is a holder of the coupons for value, and denies that defendant is, or ever was, liable for the payment of the coupons. It alleges that the bonds were satisfied and defendant released from the payment of them before they became due and before the plaintiff became possessed of the coupons, and inferentially charges him with notice of these alleged facts. The bonds are spoken of as public securities of the county prior to the alleged discharge of the county from liability thereon. Construing this answer as a whole, we take it to admit that the bonds were valid at their inception, but to claim that they ceased to be of any validity by reason of the discharge which was made matter of record in the county court. Not that the answer makes expressly any such admission, but that it is necessarily implied from what is stated. This being so it cures the defect in the petition. *Garth v. Caldwell*, 72 Mo. 622."

Seal Prima Facie Evidence of Authority. — In an action upon the bond of a municipal corporation, the corporate seal is *prima facie* evidence of its authority to execute it. *Parkinson v. Parker*, 85 Pa. St. 313.

1. *Thayer v. Montgomery County*, 3 Dill. (U. S.) 389; *Hopper v. Covington*, 118 U. S. 148.

Negotiable Bond Issued by Town. — In
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Power Vested by General Law.—Where the power to issue bonds exists in a municipal corporation under a general law, such power need not be set forth by the plaintiff in an action on such bonds.¹

b. AVERMENT OF REGISTRATION.—Where an act requires bonds of a municipal corporation to be registered and such registration to be certified thereon, and declares that no bond shall be valid unless registered, an averment of such registration is essential in an action on such bonds.²

c. AVERMENT OF NAME OF BONDS.—Where by the act authorizing the issue of municipal bonds the provision respecting the name of the bonds is not made essential to their validity, it is not necessary in a declaration upon such bonds to aver that they were so denominated.³

an action upon a negotiable bond issued by a town authorized by the public laws of the state to issue such bonds for certain purposes only, a declaration alleging that the defendant is a municipal corporation, existing under the laws of the state, with full power and authority pursuant to those laws to execute negotiable commercial paper, and that pursuant to those laws it executed the bond sued on, without showing for what purpose the bond was made, is bad on demurrer. *Hopper v. Covington*, 118 U. S. 148. In this case the court said: "A demurrer admits only facts, and facts well pleaded. The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority. There is nothing in this declaration, or in the copies of instruments annexed to and made part of it, which shows, or has any tendency to show, for what purpose the bonds were made. The averment, that the defendant is a municipal corporation under the laws of Indiana, 'with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper,' if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice. The averment, that the bonds held by the plaintiff were executed pursuant to the laws of the state, is but a statement of a conclusion of law, which is not admitted by demurrer. The declaration is fatally defective for not stating the facts

necessary to enable the court to judge for itself whether that conclusion of law has any foundation in fact." *Citing Pumpelly v. Green Bay, etc., Canal Co.*, 13 Wall. (U. S.) 175; *Cragin v. Lovell*, 109 U. S. 194; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; *Broome v. Taylor*, 76 N. Y. 564; *Cotton v. New Providence Tp.*, 47 N. J. L. 401.

1. *Ring v. Johnson County*, 6 Iowa 265.

2. *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48; *Morrison v. Bernards Tp.*, 36 N. J. L. 219; *Cotton v. New Providence Tp.*, 47 N. J. L. 401.

Averment of Certification of Registration.—In *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 52, the court said: "When an act required bonds of a public corporation to be registered in the county clerk's office, and such registration to be certified thereon, and declared that no bond should be valid unless registered, it was held that an averment of such registration was essential in a declaration on a bond. *Morrison v. Bernards Tp.*, 36 N. J. L. 219. But an omission to aver that the registration had been certified on such a bond was held not to be objectionable, because the act did not declare the bonds to be invalid if not so certified. *Cotton v. New Providence Tp.*, 47 N. J. L. 401."

3. *Rahway Sav. Inst. v. Rahway*, 53 N. J. L. 48. In this case the act provided that the bonds were to be denominated on their face "*Rahway City Water Bonds*." It was held that as such denomination was not made essential to the validity of the bonds, it was not necessary to aver in a declaration upon such bonds that they were so denominated; but, if necessary, an

d. AVERMENT THAT BOND WAS TAKEN AT PAR. — In an action on a municipal bond taken in payment of a municipal debt, it is not necessary for the plaintiff to aver that such bond was taken at par.¹

e. NEGATION OF OVERISSUE. — In an action on bonds issued by a county under an act limiting the total amount to be issued, where the sum sued for is less than the limitation, the plaintiff need not deny that there was an overissue; this, if true, being matter of defense.²

f. IDENTIFICATION OF COUPON. — In declaring on coupons, while it is not necessary to produce the bonds, it would seem to be advisable that the instruments in suit should be identified on the face of the declaration, petition, or complaint, by the number of the bonds as well as by the date, amount, time of payment, etc., of the coupons themselves, thus diminishing the danger that the same instrument may be more than once put in suit.³

5. Answer — Nil Debet and Non Est Factum. — To a suit on its bonds, a municipal corporation may properly plead both *nil debet* and *non est factum*, since there is apparently no inconsistency in such pleas.⁴

Denial of Plaintiff's Ownership. — In a suit upon the coupons of railroad bonds issued by a county, payable both bonds and coupons by these terms, to the bearer, where the declaration alleges that

averment that the bonds were writings denominated "Rahway City Water Bonds" is sufficient.

1. *Wiley v. Board of Education*, 11 Minn. 371. In this case the court said: "If it should be held that the board was limited in disposing of these bonds, to sell them at par, it must be set up as matter of defense, and cannot be taken advantage of on demurrer to the complaint."

2. *Catron v. La Fayette County*, 106 Mo. 659.

Sufficient Denial of Overissue. — Even if such overissue were not a matter of defense, an averment in the petition that the bonds were duly issued would be sufficient. *Catron v. La Fayette County*, 106 Mo. 659.

Averment as to Limitation of Indebtedness. — In *Brown v. Point Pleasant*, 36 W. Va. 290, which was an action of assumpsit to recover on unpaid coupons, the declaration under which a trial was had set out the ordinances of the town, and the vote of the qualified voters; also an exact copy of one of the bonds sued upon, which bond recited the acts of the legislature by authority of which it was issued, the delivery to the railroad company and the purchase for value by the complainants, and the

failure to pay the semi-annual installment of interest for which suit was brought. The declaration likewise contained, immediately after the recital of the said acts of the legislature and the ordinances of the town, the following general averment: "And so the plaintiffs aver that all of the said ten bonds and interest notes or coupons thereto attached were lawfully made, executed, sold and delivered by the said town of Point Pleasant to the said Point Pleasant & Ohio River Railroad Company." It was held that while the declaration does not specifically allege a compliance with the section of the constitution limiting municipal indebtedness yet it contains enough to make for the plaintiffs a *prima facie* case entitling them to recover; and if the defendant wished to set up the defense of the unconstitutionality of the issuance of the bonds, it should have done so by proper pleading, and have sustained the issue by proper and sufficient evidence.

3. *Kennard v. Cass County*, 3 Dill. (U. S.) 147.

4. *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355. See also as to plea of *non est factum* by a municipal corporation, *Coler v. Cleburne*, 131 U. S. 162.

the plaintiff is owner, holder, and bearer of the coupons, a plea that the plaintiff was not, either at the time when the declaration or when the plea was filed, the owner, holder, or bearer, is a traverse of a material allegation, and though faulty as argumentative, will be held good on general demurrer.¹

Noncompliance with Statutory Formalities. — In a suit against a municipal corporation by a *bona fide* holder of its bonds, whose title accrued before maturity, the defendant cannot show, by way of defense, if the legal authority of the corporation to issue the bonds is sufficiently comprehensive, a want of compliance on its part with formalities required by the statute authorizing the issue of the bonds, or show fraud by its own agents in issuing them.²

6. Enforcement of Judgment — By Mandamus. — After the validity of municipal bonds has been established by suit and judgment, mandamus will issue to compel the payment of such bonds or coupons.³

III. FEDERAL JURISDICTION IN ACTIONS ON MUNICIPAL SECURITIES

— **Action by Nonresident.** — An action on municipal orders or warrants may be maintained by a nonresident owner in the federal courts, where the amount is sufficient to invoke their jurisdiction, and where the municipal corporation issuing such orders or warrants might have been sued in the state court.⁴

Remedy in State Court. — Where the plaintiff is otherwise entitled to relief in the federal courts, he will not be debarred therefrom

1. *Pendleton County v. Amy*, 13 Wall. (U. S.) 297.

2. *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355. See also *Woods v. Lawrence County*, 1 Black (U. S.) 386; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384.

3. *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Queensbury v. Culver*, 19 Wall. (U. S.) 83. See article MUNICIPAL CORPORATIONS, III. *Judgments*, 2. *Enforcement*, ante, p. 244 et seq.; also IV. *Mandamus Against Municipal Corporations*, ante, p. 251 et seq.

Federal Jurisdiction — Prior Judgment Required. — In order that the holder of municipal securities may apply in the federal courts for a mandamus to compel the levy and collection of taxes to pay such municipal securities, he must first obtain a judgment of law establishing the amount and validity of his debt. *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Queensbury v. Culver*, 19 Wall. (U. S.) 83; *Bath County v. Amy*, 13 Wall. (U. S.) 244; *Rosen-*

baum v. Bauer, 120 U. S. 450; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Greene County v. Daniel*, 102 U. S. 187; *Osborne v. Adams County*, 7 Fed. Rep. 441; *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Davenport v. Dodge County*, 105 U. S. 237; *Smith v. Bourbon County*, 127 U. S. 105.

Writ Will Only Command Discharge of Legal Duty. — In *Jordan v. Cass County*, 3 Dill. (U. S.) 185, it is held that upon a judgment in an action on coupons of municipal bonds in the federal court, the writ will only compel the levy and collection of the special tax provided by the statute as the means to pay the bonds and interest thereon. See also *Carroll County v. U. S.*, 18 Wall. (U. S.) 71.

4. *Carroll County v. U. S.*, 18 Wall. (U. S.) 71; *Aylesworth v. Gratiot County*, 43 Fed. Rep. 350; *Thompson v. Searcy County*, 57 Fed. Rep. 1030; *Lyell v. Lapeer County*, 6 McLean (U. S.) 446.

Action by Holder. — Where county orders are held to be negotiable instruments in the sense that suit may be brought upon them by the holder, the

by reason of the fact that his remedy in the state court, upon the same cause of action, would be of a character which the federal courts are not entitled to administer.¹

Mandamus. — Upon the rendition of the judgment in such an action a writ of mandamus may issue, on application of the plaintiff, to compel the proper officers of the municipal corporation to perform their duty in the satisfaction of such judgment.²

Transfer for Purpose of Suit. — A recovery cannot, however, be had in a United States court on bonds or coupons transferred to the plaintiff by citizens of the state in which the municipal corpora-

latter may sue in the federal courts, even though such court would not have jurisdiction of an action by the assignor. *Aylesworth v. Gratiot County*, 43 Fed. Rep. 350.

Warrant Payable "to A B or Bearer." — In *Thompson v. Searcy County*, 57 Fed. Rep. 1030, it is held that "a warrant made payable 'to A B or bearer' is for all practical purposes, and in legal effect, the equivalent of one made payable simply 'to bearer,' and, under the Judiciary Act of March 3, 1887, an assignee may maintain an action in the national courts on a warrant drawn in one form as well as the other, if the other requisite jurisdictional facts appear." See generally on this subject article NEGOTIABLE INSTRUMENTS.

Effect of Statute Requiring Presentation. — In *Thompson v. Searcy County*, 57 Fed. Rep. 1030, it was held that the *Arkansas* statute providing that all persons having demands against a county must present them to the county court for allowance, and repealing all previous acts authorizing counties of the state to be sued, does not deprive nonresident creditors of a county of their right to sue the county in the national courts, when the amount is sufficient to invoke their jurisdiction.

1. *Aylesworth v. Gratiot County*, 43 Fed. Rep. 350.

2. *Aylesworth v. Gratiot County*, 43 Fed. Rep. 350; *Carroll County v. U. S.*, 18 Wall. (U. S.) 71.

Writ Does Not Create a Duty. — A mandamus from the federal court will not, however, be awarded to compel officers of a municipal corporation to do any act which they are not authorized to do by the laws of the state from which they derive their powers, and in order that such writ may issue to compel the levy of a special tax to satisfy a judgment against a municipal corporation in an action on warrants

issued by it, it must appear that it was the duty of the officers of such corporation to levy such special tax. *Carroll County v. U. S.*, 18 Wall. (U. S.) 71; *Cowles v. Mercer County*, 7 Wall. (U. S.) 118; *Vincent v. Lincoln County*, 30 Fed. Rep. 749.

Regardless of Citizenship of Prior Holder. — A suit on a municipal bond may be brought in a United States court by an assignee, notwithstanding the fact that a suit could not have been prosecuted in such court if no assignment had been made. *New Providence v. Halsey*, 117 U. S. 336; *Ackley School Dist. v. Hall*, 113 U. S. 135.

Statutes Limiting Jurisdiction Not Applicable. — In *Cowles v. Mercer County*, 7 Wall. (U. S.) 118, which was an action on county bonds, where it was argued that counties in Illinois were exempted by the law of their organization from suit elsewhere than in the circuit courts of the county, it was held that the statutes of a state limiting the jurisdiction of suits against counties to circuit courts held within such counties can have no application to courts of the national government. See also *Vincent v. Lincoln County*, 30 Fed. Rep. 749, in which the court said: "Upon the first point urged, that section 19 of the act under which these bonds were issued imposes a limitation upon the holder to sue only in the state court, the case of *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445, is a complete answer. If that was the object and purpose of that section, it is void, since the state cannot directly or indirectly control the jurisdiction of the national courts, nor can it limit or control the rights of parties to bring suits therein."

Action by Assignee of Municipal Bond. — In *Porter v. Janesville*, 3 Fed. Rep. 617, it was held that under section 1, c. 137, Act of March 3, 1875, the assignee of a municipal bond may sue

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tion issuing such bonds is situated, for the mere purpose of being sued on in a federal court.¹

IV. BILL IN EQUITY TO CANCEL ORDERS OR WARRANTS. — A bill in equity may be maintained by a municipal corporation to cancel orders or warrants issued contrary to law.²

V. INJUNCTIONS TO RESTRAIN ISSUE OF WARRANTS. — Where no authority exists in a municipal corporation to issue scrip or warrants, such an act is *ultra vires* and may be restrained by a bill to enjoin such issue filed by a taxpayer in his own name.³

thereon in the United States Circuit Courts, where it is a simple acknowledgment of indebtedness, and a promise to pay a certain sum of money at a time certain, without condition.

1. *New Providence v. Halsey*, 117 U. S. 336; *Farmington v. Pillsbury*, 114 U. S. 138; *Bernards Tp. v. Stibbins*, 109 U. S. 341.

Action on Transferred Coupons. — After a decision by a state court that certain bonds issued by a municipal corporation were void as issued under an unconstitutional act, several bondholders, citizens of the state, cut the coupons from their bonds, and transferred them to a citizen of another state, who gave to the agent of the owner of the coupons a note of hand for much less than the face value of the coupons, and an agreement that if he should succeed in collecting the full amount of the cou-

pons he would pay him fifty per cent of the amount collected from the corporation. The new holder thereupon brought suit in his own name on the coupons, against the municipal corporation, in the Circuit Court of the United States. It was held that this was within the prohibition of section 5, Act of March 3, 1875, 18 Stat. 472, as to parties improperly or collusively made for the purpose of creating a case cognizable by a Circuit Court of the United States. *Farmington v. Pillsbury*, 114 U. S. 138.

2. *Pulaski County v. Lincoln*, 9 Ark. 320. See also *Webster County v. Taylor*, 19 Iowa 117; *Weaver v. Cherry*, 8 Ohio St. 564. And consult article RESCISSION AND CANCELLATION.

3. *Colburn v. Chattanooga*, (Tenn.) 17 Am. L. Reg. N. S. 191.

MURDER.

See article *HOMICIDE*, vol. 10, p. 106.

MUTUAL BENEFIT ASSOCIATIONS.

See article *INSURANCE*, vol. 11, p. 375.

NAMES.

BY JOHN LEHMAN.

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CROSS-REFERENCES.

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Amendment of Names Generally, see article *AMENDMENTS*, vol. 1, p. 458.
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Names of Corporations, see article *CORPORATIONS*, vol. 5, p. 52.
 As to *Indictments, Informations, and Complaints*, see article *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 344.
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 See also generally articles *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 257; *VERDICT*; *WARRANTS*; *PROCESS*; and other specific titles, as *FORGERY*, vol. 9, p. 598; *LARCENY*, vol. 12, p. 960.

I. DEFINITION AND NATURE. — Names are the *indicia* by which persons are distinguished from each other and identified.¹

Distinction Between Christian Name and Surname. — Anciently it was considered that the defendant could not take advantage of a mistaken surname, though he might of a mistaken Christian name, but modern decisions make no such distinction.²

1. *Washington v. State*, 68 Ala. 87; *People v. Dick*, 37 Cal. 277; *People v. Kelly*, 6 Cal. 211; *Minor v. State*, 63 Ga. 320; *Gordon v. State*, 59 Ind. 77; *Vernon Ins. Co. v. Glenn*, 13 Ind. App. 340; *Talbott v. Hale*, 72 Ind. 1; *Skelton v. Sackett*, 91 Mo. 379; *Herf v. Shulze*, 10 Ohio 265; *Gordon v. Holiday*, 1 Wash. (U. S.) 289.

2. "Hawkins lays it down that a defendant cannot take advantage of a mistaken surname in the indictment, though he may of a mistaken Christian name; though the surname by which he is described hath no affinity with his true

one, and he was never known by it. Lord Chief Justice Hale states the law as Hawkins does and refers to some very old authors, the correctness of which he questions, and remarks that it is always safest to allow the plea of misnomer, both as to the surname and Christian name." The reason for the distinction between the one name and the other must have been upon some refinement of reasoning which has become antiquated and obsolete, and no such distinction is now recognized. *Lynes v. State*, 5 Port. (Ala.) 240. See also *Washington v. State*, 68 Ala. 85; *People*

II. DESIGNATION OF NAMES — 1. Necessity to Designate Names. — The Plaintiff's Name must be set out in his pleading, though it would seem that this may be done in the title.¹

The Defendant's Name. — One cannot be brought before the court unless a cause is set out against him,² for which purpose a mere relative description, without giving a name, is insufficient.³ On the other hand, it is held that a description following the incorrect designation of a name may be sufficient to obviate the effect of the incorrect designation.⁴

v. Kelly, 6 Cal. 211; *Herf v. Shulze*, 10 Ohio 263; *State v. Lorcy*, 2 Brev. (S. Car.) 395.

1. *Shaw v. Adams*, 2 Tex. App. Civ. Cas. § 178.

The State. — A complaint entitled "The State of Colorado, plaintiff," instead of "The People of the State of Colorado," in which latter name all process is required by the Constitution to run, was held sufficient, it being held to mean the whole people united in one body politic, and the two expressions, therefore, being equivalent. *Brown v. State*, 5 Colo. 499, *citing Penhallow v. Doane*, 3 Dall. (U. S.) 93.

In Title. — The title of a cause is sometimes made a part of the petition or complaint, rendering it unnecessary to set out the names of the parties otherwise than in the title. *Stubendorf v. Sonnenschein*, 11 Neb. 235; *King v. Bell*, 13 Neb. 409; *Cosby v. Powers*, 137 Ind. 695; *Lowry v. Dutton*, 28 Ind. 473. See article COMPLAINTS AND PETITIONS IN CODE PLEADING, vol. 4, p. 592.

2. *McKinlay v. Tuttle*, 42 Cal. 573.

In *Varnell v. Speer*, 55 Ga. 132, suit was brought against certain railroad companies and their connecting lines on to Chattanooga, and the East Tennessee, Virginia and Georgia R. R. Co. garnishee. Judgment was rendered by the justice against the garnishee, but the Supreme Court held that a certiorari should have been sustained, as the parties were too indefinite to justify any valid judgment against any one.

3. **The Use of the Words "and Wife"** after the name of a defendant in a summons does not make the wife a party. *Sossman v. Price*, 57 Ala. 204. But in *Weil v. Martin*, 24 Hun (N. Y.) 645, which was an action for the foreclosure of a mortgage, the name of a defendant was not given in the summons or complaint, though she was referred to as the wife of the defendant, whose name was set out. On appeal

from an order denying a motion to vacate judgment, it was held that while there was an irregularity, under the provision of the code requiring the summons to contain the name of each party, or as much of his or her name as is known, adding in that case a description identifying the person intended, the defect was amendable and did not deprive the plaintiff of the right to a judgment nor entitle the defendant to have it vacated after it had been entered. In this case the complaint was amended after it had been served.

"**The Heirs of A B**" is not a sufficient designation of persons to make them parties. *Reynolds v. May*, 4 Greene (Iowa) 283; *Kerlee v. Corpening*, 97 N. Car. 330.

"**Et Al.**" following a name is not a sufficient designation of persons other than the one whose name is set out. *Lyman v. Milton*, 44 Cal. 630. See also *Yarish v. Cedar Rapids, etc., R. Co.*, 72 Iowa 556; *Carskadden v. M'Ghee*, 7 W. & S. (Pa.) 140.

4. Thus, a notice was served on Charles A. Luckenbough and William Chapman, assignees of Benjamin G. Unangst. In the conveyance the name of the first grantee was Luckenbach. In the notice and petition the grantees are designated as "assignees of Benjamin G. Unangst." It was held that absolute accuracy in names in such cases was not required. The proceeding as against Luckenbach and Chapman was in their representative capacity, and they were thus described in both notice and petition. Where parties are thus relatively designated, there is less reason for a technical adherence or exactness as to names than in other cases. *Schee v. La Grange*, 78 Iowa 101.

In *Fanning v. Krapf*, 68 Iowa 244, Hopkins and wife were defendants. The wife's initials were T. P. B. In the notice the initials appeared P. T. B., but she was designated as the wife

2. **Full Name.** — The proper and approved form of designating persons is to set out the full Christian name and surname.¹

3. **Initials — No Part of Name.** — Initials are said to be no legal part of a name, and correct pleading requires that they should not be used instead of the full Christian name.²

At Common Law a pleading describing parties by the initials only of their Christian names was bad on special demurrer,³ though a single letter prefixed to the surname would be intended to be the

of John C. Hopkins, and the court gave this rule, in substance, that with the descriptive words, "wife of John C. Hopkins," she must have known that she was the party interested.

So where an indictment charged Charles Herron with the murder of "Lula Herring, his wife," the court refused to arrest judgment on a verdict of guilty because the name of the wife was spelled "Herring" instead of "Herron." *Herron v. State*, 93 Ga. 554, *distinguishing* *Lewis v. State*, 90 Ga. 95, in that it was not alleged in that case that the murdered woman was the wife of the accused.

1. *Gerrish v. State*, 53 Ala. 476; *U. S. v. Upham*, 43 Fed. Rep. 68; *Schmidt v. Thomas*, 33 Ill. App. 109; *Gardner v. McClure*, 6 Minn. 250; *Skelton v. Sackett*, 91 Mo. 377; *Martin v. Barron*, 37 Mo. 301; *Enewold v. Olsen*, 39 Neb. 59; *Dittmar Powder Mfg. Co. v. Leon*, 42 N. J. L. 540; *Elberson v. Richards*, 42 N. J. L. 69; *Herf v. Shulze*, 10 Ohio 265; *Slocum v. McBride*, 17 Ohio 607; *McColgan v. Territory*, 5 Okla. 567.

Omission of Christian Name. — It has been held that the omission of the Christian name will not subject an indictment to demurrer. "It is quite probable that appellee had a Christian name, but there is nothing in the record from which the fact can be ascertained that she had one; and having admitted, by her demurrer, that the facts as stated in the indictment are true, it would follow as a necessary consequence that she was correctly described and named therein." This ruling was based on a provision of the Criminal Code that "an error in the name of a defendant shall not vitiate an indictment or proceedings thereon, and if his true name is discovered at any time before execution, an entry shall be made on the minutes of the court of his true name," etc., which provision is said to change the elementary rule that a person charged in an indictment must be described by his first or Christian name

as well as by his surname. *Com. v. Kelcher*, 3 Metc. (Ky.) 485.

So where a person sues by his surname, omitting the Christian name, the error is not available in the court of last resort, and whether the party has another name is not a matter of law but a matter of fact, as if he has but one name he may certainly sue by that name. *Brashear v. Stothard*, 4 Bibb (Ky.) 265; *Slocum v. McBride*, 17 Ohio 607; *Chappell v. Proctor*, Harp. L. (S. Car.) 49; *Seely v. Boon*, 1 N. J. L. 161.

Name Unknown. — Under the *Texas* Code of Criminal Procedure, an indictment which gives only the surname of the owner of stolen property and does not state that the initials of his Christian name are unknown to the grand jury is defective. *Farmer v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 197; *Pancho v. State*, 25 Tex. App. 402. See also *infra*, II. 6. *Name Unknown — Fictitious Name.*

Transposition of Christian Name and Surname. — Where "Clements Turner" was impleaded, and the evidence named and the verdict and judgment condemned "Turner Clements," and there was nothing in the record to identify the parties, it was held that the variance was fatal. *Clements v. State*, 21 Tex. App. 258. See also *Jones v. Macquillin*, 5 T. R. 195.

A Writ of Error should state the Christian name of the plaintiff in error and not merely the initial letter thereof. *Walton v. Marietta Chair Co.*, 157 U. S. 342. See also articles ASSIGNMENT OF ERRORS, vol. 2, p. 920; ERROR, WRIT OF, vol. 7, p. 866.

2. *Monroe Cattle Co. v. Becker*, 147 U. S. 57; *Norris v. Graves*, 4 Strobb. L. (S. Car.) 32. See *infra*, II. 8. *Misnomer in Written Instruments.*

3. *Turner v. Fitt*, 3 C. B. 701, 54 E. C. L. 701; *Miller v. Hay*, 3 Exch. 14; *Nash v. Calder*, 5 C. B. 177, 57 E. C. L. 177; *Kinnersley v. Knott*, 7 C. B. 980, 62 E. C. L. 980.

full Christian name if a vowel, but in that case only.¹

In the United States the defect has been regarded in some cases as one touching the legal sufficiency of the pleading appearing upon the face thereof.²

Description of Written Instrument.—The modern rule is that no written instrument should be regarded as a nullity because the Christian name is designated by initials instead of being written in full.³

The Court Will Intend such initials to be the full name of the person represented, in the absence of an objection which draws in question the fact whether the initials are vowels or consonants.⁴

1. *Kinnersley v. Knott*, 7 C. B. 980, 62 E. C. L. 980; *Lomax v. Landells*, 6 C. B. 577, 60 E. C. L. 577; *Tweedy v. Jarvis*, 27 Conn. 45 [citing *Miller v. Hay*, 3 Exch. 14; *Nash v. Calder*, 5 C. B. 177, 57 E. C. L. 177; *Reg. v. Dale*, 5 Eng. L. & Eq. 360; *Myers v. Sealy*, 5 Rich. L. (S. Car.) 473; *Norris v. Graves*, 4 Strobb. L. (S. Car.) 32; *City Council v. King*, 4 McCord L. (S. Car.) 487].

2. **Christian Name Presumed.**—Thus, in *Gardner v. State*, 4 Ind. 634, it was held that every person is presumed to have a Christian name until the contrary is made to appear by proper averment, and that the question of sufficiency in a case like that at bar could be raised by motion to quash as well as by plea in abatement. See also *Burton v. State*, 75 Ind. 478; *State v. Rook*, 42 Kan. 420.

Party Well Known by Initials.—In *Norris v. Graves*, 4 Strobb. L. (S. Car.) 32, the objection that the plaintiff sued by the initials of his Christian name was taken by plea in abatement, and it was held that as the plaintiff must know and state his true name, a replication that the plaintiff was as well known by the name in which he sued as by that set up in the plea in abatement was not a good answer to the plea.

3. *Ferguson v. Smith*, 10 Kan. 396, wherein it is said that the full Christian name is now seldom written anywhere, and although the court might for good cause require that the Christian name be written in full, it will not in any case set aside a proceeding had in court, or make any order against a party, because the Christian name of any person mentioned in any paper in the court has not been written in full, without first giving ample time and opportunity to the parties interested to have the name so written.

By Statute.—A rule has been adopted in some states making this objection one to be reached by demurrer. *Wiebbold v. Hermann*, 2 Mont. 609. But even in this case the defect is not one which can be taken advantage of if the statutory method is not pursued, and if a party fails to interpose his demurrer at the proper time he cannot object after verdict. *Boyd v. Platner*, 5 Mont. 232; *Nichols v. Dobbins*, 2 Mont. 540. See also *Cummins v. Peed*, 109 Ind. 72.

4. *Arkansas.*—*State v. Seely*, 30 Ark. 164; *State v. Webster*, 30 Ark. 168.

Colorado.—*Taylor v. Insley*, 7 Colo. App. 177.

Connecticut.—*Tweedy v. Jarvis*, 27 Conn. 42.

Georgia.—*Minor v. State*, 63 Ga. 320; *Wiggins v. State*, 80 Ga. 468.

Illinois.—*Lucas v. Farrington*, 21 Ill. 31.

Louisiana.—*State v. Prince*, 42 La. Ann. 823; *State v. Vanderlip*, 4 La. Ann. 444.

Maine.—*State v. Cameron*, 86 Me. 197; *Dutton v. Simmons*, 65 Me. 584.

Michigan.—*Hinkle v. Collins*, (Mich. 1897) 71 N. W. Rep. 481; *Fewlass v. Abbott*, 28 Mich. 270.

Minnesota.—*Kenyon v. Semon*, 43 Minn. 180.

New York.—*Dana v. Fiedler*, 12 N. Y. 40.

North Carolina.—*State v. Brite*, 73 N. Car. 26; *State v. Henderson*, 68 N. Car. 348.

Oklahoma.—*McColgan v. Territory*, 5 Okla. 567.

Pennsylvania.—*Burford v. McCue*, 53 Pa. St. 427.

South Carolina.—*State v. Anderson*, 3 Rich. L. (S. Car.) 174.

West Virginia.—*Handley v. Ludington*, 4 W. Va. 53.

or that he is known and called by such name as well as by his full Christian name.¹ The court will not assume without proof that letters are only initials and are not the full and proper name.²

4. Middle Name or Initial — The Law Knows But One Name. — In legal contemplation a middle name or initial thereof written between the Christian name and the surname constitutes no part of one's name.³

Omission or Incorrect Statement of Middle Name. — In legal proceedings

Wyoming. — Perkins v. McDowell, 3 Wyoming 328.

England. — Reg. v. Dale, 15 Jur. 657.
1. U. S. v. Janes, 74 Fed. Rep. 543; People v. Dick, 37 Cal. 277; Lucas v. Farrington, 21 Ill. 31; Wiggins v. State, 80 Ga. 468; Minor v. State, 63 Ga. 320; City Council v. King, 4 McCord L. (S. Car.) 487; Haywood v. State, 47 Miss. 3.

Before Evidence Offered, a judge wholly ignorant of the persons in the indictment cannot know that letters which are said to be initials are not the names of baptism; and when the evidence is heard, if it appears that these letters are only the initials of the true Christian names, yet the judge cannot know that the persons so designated are not known and called thereby. State v. Anderson, 3 Rich. L. (S. Car.) 174; State v. Szely, 30 Ark. 164.

2. Wilthaus v. Ludecus, 5 Rich. L. (S. Car.) 326.

3. Doane v. Glenn, 1 Colo. 502; Burroughs v. State, 17 Fla. 654; Erskine v. Davis, 25 Ill. 251; O'Connor v. State, 97 Ind. 105; Choen v. State, 52 Ind. 347; Grimes v. Martin, 10 Iowa 347; Hart v. Lindsey, 17 N. H. 235; Franklin v. Talmadge, 5 Johns. (N. Y.) 84; Roosevelt v. Gardiner, 2 Cow. (N. Y.) 463; Milk v. Christie, 1 Hill (N. Y.) 102; Hamilton v. Cunningham, Tappan (Ohio) 257; Allen v. Taylor, 26 Vt. 601.

Objections to Depositions. — An initial letter is not to be regarded as any part of a man's name in the caption and certificate of a deposition, especially when one name is given in full. Walbridge v. Kibbee, 20 Vt. 545 [citing Isaacs v. Wiley, 12 Vt. 674]; Allen v. Taylor, 26 Vt. 601.

Notice to Take Depositions. — So where a notice to take depositions designated the place of taking as at the house of Joseph Moore, and a deposition was in fact taken at the house of Joseph H. Moore, the defendant not being present, it was held that the omission of the letter H between the Christian name

and surname was not a misnomer. King v. Hutchins, 28 N. H. 578.

Name of Witness in Commission. — A mistake in the middle initial of the name of a witness, in a commission to take depositions, is not a misnomer and will not exclude the deposition. Doane v. Glenn, 1 Colo. 502.

Middle Initial Unknown. — The law recognizes but one Christian name, and it is sufficient to indict a defendant by one Christian name preceding his surname without reference to any other name. It is wholly immaterial whether the grand jury knows his other Christian name or not, if he has any, and a statement in an indictment that such other name is to the grand jury unknown is unnecessary and will be rejected as surplusage. Taylor v. State, 100 Ala. 68.

Omission of Surname. — An indictment charged the defendant with the killing of "one William, a man of color," without giving any surname. This was held to be sufficient, because the court could not judicially know that a man had two names, particularly in the case of a person recently emancipated, and who might not have acquired a surname. Boyd v. State, 7 Coldw. (Tenn.) 69. See also article HOMICIDE, vol. 10, p. 146.

Middle Christian Name instead of First Christian Name. — A plea in abatement that the name of a defendant indicted as "William Martin" is "John William Martin" is good on demurrer, because the middle name forms no part of the Christian name. State v. Martin, 10 Mo. 391.

But where a defendant was indicted by the name of "D. K. Olney Winter," the court refused to quash the indictment, upon the ground that the name as indicated might have been one adopted by the defendant and by which he had caused himself to be and was commonly known. U. S. v. Winter, 13 Blatchf. (U. S.) 276.

the entire omission of a middle initial, or the insertion of an incorrect middle name or initial, will not create a misnomer, nor, as a general rule, result in a fatal variance if contradicted by the evidence.¹ But the rule is not universal, nor is it always carried to the same extent. On the contrary, it has been held in some states that the middle name is a part of one's name, and that if it is stated either in full or by the initial, it must be stated correctly,² although it might not be necessary to state the initial in the first instance.³

1. *Alabama*. — *Rooks v. State*, 83 Ala. 79; *Pace v. State*, 69 Ala. 231; *Edmundson v. State*, 17 Ala. 179.

Arkansas. — *State v. Smith*, 12 Ark. 622.

California. — *People v. Lockwood*, 6 Cal. 205.

Illinois. — *Tucker v. People*, 122 Ill. 583; *Thompson v. Lee*, 21 Ill. 242; *Bletch v. Johnson*, 40 Ill. 116, holding that a middle name is not regarded as necessarily a part of the name of a party to a suit, and that where a party to a writ of error is designated in the record by one Christian name and one surname, and in the writ of error the middle initials are interjected between such Christian name and surname, it will be intended that the two names represent the same person unless the contrary is made to appear.

Indiana. — *Choen v. State*, 52 Ind. 347; *Ross v. State*, 116 Ind. 496; *Miller v. State*, 69 Ind. 284.

Iowa. — *Hendershott v. Thompson*, 1 Morr. (Iowa) 187.

Kansas. — *State v. Gordon*, 56 Kan. 68 [citing *State v. Watson*, 30 Kan. 282; *State v. Blackman*, 32 Kan. 615; *State v. Drake*, 33 Kan. 151; *State v. Rook*, 42 Kan. 419; *State v. Flack*, 48 Kan. 146, 16 Am. and Eng. Encyc. of Law 114].

Missouri. — *Orme v. Shephard*, 7 Mo. 606; *State v. Black*, 12 Mo. App. 533; *Smith v. Ross*, 7 Mo. 463; *Hardy v. State*, 7 Mo. 607; *Campbell v. Wolf*, 33 Mo. 460.

New Jersey. — *Dilts v. Kinney*, 15 N. J. L. 130.

New York. — *People v. Lake*, 110 N. Y. 61; *Roosevelt v. Gardinier*, 2 Cow. (N. Y.) 463; *Milk v. Christie*, 1 Hill (N. Y.) 102; *Franklin v. Talmadge*, 5 Johns. (N. Y.) 84; *Aylesworth v. Brown*, 10 Barb. (N. Y.) 167.

North Dakota. — *Johnson v. Day*, 2 N. Dak. 296.

Pennsylvania. — *Bratton v. Seymour*, 4 Watts (Pa.) 329; *Paul v. Johnson*, 9 Phila. (Pa.) 33, 29 Leg. Int. (Pa.) 4.

South Carolina. — *State v. Garvin*, 48 S. Car. 258.

Texas. — *McKay v. Speak*, 8 Tex. 376, holding that a middle name or initial is not known in law, and will not be noticed unless it is made to appear that such name or initial represents a different person from the one intended; *Dixon v. State*, 2 Tex. App. 531; *State v. Manning*, 14 Tex. 405; *Delphino v. State*, 11 Tex. App. 30; *Stockton v. State*, 25 Tex. 772.

Vermont. — *Bogue v. Bigelow*, 29 Vt. 182.

West Virginia. — *Long v. Campbell*, 37 W. Va. 668.

United States. — *Games v. Stiles*, 14 Pet. (U. S.) 322; *Keene v. Meade*, 3 Pet. (U. S.) 9.

England. — *Rex v. Newman*, 1 Ld. Raym. 562.

2. *State v. Hughes*, 1 Swan (Tenn.) 261; *Com. v. Buckley*, 145 Mass. 182 [citing *Com. v. Perkins*, 1 Pick. (Mass.) 388; *Com. v. Hall*, 3 Pick. (Mass.) 262; *Com. v. Shearman*, 11 Cush. (Mass.) 546; *Com. v. McAvoy*, 16 Gray (Mass.) 235; *Terry v. Sisson*, 125 Mass. 560].

3. *King v. Clark*, 7 Mo. 269.

In *Ohio*, upon the question whether a record pleaded and the averments of the plea showed that the defendant had been once put in jeopardy for the same offense, it was held that *Horace B. Westerhaven* and *Horace E. Westerhaven* are different names designating different persons, unless the plea further avers that the party is as well known by the one name as by the other. *Price v. State*, 19 Ohio 424.

In *Maine* it is said that there has been a growing dissatisfaction with the doctrine that a middle initial is no part of one's name, until that doctrine must be regarded as overruled in that state. *State v. Dresser*, 54 Me. 569. Thus, where both parties in a real action claimed title through *Henry F. Hawkins*, the plaintiff directly by deed and the defendant by a deed from the levying judgment creditor of *Henry F.*

When the First Name Is Not Given, but only its initial, the rule that the middle initials are no part of the name does not apply.¹

5. Names in Common Use and Assumed Names — a. DESIGNATION BY ASSUMED NAME SUFFICIENT. — Notwithstanding a person may not change his name without a proper proceeding for that purpose where it is so prescribed by statute, he may, as at common law, adopt any name he pleases in his business transactions, and such name, or any name by which he is usually known and called, is sufficient by which to designate him in civil or criminal proceedings instituted against him,² and he is estopped

Hawkins, the deed to the demandant was prior to the levy of the tenant but subsequent to the attachment on which the levy was made. The demandant, however, claimed that the attachment was defective because in the return of the officer to the registry of deeds the defendant in that suit was described as Henry M. Hawkins, when his true name was Henry F. Hawkins, by which latter name he was sued. It was held that such misdescription vitiated the attachment, the court adding, *obiter*: "The tenant claims that the name is described in the return with substantial correctness, and that the error is one of inaccuracy only and not fatal to the validity of the attachment. He would have had, probably, less difficulty to contend with had the error been the omission of the middle letter (as if written Henry Hawkins), or if only the initial of the Christian name had been written, but correctly given (as H. F. Hawkins). In such case, perhaps, the omission could have been supplied by parol proof." *Dutton v. Simmons*, 65 Me. 583.

In *State v. Homer*, 40 Me. 438, the defendant pleaded in abatement that her name was Mary Y. Homer and not Mary Homer, and the court said that if the letter Y is to be regarded merely as the initial letter of the middle name, it may well be questioned whether the plea is sufficient. The name of which that letter is the initial should have been set forth in the plea, as in *Com. v. Perkins*, 1 Pick. (Mass.) 388. But in *State v. Dresser*, 54 Me. 569, the defendant filed a plea in abatement, alleging that his name was David D. Dresser, and not David Dresser, etc., and the issue made by a replication that the defendant was known as well by one name as by the other was submitted to the jury.

1. *English v. State*, 30 Tex. App. 471,

which was a question of variance and repugnancy between the purport and tenor clause in an indictment for forgery. To the same point see *State v. Higgins*, 60 Minn. 1.

So where a declaration described a bill as being drawn by "George A. Cook," under the name of "G. A. Cook," and the bill offered in evidence was drawn by "G. W. Cook," the variance was held to be material. *King v. Clark*, 7 Mo. 269.

In *New Jersey* it was held that if a summons issues in the name of J. M., plaintiff, and in the state of demand a middle letter is inserted in the name of the plaintiff (namely, J. S. M.), and the defendant does not appear, but judgment is rendered against him in his absence, the judgment will be reversed. *Bowen v. Mulford*, 10 N. J. L. 230.

2. *Wartena v. State*, 105 Ind. 445; *Com. v. O'Hearn*, 132 Mass. 555; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 242; *Isaacs v. Mintz*, (City Ct.) 11 N. Y. Supp. 423 [citing *Eagleston v. Son*, 5 Robt. (N. Y.) 640; *Kennedy v. People*, 39 N. Y. 250]; *Farmers' Nat. Bank v. Williams*, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 213; *Preiss v. Le Poidevin*, 19 Abb. N. Cas. (Brooklyn City Ct.) 127; *City Council v. King*, 4 McCord L. (S. Car.) 487; *McGregor v. Balch*, 17 Vt. 562; *Linton v. Kittanning First Nat. Bank*, 10 Fed. Rep. 897. See also article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344, and the various articles discussing specific criminal subjects.

Rule Applied to Use of Initials for Christian Name. — *State v. Seely*, 30 Ark. 164; *People v. Dick*, 37 Cal. 277; *Minor v. State*, 63 Ga. 320; *Haywood v. State*, 47 Miss. 3; *Oakley v. Pegler*, 30 Neb. 628, holding that initials of the Christian name will be treated as the party's business name, and that a judgment recovered against him by that name

from repudiating a name under which he contracts for the purpose of relieving himself of the obligation of the contract. There is nothing so sacred in a name that right and justice should be sacrificed to its sanctity.¹ So a person may sue in any name in which he may contract,² as well as in any name by which he is generally known.³

b. REPLICATION TO PLEA OF MISNOMER.—It follows that where a party pleads in abatement on the ground of a misnomer, a replication that the person intended to be designated is known by the name used in the pleading as well as by the name set up in the plea in abatement puts in issue the material averments of such plea and is a sufficient answer thereto.⁴

will not be subject to collateral attack; *State v. Anderson*, 3 Rich. L. (S. Car.) 172; *City Council v. King*, 4 McCord L. (S. Car.) 487.

Designation of Woman by Initials of Husband's Name.—Where an indictment alleged an assault upon Mrs. George W. Bell, and the defense insisted that her name was Sallie Bell, the court held that the practice concerning the determination of this question should be analogous to the practice in the case of a plea of misnomer by the prisoner; that the fact should be submitted to the jury; and that it would be competent to show, in support of the allegations of the indictment, that the person was as well known by the name used as by any other. *Bell v. State*, 25 Tex. 574. See also *Davis v. State*, (Tex. App. 1889) 11 S. W. Rep. 647.

In *Carroll v. State*, (Neb. 1898) 73 N. W. Rep. 939, it was held that if a wife is proposed to be used as a witness in a criminal cause and this fact is evidenced by an indorsement of her husband's surname following the abbreviation Mrs., together with the middle Christian appellation of the husband, it is sufficient, it not appearing, or no complaint being made, that the accused was misled, as a person may in fact have a middle name by which he is commonly known and identified.

Middle Name Preceded by Initials.—In *U. S. v. Winter*, 13 Blatchf. (U. S.) 276, the defendant was indicted by the name of D. K. Olney Winter. On a motion to quash the indictment it was held that this was not a case where no Christian name was mentioned, nor where the Christian name was designated simply by its initial letter, the court saying: "Here a given name is set out, and, upon a motion to quash,

it is to be presumed that such name is the only given name by which the defendant has chosen to be and has come to be known. Having by such adoption become the distinctive given name of the defendant, it is properly used to describe him."

1. *Preiss v. Le Poidevin*, 19 Abb. N. Cas. (Brooklyn City Ct.) 127.

2. *Steinfeld v. Taylor*, 51 Ill. App. 400.

3. *Baumeister v. Markham*, (Ky. 1897) 39 S. W. Rep. 845; *Donaldson v. Donaldson*, (Ohio C. Pl.) 31 Wkly. L. Bul. 102; *Clark v. Clark*, 19 Kan. 522; *Cooper v. Burr*, 45 Barb. (N. Y.) 9; *Rich v. Mayer*, (City Ct.) 26 N. Y. St. Rep. 109.

4. *Washington v. State*, 68 Ala. 88; *Parmelee v. Raymond*, 43 Ill. App. 610; *Lucas v. Farrington*, 21 Ill. 31; *Schoonhoven v. Gott*, 20 Ill. 47; *Massey v. Chance*, 7 Blackf. (Ind.) 160; *State v. Homer*, 40 Me. 439; *State v. Corkrey*, 64 Me. 522; *Com. v. Gale*, 11 Gray (Mass.) 320; *State v. Martin*, 10 Mo. 392; *Hart v. Lindsey*, 17 N. H. 239; *Sunapee v. Eastman*, 32 N. H. 472; *People v. Byrnes*, 33 Hun (N. Y.) 105; *State v. Lorey*, 2 Brev. (S. Car.) 396; *Bowen v. Shapcott*, 1 East 542; *Sabine v. Johnstone*, 1 B. & P. 60; *Eichorn v. Lémaitre*, 2 Wils. 367.

Probably the Earliest Case of this sort is that of Gerard, in the time of Henry VII., cited by Sir Matthew Hale in 2 P. C. 237. The defendant, being charged with a felony by the name of Alan Gerard, pleaded that his name was John Allen, and not Alan Gerard, to which the king's attorney was allowed to reply that he was as well known by the latter name as by the former. Cited in *Gerrish v. State*, 53 Ala. 476.

Misnomer of Plaintiff.—Such a repli-

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6. Name Unknown — Fictitious Name — a. IN CRIMINAL PROSECUTIONS. — If the name of a defendant in a criminal prosecution is unknown, or if such is the case with reference to the name of any other person necessary to the description of a criminal offense, the fact that the name is unknown may be stated, with such description as is at hand, in lieu of the correct name.¹

cation is a good answer to a plea in abatement on the ground of misnomer in the plaintiff's name. *Goodenow v. Tappan*, 1 Ohio 60; *Lucas v. Farrington*, 21 Ill. 31; *Sunapee v. Eastman*, 32 N. H. 472; *Bowen v. Shapcott*, 1 East 542. *Contra*, *Norris v. Graves*, 4 Strobb. L. (S. Car.) 32, holding that the plaintiff must know and state his true name, and that such a replication is good only when the plaintiff mistakes the defendant's name.

The Issue upon such a stay of pleadings is not how the party's name is spelled, but how he is called and known. *Massey v. Chance*, 7 Blackf. (Ind.) 160.

The Predominant Name. — The replication may be sustained though the number of persons who knew the party and called him by the name used is smaller than the number of those who knew and called him by his proper name. *Frye v. Hinkley*, 18 Me. 320.

The issue is not whether the defendant is as well known by the name charged as by his true name, because in such a case the evidence would leave the scales in which the two names were placed in *equilibrium*. The true issue is whether he is known by one name as well as by the other, in which issue an equipoise is not required, for it is enough if he be known by both names. *State v. Dresser*, 54 Me. 571. See also *Bell v. State*, 25 Tex. 575.

Failure to Sustain Issue. — Where one is indicted as "O. Alonzo Rockwell," proof that the defendant usually signed his name "O. A. Rockwell," and was generally called by that name, and that some of his relatives called him "Alonzo," and that "O. A." were the initial letters of his name, is not sufficient to sustain a replication that the defendant was known as well by the name O. Alonzo, as used in the indictment, as by his true name, Orville A. Rockwell *v. State*, 12 Ohio St. 427.

In *Gerrish v. State*, 53 Ala. 476, it is held that while a replication that a party is as well known by initials as by the name set up in the plea in

abatement is not subject to demurrer, because it does not appear that the initials are not names instead of the first letters of names, yet if used as initials merely, and this is shown upon the trial of the issue, the court should direct the jury to find the issue for the defendant.

Evidence — Former Indictment. —

Upon an issue whether the defendant is as well known by the name in the indictment as by another, a former indictment against her by the same name under which she pleaded "not guilty" is competent evidence for the consideration of the jury. *State v. Homer*, 40 Me. 439.

1. See generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

Initials of Christian Name. — An indictment which sets forth the defendant's Christian name by initials only is held to be subject to a plea in abatement, unless it is alleged that the Christian name is unknown to the grand jury otherwise than as laid. *Gerrish v. State*, 53 Ala. 476; *U. S. v. Upham*, 43 Fed. Rep. 68; *Turner v. People*, 40 Ill. App. 19.

But in *State v. Vanderlip*, 4 La. Ann. 444, notes belonging to Isaac B. Kirkland were stolen in transmission from a package marked "I. B. Kirkland," and it was held that it only becomes necessary to state that a person is unknown when he cannot be described by name, and that, with the evidence before him that the aggrieved party was known by the name of I. B. Kirkland, the attorney-general could not, with propriety or truth, have averred the property in the notes to be in a person unknown, and therefore the ownership was properly laid in I. B. Kirkland.

Initials Unknown. — An indictment which states the surname only, without stating that the initials of the Christian name of the defendant are unknown, is defective under a statute which permits the description of persons in an indictment by the initials of the Christian name and the surname.

b. IN CIVIL ACTIONS — Statutory Provisions. — In civil cases, when the plaintiff is ignorant of the name of the defendant, it is sometimes permissible by statute to designate such defendant by a fictitious name and to amend the pleading or proceeding by inserting the true name as soon as it is ascertained.¹

Defendant's Name Must Be Actually Unknown. — It is held, however, that the fictitious name cannot be inserted at discretion, but only when the plaintiff is ignorant of the true name of a real party, and the statute does not contemplate or permit the use of such names as an expedient to cover the name of a party not sued, so that he might be brought in afterwards and made a party by inserting his name.²

Effect of Amendment. — A fictitious name makes the defendant a party from the commencement of the action, and an amendment inserting the true name does not change the original cause of action.³

Farmer v. State, (Tex. Crim. App. 1894) 28 S. W. Rep. 197; *Pancho v. State*, 25 Tex. App. 402; *Brewer v. State*, 18 Tex. App. 456.

And a reasonably accurate description of the defendant must be given in the indictment, under the *Texas* Code of Crim. Pro., when the name is unknown and cannot be set out conformably to the statute. *Victor v. State*, 15 Tex. App. 90.

Middle Christian Name. — Where one Christian name is given it is not necessary to state that the middle Christian name is unknown, because the middle Christian name is not a part of the name, and if such an allegation is made it may be rejected as surplusage. *Taylor v. State*, 100 Ala. 68.

1. *Rosencrantz v. Rogers*, 40 Cal. 489; *Morgan v. Thrift*, 2 Cal. 562; *Campbell v. Adams*, 50 Cal. 203; *Tyrell v. Baldwin*, 67 Cal. 3; *McKinlay v. Tuttle*, 42 Cal. 573.

Fictitious Name Followed by Alias. — In *Curtis v. Herrick*, 14 Cal. 118, where service against a party in his fictitious name was returned as made upon "John Doe, alias Westfall," it was held that the fact that Westfall made no appearance or defense after this service was equivalent to an admission that he was the person intended to be sued, and the judgment was properly rendered against him.

2. **The Remedy in Such an Emergency** is by an application to amend the summons and bring in the newly discovered party. *Hancock v. Oxford First Nat. Bank*, 93 N. Y. 86.

Necessary Allegation. — There must

be a distinct allegation to the effect that the name so used is used by reason of ignorance of the defendant's true name. *Gardner v. Kraft*, 52 How. Pr. (N. Y. C. Pl.) 499; *Crandall v. Beach*, 7 How. Pr. (N. Y. Supreme Ct.) 271; *Waterbury v. Mather*, 16 Wend. (N. Y.) 611. Or it must be alleged by way of replication to a plea of misnomer. *Waterbury v. Mather*, 16 Wend. (N. Y.) 611. And the record must show the fact that a fictitious name was used. *Ford v. Doyle*, 37 Cal. 346.

3. *Farris v. Merritt*, 63 Cal. 118, citing *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737.

Service of Amended Complaint. — On amending a complaint by inserting the true name of a defendant sued by a fictitious name, and duly served, it is not necessary to serve on him a copy of the amended complaint. *Brock v. Martinovich*, 55 Cal. 516.

Necessity of Amendment. — Except for such a statute, a plaintiff could not sue any person by a name not belonging to him, and, consequently, a defendant cannot be charged with a suit unless he is made a defendant by an amendment, as provided by the statute, when his true name is ascertained. *McKinlay v. Tuttle*, 42 Cal. 573; *Rosencrantz v. Rogers*, 40 Cal. 489; *McCabe v. Doe*, 2 E. D. Smith (N. Y.) 64. But it is also held that if the defendant so sued is served, appears, and defends, he cannot complain in the Supreme Court for want of a formal amendment substituting his real name. *Moore v. Lewis*, 76 Mich. 300.

7. Alias Dictus — An Alias May Be Alleged. — The use of an *alias dictus* following the designation of the correct name, indicating that the party was known and called thereby, does not render a pleading objectionable.¹

It need not be proved that a defendant designated under an alias was known and called by both names. It is sufficient if he is identified as a person entitled to either of the names given.²

8. Misnomer in Written Instruments. — Upon a Satisfactory Show-

But if a party is sued by a fictitious name and is served with summons and answers by his true name, a judgment against him is not void by reason of the fact that the complaint is not amended by inserting the true name so as to subject it to collateral attack. *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; *Campbell v. Adams*, 50 Cal. 203; *Baldwin v. Morgan*, 50 Cal. 589; *Tyrrell v. Baldwin*, 67 Cal. 3; *Farris v. Merritt*, 63 Cal. 119. *Contra*, *Gardner v. Kraft*, 52 How. Pr. (N. Y. C. Pl.) 501.

Part of Several Defendants Fictitiously Designated. — Where there were several defendants designated by their proper names, and two others designated by the fictitious names John Doe and Richard Roe, and an answer was filed by the "defendants" generally, the record not showing that the true names of the defendants designated as John Doe and Richard Roe had been discovered, and the proceedings not having been amended by the substitution of the proper names for these fictitious names, it was held that the answer should be construed as of those only of the defendants who were sued by their proper names, and that an injunction granted in the suit would be operative against such persons only. *Moulton v. Parks*, 64 Cal. 166.

1. *Kennedy v. People*, 39 N. Y. 250; *Barnesciotta v. People*, 10 Hun (N. Y.) 137; *Reid v. Lord*, 4 Johns. (N. Y.) 118; *Wilson v. Shannon*, 6 Ark. 198; *U. S. v. Wright*, 16 Fed. Rep. 112; *Haley v. State*, 63 Ala. 89; *Noblin v. State*, 100 Ala. 13, wherein a plea in abatement that the true name was that given as an alias was held to be bad.

"An *alias dictus*, as one of the old cases says (Jenk. Cent. 119), is only reputation, and is not the truth; and though it might as well have been omitted altogether, yet if it be supported by the covenant, the defendant cannot take an exception." *Reid v. Lord*, 4 Johns. (N. Y.) 118.

Description of Instrument or Person. — An indictment which recites that a note was executed by "John K. Pickens, alias John Pickens," does not describe the note, but merely the person who executed it. But a description of an affidavit as "the said John K. Pickens, alias John Pickens," made a certain paper writing purporting to be an affidavit in writing of him, the said John K. Pickens, alias John Pickens," in fact described a paper as subscribed by John K. Pickens, alias John Pickens, and if the paper produced in evidence is subscribed by John Pickens only, there is a variance which will make the paper inadmissible in evidence. *Pickens v. State*, 6 Ohio 274. See *infra*, II. 8. *Misnomer in Written Instruments*.

Variance Between Information and Affidavit. — An affidavit describing the defendant with an alias is sufficient to support an information which omits such alias. It may sufficiently appear from such affidavit and information that but one offense is charged. *Harrison v. State*, 6 Tex. App. 256.

Christian Names may be designated under an *alias dictus*, though some ancient authorities look the other way. *Lee v. State*, 55 Ala. 259. See also *Haley v. State*, 63 Ala. 89; *Skinner v. State*, 30 Ala. 524; *Bryant v. State*, 36 Ala. 270; *Rex v. Newman*, 1 Ld. Raym. 562.

Incorrect Use. — The word "alias," following an improper designation, will be treated as surplusage and will not aid the improper designation. Thus, where an attempt is made to prosecute a person by a fictitious name, if the only designation in the complaint and warrant is a name followed by the word "alias," without any preceding description of the person, that name, not being the name of the defendant, is not sufficient and is no justification in an action for false imprisonment. *Scheer v. Keown*, 29 Wis. 586.

2. *Evans v. State*, 62 Ala. 12.

ing of Identity the misnomer of a person or corporation in a written instrument will not defeat a right to recover upon such instrument,¹ or relieve from liability persons who are bound thereon, as where the drawer of a draft is described by the name signed to the draft, in which case the acceptor is estopped from denying the name, whether it is real or fictitious.²

1. *Marmet Co. v. Archibald*, 37 W. Va. 778; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360.

Parol Evidence of Identity.—Where a declaration was brought in the name of "Mrs. Alice McPherson Ansley," and in the memorandum of sale the name was "Mrs. Frank J. Ansley," it was held that the name in the memorandum was likely to be that of the plaintiff's husband, which fact could be explained by parol evidence, and that the plaintiff was entitled to be allowed to show that Frank J. Ansley was the name of her husband, and that the words "Mrs. Frank J." were applied to her in the memorandum. *Ansley v. Green*, 82 Ga. 181.

In an Action on an Administration Bond wherein the name of the intestate was incorrectly written, and the only evidence offered to prove the amount of assets in the hands of administrators was an inventory of the goods and chattels of the intestate by his correct name, it was held that parol evidence was admissible to show the name of the intestate, and that the bond was really given by the administrators, the variance being a mistake committed by the obligors themselves. *State v. Wootton*, 4 Har. & J. (Md.) 21.

Incorrect Name in Recognizance.—If a defendant is not the person who entered into a recognizance he could plead the fact in abatement, but where he does not appear to deny his identity as the man who bound himself for the appearance of the defendant in the recognizance, and the only difficulty appears to be that he is described by a wrong Christian name in the body of the recognizance, this is a clerical error, and the court should permit the clerk to amend it if necessary. *State v. Rhodius*, 37 Tex. 166.

Sureties cannot take advantage of a variance between the name in the recognizance and the signature. *Carpenter v. State*, 8 Mo. 291.

"Martini—Martinez."—A complaint on a forfeited recognizance alleged the name of the accused for whose appearance to answer it was given, and the

name by which he was indicted, to be "Antonio Martini," and that the name was written in the recognizance as "Antonio Martinez," but that the same person was intended, and a demurrer on the ground of ambiguity and uncertainty was overruled. *People v. Eaton*, 41 Cal. 657.

Exception to Rule Against Use of Initials.—The rule requiring certainty in the statement of names of parties, and that such names should be written with the full Christian and surname, has an exception in the statute 3 & 4 William IV., c. 42, § 12, which indicates that in all actions upon bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient to designate the person by the same initial letter or letters as in the contracts, instead of stating the Christian name or names in full. *Elberson v. Richards*, 42 N. J. L. 71, holding that the said statute was in force in New Jersey. *Enewold v. Olsen*, 39 Neb. 59, under the *Nebraska Code of Civ. Pro.*

But in *Montana* a demurrer was held to be proper where a party brings an action upon an instrument wherein he is designated by the initial letters of his name, if he does not aver in the pleading and establish by proof what his name really is. *Wiebbold v. Hermann*, 2 Mont. 609; *Curtis v. Valiton*, 3 Mont. 154.

2. *Claffin v. Griffin*, 8 Bosw. (N. Y.) 689.

Bart.—Bartholomew.—In suits brought by an indorsee against the indorser, and by the indorsee against the drawer, of a bill payable to Bart. Whalon, the bill was described in the declaration as payable to Bartholomew Whalon, without any averment that Bart. and Bartholomew were one and the same person, or that the former name was an abbreviation of the latter, and it was held that the court could not judicially know that the former is an abbreviation of the latter, or that

Name of Plaintiff. — A suit may be brought either in the erroneous name appearing in the written instrument, as where initials are used instead of the full Christian name,¹ or in the true name, where an erroneous name is used in the writing, with proper averments that the party suing is the party intended by the designation given in the instrument.²

Name of Defendant. — A party may be sued by the name which he signs to a note or other instrument, and he cannot be permitted to deny the name unless he denies the execution of the instrument;³ or he may be described by his true

Bart. is not a full proper name. *Curtis v. Marrs*, 29 Ill. 508; *Rives v. Marrs*, 25 Ill. 315. See also article NEGOTIABLE INSTRUMENTS.

1. In an Action on a Promissory Note, it was held that the defendant by his signature to the note acknowledged the name of the plaintiff to be as described in the process and was thereby estopped from setting up that such was not a proper designation of his name. *Davis v. David*, 1 Greene (Iowa) 429. See also *Farmers' Nat. Bank v. Williams*, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 213.

So where a note is payable to a party whose Christian name is designated by initials, in a suit by the payee the defendant cannot plead in abatement that the plaintiff sued by the initials of his Christian name. *Woodberry v. Dye*, 10 Rich. L. (S. Car.) 31, *distinguishing* *Norris v. Graves*, 4 Strobb. L. (S. Car.) 32, in that the payee in the note in that case was not designated by the initials of his Christian name. See also *Fewlass v. Abbott*, 28 Mich. 270.

2. *Taylor v. Strickland*, 37 Ala. 642 [*overruling*, in effect, *Gayle v. Hudson*, 10 Ala. 116]; *Nicholay v. Kay*, 6 Ark. 59; *Northwestern Distilling Co. v. Brant*, 69 Ill. 661; *Pinckard v. Milmine*, 76 Ill. 453; *Board of Education v. Greenebaum*, 39 Ill. 609; *Leaphardt v. Sloan*, 5 Blackf. (Ind.) 278; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *Lowell v. Morse*, 1 Met. (Mass.) 473; *Upper Alloways Creek Tp. v. String*, 10 N. J. L. 323; *Woolwich v. Forrest*, 2 N. J. L. 107; *Middletown v. M'Cormick*, 3 N. J. L. 92; *New York African Soc. v. Varick*, 13 Johns. (N. Y.) 39; *Andrews v. Wynn*, 4 S. Dak. 40; *McMinn Academy v. Reneau*, 2 Swan (Tenn.) 94; *Hathaway v. Sabin*, 63 Vt. 527. See article NEGOTIABLE INSTRUMENTS.

Amendment. — Where the corporate

name was erroneously stated both in the complaint and in the bond sued on, but there was no question as to the identity of the person, nor that the complainants were the obligees in the bond, it was held that the contract could not be avoided for the misnomer, but that the bill might be amended by inserting the true name of the corporation with a proper averment as to identity. *Hoboken Bldg. Assoc. v. Martin*, 13 N. J. Eq. 429.

Full Name instead of Initials. — Where the plaintiff sued as "Mary A. Quarles," on a note made payable to "M. A. Quarles," it was held that the possession of the note rendered the initial letters sufficient. *Quarles v. Collier*, 3 Strobb. L. (S. Car.) 223.

In a suit before a justice of the peace by John Hopper, the note in suit was made payable to John Harper. It was held not to be demurrable and that the plaintiff might prove that the note was executed to him by a wrong name. *Jester v. Hopper*, 13 Ark. 43.

3. *Comer v. Jackson*, 50 Ala. 384; *Kemp v. McCormick*, 1 Mont. 423; *McColgan v. Territory*, 5 Okla. 567; *Graham v. Eiszner*, 28 Ill. App. 273; *Com. v. Hughes*, 10 B. Mon. (Ky.) 160; *Slocum v. McBride*, 17 Ohio 607, holding that a demurrer would not raise an objection to this form of pleading, the name signed purporting to be a partnership name. *Porter v. Cresson*, 10 S. & R. (Pa.) 257; *Bigelow v. Chatterton*, 10 U. S. App. 267. See further articles PARTNERSHIP; NEGOTIABLE INSTRUMENTS.

Reply to Plea in Abatement. — If a party executes an obligation by a wrong Christian name he should be sued on the instrument in that name; and if he plead the misnomer in abatement, the plaintiff may state the facts specially in a replication, or reply generally that the defendant is as well known by that name as by the other; and in either

name¹ with an averment and proof that the instrument was executed by the party by the name appearing in the instrument.²

9. Repetition, Repugnancy, and Variance — *a. REFERENCE FROM ONE COUNT TO ANOTHER.* — The rule that each paragraph of a complaint or each count of an indictment must contain within itself a good cause of action or charge the commission of an offense does not go to the extent of requiring the repetition of names which have been previously given, but such names may be indicated by suitable words of reference.³

b. REPUGNANCY AND VARIANCE — *Clerical Error.* — Where names are repeated in a pleading, a mere clerical error in the statement of the name in one place will not affect the validity of the pleading where the identity of the person is apparent.⁴

case the replication will be sustained by the production of the instrument. *Guinard v. Heysinger*, 15 Ill. 290, *citing* *Field v. Winlow*, Cro. Eliz. 897; *Hyckman v. Shotbolt*, 3 Dyer 279*b*; *Linch v. Hooke*, 1 Salk. 7; *Gould v. Barnes*, 3 Taunt. 504; *Wooster v. Lyons*, 5 Blackf. (Ind.) 60.

1. *Cantley v. Hopkins*, 5 Stew. & P. (Ala.) 58, wherein suit was brought against John Cantley on a note signed by J. Cantley, but the declaration did not attempt to set out the execution of the note *in hac verba*, and it was held that there was no discrepancy.

In *Blood v. Crandall*, 28 Vt. 396, which was a declaration in scire facias against John J. Crandall as bail, to a plea that the defendant did not give bail in the manner and form as alleged the replication averred that the defendant, as deputy sheriff, made return, subscribed with his name, John J. Crandall, "that he, the said John J. Crandall, became his, the said Fallon's, bail, by indorsing his, the said Crandall's, said name of J. J. Crandall on said writ, as bail thereon." It was held that it required too great a refinement of language to raise any fair and reasonable doubt as to the averment that the defendant indorsed the writ as bail by the name of J. J. Crandall.

Amendment. — Where a corporation, by issuing notes in a wrong name, misleads a party to bring suit against it in such wrong name, upon a plea in abatement setting up such misnomer the plaintiff is entitled to amend. *Bullard v. Nantucket Bank*, 5 Mass. 99.

2. *Northwestern Distilling Co. v. Brant*, 69 Ill. 661 [*citing* *O'Brien v. People*, 41 Ill. 456; *Garrison v. People*,

21 Ill. 535; *Graves v. People*, 11 Ill. 542]; *Wilson v. Shannon*, 6 Ark. 196, holding that this is the proper form of bringing an action against a person improperly styled in a contract upon which the suit is brought. See also, *Dallam v. Wilson*, 4 T. B. Mon. (Ky.) 109.

Contra. — But it has been held that it is improper to declare against a person in his true name averring that he executed the instrument by the untrue description, but that the suit must be brought in the name signed to the instrument. *Wooster v. Lyons*, 5 Blackf. (Ind.) 60; *Gould v. Barnes*, 3 Taunt. 504.

Variance in Body and Signature to Bond. — When the obligor's name in a bond is written by mistake "James P. Coman," and he signs the bond "J. P. Coman," while his real name is Joshua P. Coman, he may be sued by his true name with averments stating the facts. *Wood v. Coman*, 56 Ala. 283.

3. See articles COMPLAINTS AND PETITIONS, vol. 4, p. 592; INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 504 *et seq.*

4. *Phillips v. State*, 35 Ark. 384; *O'Connor v. State*, 97 Ind. 104; *Gatling v. Robbins*, 8 Ind. 184; *Kennedy v. State*, 62 Ind. 138; *State v. Wall*, 39 Mo. 532; *Hall v. State*, 32 Tex. Crim. Rep. 594; *Rowell v. Bruce*, 5 N. H. 381; *Hart v. State*, 38 Tex. 382.

Omission of Initial in Reference. — Where the name is set out with the full Christian name and surname and a middle initial inserted between the two, and thereafter a reference is made to the person as the said —, omitting the middle initial between the Christian name and the surname, it is held

Slight Variances. — The same may be said where there are slight variances in the designation of the same person in different parts of the same proceeding, where there is no misapprehension or mistake occasioned thereby and the identity of the parties mentioned is obvious.¹

that the reference necessarily refers to the full name as stated. *Com. v. Robinson*, 165 Mass. 426; *Com. v. O'Hearn*, 132 Mass. 553.

Misnomer in Unnecessary Clause. — Where the misnomer occurs in a clause which may be rejected as surplusage, it will not affect the pleading. *Com. v. Hunt*, 4 Pick. (Mass.) 252, where the indictment charged that the defendant "in and upon one Peddy Harvey * * * did make an assault, and her the said Peddy Hunt * * * did beat," etc., and it was held that the objection for repugnancy was not well taken, because the whole clause containing the error was surplusage. See also *Greeson v. State*, 5 How. (Miss.) 33; *Cotton v. State*, 4 Tex. 265; *Kennedy v. State*, 62 Ind. 138; *Rex v. Morris*, 1 Leach C. C. 109.

Defect Not Prejudicial to Substantial Rights. — And the same character of objection has been held to fall within the statute which provides that an indictment shall not be quashed or set aside for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant upon the merits. *Kennedy v. State*, 62 Ind. 138; *State v. McCunniff*, 70 Iowa 217.

After Amendment — Petition. — In an action for wrongful attachment the petition alleged that the property attached was a mare named "Jane," which name appeared twice in the petition. On the trial it appeared that the name of the mare was "Iona," and on application leave was given to amend the petition by changing the name from Jane to Iona. The amendment was made in one of the places in which the name appeared, leaving the petition as alleging in one place the ownership of a mare named "Iona," and in another place the seizure of a mare named "Jane." It was held that the failure to make the change in both places was a mere clerical omission on the part of counsel and did not affect the right of parties. *Sanford v. Willetts*, 29 Kan. 647.

Indictment. — But in *Miller v. State*, 53 Miss. 403, the indictment charged

an assault upon Roan Blackman with intent to kill and murder Roan Blackman. An amendment was allowed changing the name "Blackman" to "Blackburn," but in making the amendment in the indictment there was a careless omission to amend the name in both places, leaving the indictment to charge, after the amendment, an assault upon Roan Blackburn with the intent to kill and murder Roan Blackman. It was held that for this blunder the judgment must be reversed, the court saying that if the order of the court itself worked the substitution of names it would have been otherwise, but that the phraseology of the statute carried with it the idea of a manual change in the indictment, by the actual substitution of a name by insertion in lieu of that stricken out.

1. *Reeves v. State*, (Ala. 1898) 23 So. Rep. 28; *Ex p. Gordan*, 95 Cal. 374; *Butler v. Ashworth*, 100 Cal. 334; *Schemick v. Chicago*, 151 Ill. 336; *Gordon v. State*, 59 Ind. 75, holding that the rule requiring the Christian name of a defendant to be set out in full, unless it is alleged to be unknown, is not strictly applied to names in papers subsequently filed in the case in which the person referred to is clearly identified; *Ryder v. Mansell*, 66 Me. 170; *State v. Wall*, 39 Mo. 534; *State v. Atkinson*, 27 N. J. L. 420; *State v. Vestal*, 82 N. Car. 564; *Liscomb v. Eldredge*, (R. I. 1897) 38 Atl. Rep. 1052.

Identity from Other Matters of Description. — Where an order for the support of a minor child designated the child as "Lena," or "Lina," while the child was designated by its real name, "Leah," in other parts of the proceeding, wherein it was also otherwise described as being the sole issue of the marriage of its parents, the parties to the proceeding, it was held that the minor child was sufficiently identified and that the order was not void. *Ex p. Gordan*, 95 Cal. 374.

Appeal from Justice — Suit and Judgment in Different Names. — Where a suit was instituted in one name, and judg-

Variance Between Pleading and Proof. — Notwithstanding the rule that no advantage can be taken of a misnomer as such, except *in limine*, as by plea in abatement,¹ yet occasions may arise when an objection before trial would not be proper, as where there is a variance between the declaration and the proof, *e. g.*, between the name set out in the pleading and that written in the instrument sued on.²

Name of Third Person. — Where the name of a third person is necessary to the identity of an offense, proof of a different person makes a fatal variance; as where an indictment charges assault upon one person by name and the proof shows an assault upon a different person, the name of the latter not being shown to be one by which the person alleged to have been assaulted was known;³ and this rule as to variance in stating the name of a

ment was rendered before the justice against the plaintiff by another name by which he was as well known as by the name in which the suit was brought, and no objection was made before the justice, the objection on appeal was overruled. *Scott v. White*, 71 Ill. 287.

1. See *infra*, IV. *Effect of Misnomer — Objections.*

2. *Sunapee v. Eastman*, 32 N. H. 472; *Chappell v. Proctor*, Harp. L. (S. Car.) 49.

Variance Between Name on Account and Name in Pleading. — There being no question of the identity of the party, where an indebtedness of William B. McQuillan is averred to be for goods and merchandise, and the bill of particulars filed as an exhibit is against W. B. McQuillan, there is no discrepancy. "The heading of the account might have been altogether omitted, and still the items of the account would constitute the subject of the indebtedness and might have been proved on the trial." *Ware v. McQuillan*, 54 Miss. 703.

Flory — Fleurer. — So where charges in the plaintiff's book were against "Mrs. Flory," while the defendant's real name, as stated in the declaration and bill of particulars, was "Fleurer," it was held that the defendant could not have been misled. *Imhoff v. Fleurer*, 2 Phila. (Pa.) 35.

3. *People v. Oreileus*, 79 Cal. 180; *State v. Taylor*, 49 La. Ann. 320; *Blumenberg v. State*, 55 Miss. 529; *McBeth v. State*, 50 Miss. 81; *Moynahan v. People*, 3 Colo. 367; *Lewis v. State*, 90 Ga. 95. See various articles treating specific offenses. See also article IN-

DICTIONMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

Misnomer Aided by Other Description — Defendant's Wife. — In *Herron v. State*, 93 Ga. 554, the indictment, as amended, charged Charles Herron with killing "Lula Herring, his wife;" and her name was "Herron." It was held that this misnomer would not justify the court in arresting a judgment of conviction, *distinguishing Lewis v. State*, 90 Ga. 95, in that there was a motion for a new trial in that case, and the point was thus properly made, and further, that the indictment in that case did not allege that the deceased was the wife of the accused, the court adding: "Had the indictment charged that the deceased was the wife of the accused, the decision might have been otherwise, notwithstanding the variance between the indictment and the evidence as to her given name."

Sole Issue of Marriage. — So where an order for the support of a minor child whose name was "Leah" designated the child as "Lena," or "Lina," but the child was designated by its proper name in other parts of the proceeding, as well as being otherwise described as the sole issue of the marriage of its parents, parties to the proceeding, it was held that the child was sufficiently identified. *Ex p. Gordan*, 95 Cal. 374.

"Sole Heir at Law." — On a motion to dismiss an appeal from a decree of a court of probate refusing to admit to probate an instrument purporting to be a last will and testament, the ground of the motion urged was that the record did not show that Harriet Richmond Eldredge, heir at law of the testator,

third person was formerly very strictly observed ¹

The Question Is Now One of Identity, and where this is established, or the inaccuracy is not misleading, it will not be fatal. ²

described and mentioned in the instrument presented for probate, had ever been served with notice of appeal or summons. The reasons of appeal prayed for a citation to Harriet R. Eldredge, described as of Dorchester, Mass., "sole heir at law of said James Pierce," and there was a citation on file with an affidavit of service thereon by a disinterested person on Harriet R. Eldredge in Boston, Mass., the service having been made, as the affidavit stated, by leaving in her hands and possession a copy of the citation, together with a certified copy of the reasons of appeal, which accompanied the citations. It was held that the court would presume, until the contrary appeared, that the Harriet R. Eldredge thus served was identical with the Harriet Richmond Eldredge who was mentioned as the heir at law of the said decedent. *Liscomb v. Eldredge*, (R. I. 1897) 38 Atl. Rep. 1052.

Presumption After Verdict. — "It will be presumed in favor of the correctness of the verdict and judgment, in the absence of any evidence to the contrary in the record, that the jury had before them evidence that Leong Chin and Leong Chung were identical; that the man killed and murdered had two names, by either of which he was equally well known." *People v. Leong Sing*, 77 Cal. 117.

1. *Unger v. State*, 42 Miss. 649; *State v. Anderson*, 3 Rich. L. (S. Car.) 174; *Com. v. Pope*, 12 Cush. (Mass.) 272, which was an indictment for wilfully obstructing an engine passing upon a railroad alleged to be built by the Boston and Worcester Railroad Company. It was held that, the true name of the railroad being the "Boston and Worcester Railroad Corporation," the variance was fatal.

2. **Variance Where Christian Name is Written with Initials.** — Where the allegation lays the ownership in a man whose first initial was J, proof that the name began with an I will not make a material variance if the initial was written wrong by mistake. *Bernhard v. State*, 76 Ga. 613.

Where ownership of stolen property is laid in "Mrs. E. A. Sanders," proof of ownership in "Mrs. Elmira Sanders" is sufficient, where there is no

question as to the identity of the person. *State v. Garvin*, 48 S. Car. 258. See also *State v. Flack*, 48 Kan. 146; *State v. Rook*, 42 Kan. 420; *Franklin v. State*, 37 Tex. Crim. Rep. 312.

Necessity of Proof of Identity. — The appellant, alone, was tried for the crime of adultery alleged to have been committed by himself and Lula Huntington. The only testimony offered at the trial was some admissions made by one Lula Huntington, in the absence of appellant. There was no testimony that Lula Huntington was identical with Lula Huntington. The circuit judge admitted, against objection, the admissions or confessions of Lula Huntington to go to the jury, and charged the jury that if they found as matter of fact that the person spoken of by the witness as Lula Huntington was the same person whose name was set out in the indictment as Lula Hunting, it would be sufficient on that point, but it was held on appeal that in the absence of all testimony as to a fact, the jury were not entitled to conclude that "Hunting" was the same person as "Huntington." *State v. Mims*, 39 S. Car. 557.

Variance Immaterial Under Statute. — It is sometimes provided by statute that a variance in names is not fatal and cannot work an acquittal, unless it is found to be material to the merits of the case, or that it may be prejudicial to the defendant. *Mead v. State*, 26 Ohio St. 505; *People v. Main*, 114 Cal. 634; *State v. Harl*, 137 Mo. 252, holding that under such a statute it may be shown on the trial of an indictment for uttering a forged note purporting to be signed by "J. Mugumry" that the defendant agreed to have "J. H. Montgomery" sign the note and represented the signature to be that of the latter; and that when an offense involves the commission of or attempt to commit an injury to a person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured is not material; *State v. Emeigh*, 18 Iowa 122; *State v. Flynn*, 42 Iowa 164; *State v. Carr*, 43 Iowa 418; *State v. Becker*, 20 Iowa 438; *State v. Crawford*, 66 Iowa 318; *State v. Goode*, 68 Iowa 593; *State v. Thompson*, 19 Iowa 299; *State v. Windahl*, 95

A Misnomer of a Person Not Necessary to Be Named, or whose existence is not essential to the offense alleged in the indictment, is not fatal.¹

10. *Idem Sonans* — Statement of the Doctrine. — If a name as spelled, though different from the correct spelling thereof, conveys to the ear when pronounced according to the commonly accepted acoustics a sound practically identical with the sound of the correct name, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error.²

11. Names of Same Original Derivation — Use of One for Another Immaterial. — Where two names have the same original derivation, or one is an abbreviation or corruption of the other, both being taken promiscuously in common use for the same, though differing in sound, the use of the one for the other is not a material misnomer or variance.³

12. Additions — a. GENERALLY — Statutory Provisions. — In *England* it was required by statute⁴ that the addition of the estate,

Iowa 470, which was a prosecution for murder, wherein it appeared that the deceased was a tramp and his name was a matter of some dispute, it being said in the indictment to be "William Adams," but there was some testimony tending to show that it was in fact "J. P. Barnes," and the court instructed in substance that the erroneous allegation as to the name was not material, and this instruction was held to be correct under the statute; *State v. Seely*, 30 Ark. 162; *People v. McNealy*, 17 Cal. 332; *Olive v. Com.*, 5 Bush (Ky.) 376; *People v. Johnson*, 104 N. Y. 213; *People v. Dunn*, 53 Hun (N. Y.) 387.

In order to prevent its working such acquittal, however, it must appear that the person intended to be described in the indictment and the person described in the proof are identical, the variance arising from a mere mistake as to name. *Mead v. State*, 26 Ohio St. 505; *People v. Oreileus*, 79 Cal. 180; *People v. McNealy*, 17 Cal. 333; *People v. Allen*, 61 Cal. 140.

1. *U. S. v. Howard*, 3 Sumn. (U. S.) 12; *Mayo v. State*, 7 Tex. App. 346; *Com. v. Hunt*, 4 Pick. (Mass.) 252; *Union Bank v. Smith*, 3 La. Ann. 147, wherein in an answer a defendant prayed for a dissolution of an injunction, and that Smith and his surety, Charles Morgan, Sr., should be condemned *in solido* to pay interest and damages. Joseph Jewell was the surety on the bond and not Morgan, and the

court rendered a judgment against Jewell as surety. It was held that this was correct under the act which provides that the surety on the injunction bond shall be considered a party plaintiff in the suit, and that in case the injunction shall be dissolved, the court in the same suit shall condemn the plaintiff and surety jointly and severally.

Party Not Necessary to Relief Granted. — The misnomer of a party not necessary to the relief granted is not material. *Parrott v. Byers*, 40 Cal. 614.

2. *Gahan v. People*, 58 Ill. 160; *Smurr v. State*, 88 Ind. 506; *Henry v. State*, 7 Tex. App. 388; *Hoffman v. Bircher*, 22 W. Va. 540; *Letherbarrow v. Ward*, 5 Jur. 388.

This principle is supported by the great mass of cases determining the question as to what names are and what are not *idem sonans*. See title *Names*, Am. and Eng. Encyc. of Law.

3. *Walter v. State*, 105 Ind. 589; *Alsop v. State*, 36 Tex. Crim. Rep. 535; *State v. Hutson*, 15 Mo. 572; *Wilkerson v. State*, 13 Mo. 91; *Paul v. Johnson*, 9 Phila. (Pa.) 33, 29 Leg. Int. (Pa.) 4; *Jones's Estate*, 27 Pa. St. 336; *Gordon v. Holiday*, 1 Wash. (U. S.) 289.

4. 1 Henry V., c. 5.

Additions After Alias. — "According to old authorities, these additions should be added after the first name, and not after the *alias dictus*." 2 Inst. 699; 3 Salk. 20. Though if an addition be given to the name after the *alias dictus*, it may be rejected as surplusage.

degree, or mystery of the defendant should be added to his name in an indictment, and some cases in the *United States* have recognized that statute as being in force,¹ or have required such addition under similar statutes,² though in very early cases it was held to be unnecessary.³

How Objection Taken. — At all events, even where the addition was proper, a wrong addition could not be a ground for objection otherwise than by plea in abatement, such addition being merely *descriptio personæ*.⁴

b. JUNIOR AND SENIOR — No Part of Name. — As a general proposition it may be said that neither the term "Junior" nor "Senior" is a part of a name,⁵ but the terms are merely descriptive of the person and are used only for the purpose of distinguishing father and son of the same name in the same place.⁶

Hawk. P. C., b. 2, c. 25, § 71." State v. Bishop, 15 Me. 122.

1. Com. v. France, 2 Brews. (Pa.) 568; State v. Moore, 14 N. H. 451; State v. Hughes, 2 Har. & M. (Md.) 479; State v. Bishop, 15 Me. 122.

In *England* it was provided by statute, 7 Geo. IV., c. 64, that "no indictment or information shall be abated by reason of * * * want of addition, or of wrong addition." *Burroughs v. State*, 17 Fla. 656. See *infra*, IV. 3. *Amendment*.

2. Com. v. Sims, 2 Va. Cas. 374; Com. v. Rucker, 14 B. Mon. (Ky.) 184.

3. Morgan v. State, 19 Ala. 559; Studstill v. State, 7 Ga. 2; State v. McDowell, 6 Blackf. (Ind.) 49; State v. Newmans, 2 Law Repos. (N. Car.) 74.

4. Com. v. Lewis, 1 Met. (Mass.) 151; Smith v. Bowker, 1 Mass. 76; State v. M'Gregor, 41 N. H. 411.

In *Maine*, by statute, the quashing of an indictment or the arrest of judgment is prohibited for any omission or misstatement of title, caption, etc., if such omission or misstatement does not tend to prejudice the defendant. *State v. Nelson*, 29 Me. 334.

In *Whitney v. Dolloff*, 74 Me. 235, wherein the question was whether there was a variance between a declaration counting on a judgment against "Clara Dolloff, of Lisbon," and the record of a judgment against "Clara Dolloff of Lisbon, married woman," it was held that the omission of the addition did not create a variance. See also *State v. Guest*, 100 N. Car. 410; *State v. Hughes*, 2 Har. & M. (Md.) 479.

5. *Colorado*. — *Loveland v. Sears*, 1 Colo. 435.

Connecticut. — *Coit v. Starkweather*,

14 Encyc. Pl. & Pr. — 19

8 Conn. 289; *Lord v. Waterhouse*, 1 Root (Conn.) 432.

Illinois. — *Headley v. Shaw*, 39 Ill. 354; *Guignon v. Union Trust Co.*, 156 Ill. 139.

Indiana. — *Allen v. State*, 52 Ind. 486; *Geraghty v. State*, 110 Ind. 104.

Maine. — *State v. Grant*, 22 Me. 171.

Massachusetts. — *Kincaid v. Howe*, 10 Mass. 203; Com. v. Parmenter, 101 Mass. 213; Com. v. Beckley, 3 Met. (Mass.) 331; Com. v. Perkins, 1 Pick. (Mass.) 388; Com. v. East Boston Ferry Co., 13 Allen (Mass.) 589.

Minnesota. — *Bidwell v. Coleman*, 11 Minn. 78.

New York. — *People v. Cook*, 14 Barb. (N. Y.) 259; *Fleet v. Youngs*, 11 Wend. (N. Y.) 524; *People v. Collins*, 7 Johns. (N. Y.) 549; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170.

Ohio. — *Wagner v. Ziegler*, 44 Ohio St. 65.

Pennsylvania. — *Bratton v. Seymour*, 4 Watts (Pa.) 329.

Texas. — *State v. Manning*, 14 Tex. 402.

Vermont. — *Brainard v. Stilphin*, 6 Vt. 9; *Isaacs v. Wiley*, 12 Vt. 674.

Virginia. — *O'Bannon v. Saunders*, 24 Gratt. (Va.) 138.

Wisconsin. — *Clark v. Gilbert*, 1 Pin. (Wis.) 354.

United States. — *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413.

England. — *Lepiot v. Browne*, 1 Salk. 7.

6. See the cases in the last preceding note.

"The Second of That Name." — "The description of William Read, Junior, in the indictment, as 'William Read, the second of that name,' is sufficient.

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Generally Such Term Need Not Be Proved where proof of name is necessary, nor will a variance result between the pleading and the proof, whether the addition is made in the pleading or not.¹

The Question Is One of Identity of parties, and the insertion of such an addition is not material where there does not appear to be more than one person bearing the same name.² But the cases appear not to be in entire harmony. It is apprehended, however, that the rule as heretofore stated is correct when applied to the mere setting out of names in pleading, where there is no question as to identity, and that the apparent conflict seems to arise principally upon the sufficiency of proof under circumstances which bring the identity of the parties into question.³

The terms of the description constitute no part of the name." *Com. v. Parmenter*, 101 Mass. 211.

1. *Geraghty v. State*, 110 Ind. 104; *Allen v. State*, 52 Ind. 486; *State v. Best*, 108 N. Car. 747; *Ross v. State*, 116 Ind. 496 [citing *Foltz v. State*, 33 Ind. 215; *Choen v. State*, 52 Ind. 347; *Miller v. State*, 69 Ind. 284; *Com. v. Beckley*, 3 Met. (Mass.) 331]; *O'Bannon v. Saunders*, 24 Gratt. (Va.) 138.

Omission in Judgment.—An omission to add the word "Junior" to the name of the plaintiff in a judgment is not material, and a judgment which recites that "said plaintiff do have," etc., is sufficient to show in whose favor the judgment was rendered. *Loveland v. Sears*, 1 Colo. 433.

On Motion to Dismiss an Appeal it was held that the presumptions were in favor of a judgment and that the "C. F. Steincamp" named in the bond would be intended to be the identical party named as "Christian Steincamp, Sr." in the petition. *Wagner v. Ziegler*, 44 Ohio St. 66. And see, to the same point, *Fleet v. Youngs*, 11 Wend. (N. Y.) 524.

2. *San Francisco v. Randall*, 54 Cal. 408.

Actions on Notes — Addition in Instrument Only.—There is no variance between the description of a note sued on as made by "Samuel Headley" and a note produced made by "Samuel Headley, Jr." *Headley v. Shaw*, 39 Ill. 354. See also *Lord v. Waterhouse*, 1 Root (Conn.) 432.

Addition in Pleading Only.—If a note is made payable to a person not distinguished by the addition of "Senior" or "Junior," the question to which of two the note was in truth made and delivered is a question of fact resting on averments, and that the note

was made to one by that name with the addition of "Junior" is a permissible averment when there is nothing in the note to estop such allegation. *Johnson v. Lexington*, 14 B. Mon. (Ky.) 527.

And one may sue with the addition "Sr." on a note payable to him without such addition. *Neil v. Dillon*, 3 Mo. 59.

Amendment by Inserting Plaintiff's Addition.—And where the younger of the same name in the same town brought an action, omitting the addition of "Junior" from his name, the refusal of the Common Pleas to allow him to amend his writ by making the addition for the purpose of admitting in evidence a written promise of the defendant made to the plaintiff by the name of "A. B., Junior," was held reversible error. *Kincaid v. Howe*, 10 Mass. 203.

Parol Evidence.—In an action upon a note payable to a person without any addition, if it appears that there were father and son of that name at the same place, *prima facie* the father is the payee, but proof is admissible that the son was meant and is entitled to recovery. *Sweeting v. Fowler*, 1 Stark 106, 2 E. C. L. 49, cited in *Stevens v. West*, 6 Jones L. (N. Car.) 51.

3. **Person Commissioned as Deputy Sheriff.**—In *Com. v. Beckley*, 3 Met. (Mass.) 331, it appeared that the person upon whom the assault and battery in question was committed was commissioned as a deputy sheriff by the name of "Thomas Adams, Jr." Evidence was objected to on the ground of its variance from the allegations in the indictment, which objection was held to be correctly overruled, the court saying that to support the indictment it must be proved that the person named therein and in the commission were one and

Father Intended in Absence of Addition. — It is said as a general proposition that if a father and son both bear the same name, by stating the name without an addition the father will, *prima facie*, be intended.¹

13. Foreign Names — Designation by English Equivalent. — A foreigner may be designated by a name which is the equivalent in English of the name in his native tongue, and to which he has assented.²

the same, and that after verdict it would be presumed that the fact was so proved. In this case *Boyden v. Hastings*, 17 Pick. (Mass.) 200, is distinguished in that in the latter case the plaintiff undertook to describe the record of the judgment and did not describe it correctly. Upon this latter point see *De Kentland v. Somers*, 2 Root (Conn.) 437.

Mother and Daughter of Same Name. — In *Rex v. Peace*, 3 B. & Ald. 579, the indictment was for an assault on a named woman. It appeared that there were two persons of that name, mother and daughter, and that the assault was on the daughter. The indictment was held sufficient.

Adultery Committed with Father or Son. — In *State v. Vittum*, 9 N. H. 519, an indictment alleged that the defendant committed adultery with a man named, without any further addition, and it appeared that there were in that town two individuals of that name, father and son, and that the latter used the addition of "Junior" to his name, and was thereby well known and distinguished from his father. It was held that the defendant had the right to understand that the offense was charged to have been committed with the father, and evidence of adultery with the son could not be admitted.

Judgment and Execution. — In *Jarmain v. Hooper*, 6 M. & G. 827, 46 E. C. L. 827, in trespass *quare domum fregit* against the sheriff, the sheriff justified under a *fi. fa.* issued against the plaintiff's goods, to which the plaintiff replied that the *fi. fa.* did not issue against his goods. It appeared that the judgment under which the *fi. fa.* issued was against Joseph Jarmain, who was the plaintiff's son, and the goods of Joseph Jarmain the elder were taken under a *fi. fa.* issued against Joseph Jarmain, without further description. It was held that the writ was no justification to the sheriff. See also *Manry v. Shepperd*, 57 Ga. 68.

Name of Execution Debtor. — In *O'Bannon v. Saunders*, 24 Gratt. (Va.)

138, which was an action against a sheriff and his sureties on his official bond for not making and paying money under an execution, it was held that the addition of "Jr." was no part of the name of the execution debtor, and that a judgment against "B., Jr.," described as a judgment against "B.," would not sustain a plea of *nul tiel record*. See also article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 419.

1. *Brown v. Benight*, 3 Blackf. (Ind.) 41; *Lepiot v. Browne*, 1 Salk. 7; *State v. Vittum*, 9 N. H. 519. But see *contra*, *Rex v. Peace*, 3 B. & Ald. 579, in which case, however, the elder and younger persons were women.

Omission of Designation in Affidavit. — In *Singleton v. Johnson*, 9 M. & W. 67, affidavits for a rule for a judgment, as in the case of a nonsuit, were entitled with the names of the parties, except that the addition "the elder," which had appeared to the name of one of the parties in all the proceedings to the cause heretofore had, was omitted. It was held that the omission was immaterial, as it would be intended that the latter was meant unless the contrary was expressed. But in *Babineau v. Babineau*, 30 New Bruns. 18, the court refused to allow an affidavit to be read in which the addition of "Junior" was omitted from the name of one of the parties in the title of the cause.

Abatement. — In *Zuill v. Bradley*, Quincy (Mass.) 6, it appears that where father and son of the same name reside in the same town, the omission of "Junior" in a writ against the son is good cause of abatement.

2. *Alexander v. Com.*, 105 Pa. St. 1; *Hart v. Lindsey*, 17 N. H. 239; *Weitzel v. State*, 28 Tex. App. 523.

Flory — Fleurer. — In *Imhoff v. Fleurer*, 2 Phila. (Pa.) 35, the defendant objected that the charges in the plaintiff's book were against "Mrs. Flory," while the defendant's real name, as stated in the declaration and bill of particulars, was "Fleurer." It was said that "in this country, where men of different races and tongues are constantly

14. Married Women — Action by Wife in Maiden Name. — If the action is commenced by a married woman in her maiden name, instead of that acquired by marriage, this is at most a misnomer which must be taken advantage of as such a defect, and is unavailable on the trial.¹

General Principles. — The manner of stating the name of a married woman is in other respects referred to the general principles discussed in this article.²

15. Identity of Names. — Identity of name is *prima facie* evidence of identity of person,³ even if there is a variance in the

mingling in business transactions, in ignorance of the peculiarities which mark the pronunciation of the same letters in their respective languages, and where names have no higher sanction than the will of those who give and those who bear them, a liberal rule should prevail, suited to the exigencies of the situation, which differs essentially from that of the inhabitants of those countries where the state prescribes and enforces the use of baptismal registers, and regards the appellations conferred by the ministers of religion as legally binding."

Petris — Petrie. — In *Petrie v. Woodworth*, 3 Cal. (N. Y.) 219, to a plea in abatement that the defendant was sued as "Petris" instead of "Petrie," it was held that the pronunciation would still be the same in French, whether the name was spelled correctly or as it was in fact spelled.

Felipe — Phillip. — In *Cerda v. State*, 33 Tex. Crim. Rep. 458, the following charge was held to be correct: "If you believe from the evidence that the true given name of the owner is Felipe Cortez, and you further believe that the name Felipe is a Spanish name, and that the English name Phillip is one and the same, and that the alleged owner, P. Cortez, was usually and commonly called in English 'Phillip,' then there would be no variance in the name alleged and that proven."

Improper Signatures to Bond — Alias in Process. — Where the defendants are sued as "W. G. Hughes and Phi. Berry," agreeably to their signatures in the bond, and the process issues against them as "W. alias Willis G. Hughes, and Phi. alias Philander Berry," this is neither a substantial variance nor a misnomer. *Com. v. Hughes*, 10 B. Mon. (Ky.) 160.

1. *Traver v. Eighth Ave. R. Co.*, 3 Keyes (N. Y.) 498; *Beavers v. Baucum*, 33 Ark. 722, holding that such a defect

will not affect a pleading, but can only be corrected by motion or by the court.

2. "Mrs." is not a name. *Elbersson v. Richards*, 42 N. J. L. 70; *Kearsley v. Gibbs*, 44 N. J. L. 169; *Schmidt v. Thomas*, 33 Ill. App. 109; *State v. Rohfrisch*, 12 La. Ann. 382. See also article ABBREVIATIONS, vol. 1, p. 46.

"Mrs." Preceding Husband's Christian Name. — Where an indictment alleges an assault and battery upon "Mrs. George W. Bell," the fact whether she is known by such name is one to be submitted to the jury. *Bell v. State*, 25 Tex. 574. See also *Davis v. State*, (Tex. App. 1889) 11 S. W. Rep. 647.

If a person has in fact a second or middle Christian name, and is commonly known by the use of such name, it is sufficient if his wife's name as a witness in a criminal prosecution is indorsed as "Mrs.," preceding the middle Christian name of her husband together with the surname, where it does not appear that the accused was misled or did not know who was intended. *Carroll v. State*, (Neb. 1898) 73 N. W. Rep. 939. See also article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

3. See Am. and Eng. Encyc. of Law, titles *Names*; *Judgments*. See also *Wilson v. Holt*, 83 Ala. 528; *Thompson v. Manrow*, 1 Cal. 428; *Mott v. Smith*, 16 Cal. 535; *Carleton v. Townsend*, 28 Cal. 219; *Garwood v. Garwood*, 29 Cal. 514; *Douglas v. Dakin*, 46 Cal. 49; *Ward v. Dougherty*, 75 Cal. 240; *Goodell v. Hibbard*, 32 Mich. 55; *Eames v. McGregor*, 43 Mich. 313; *Morris v. McClary*, 43 Minn. 346; *Flournoy v. Warden*, 17 Mo. 435; *Gitt v. Watson*, 18 Mo. 274; *State v. Moore*, 61 Mo. 279; *Stapleton v. Pease*, 2 Mont. 553; *Hatcher v. Rocheleau*, 18 N. Y. 86; *People v. Smith*, 45 N. Y. 772; *Jackson v. Goes*, 13 Johns. (N. Y.) 518; *Jackson v. King*, 5 Cow. (N. Y.) 237; *Atchison v. McCulloch*, 5 Watts (Pa.) 13; *Kelly*

spelling, provided the two names are *idem sonans*.¹ See p. 50.

16. **In Actions on Judgments.** — See article JUDGMENTS, vol. 11, p. 796.

17. **Consistency Throughout Proceedings.** — The names of parties which are used in an action or proceeding, and by which they have become concluded, should be adhered to throughout the proceedings.²

III. CHANGE OF NAME — 1. Effect of Change. — A change in the name of a party pending an action or prosecution against him will not affect such action or prosecution.³

v. Valney, 5 Clark (Pa.) 301; *Smith v. Gillum*, 80 Tex. 125; *Chamblee v. Tarbox*, 27 Tex. 144; *Baker v. McFarland*, 77 Tex. 294; *Galveston, etc., R. Co. v. Stealey*, 66 Tex. 470; *Bogue v. Bigelow*, 29 Vt. 180; *Cross v. Martin*, 46 Vt. 18.

1. *Jackson v. Cody*, 9 Cow. (N. Y.) 140; *Kelly v. Valney*, 5 Clark (Pa.) 301.

Extent of Rule. — The rule that identity of person may be presumed from identity of name will not be extended so far as to uphold as an inference that the plaintiff and defendant are one and the same person, the names appearing to be the same. *Wilson v. Benedict*, 90 Mo. 213.

Where a criminal complaint against "John Smith" contains several counts, and the name of the defendant is set out in full in the first count, he may be referred to in the other counts as "said John," although John is also the name of the complainant. *Com. v. Hagarman*, 10 Allen (Mass.) 401.

2. *Golden v. State*, 19 Ark. 590, wherein the defendant pleaded not guilty to an indictment by the name in which he was indicted, and afterwards filed a motion for a continuance in another name. The court struck the motion from the files without considering it at all, and it was held that in this the court did not err.

Illustrations. — In *Borthwick v. Ravenscroft*, 5 M. & W. 31, the defendant, whose real name was "Humphrey D. R.," was described in the writ of summons and distingas thereon as "Henry R." On an application to set aside the distingas, he entitled his affidavit in the cause "*B. v. Humphrey D. R.*," sued as Henry R., and it was held incorrect, there being no such cause until appearance. So in *Babineau v. Babineau*, 30 New Bruns. 18, the court refused to allow an affidavit to be read in which the addition of "Junior"

was omitted from the name of one of the parties in the title of the cause. See also *Jarman v. Hooper*, 6 M. & G. 827, 46 E. C. L. 827.

But in *Tomlin v. Morris*, 16 N. J. L. 180, where a statute required a party demanding an appeal to file an affidavit, it was held to be sufficient if a defendant who is sued by a wrong name files an affidavit in his true name, the court saying that if he has sued by a wrong name, and instead of putting in a dilatory plea of misnomer he chooses more honestly to go to trial on the merits, it is no reason why in subsequent proceedings he must not only call himself by the wrong name, but actually write it wrong.

3. **Effect upon Indictment.** — In *Com. v. Phillipsburg*, 10 Mass. 78, it was said: "We cannot change the name of the defendants in the indictment, nor is there any occasion for it. We have no difficulty in proceeding upon the indictment as it stands, nor in inflicting a fine and awarding execution against the defendants by the name of the inhabitants of Phillipsburg. If a *feme sole* intermarries pending an action against her, the action still proceeds against her by her former name; and she may be taken on execution notwithstanding her coverture."

Order to Proceed in Changed Name. — Where a demurrer to a bill was interposed upon the ground that the defendant company had changed its name since the suit was instituted, the demurrer was overruled and the cause ordered to proceed in the name as changed. *Weltley v. Shenandoah Iron, etc., Co.*, 83 Va. 768. See also, for change of name of corporation, article CORPORATIONS, vol. 5, p. 66.

Change of Name by Marriage Before Indictment Found. — In *Rex v. Turner*, 1 Leach C. C. 536, it was held that an indictment for robbery of a married woman described by her maiden name

2. Proceedings for Change of Name — Right to Select Name. — One has a right to use or cause himself to be known by any name he may choose, subject to the right of others in the particular name chosen, or when not done for the purpose of perpetrating a fraud.¹

Statutory Provisions. — Regular proceedings are often provided by statute whereby one may by a due course of law have his name changed and have himself invested with a new name. Such proceedings, however, depend entirely upon the particular statutes.²

is good notwithstanding she marry before the indictment is found.

But in *Com. v. Brown*, 2 Gray (Mass.) 358, it was held that an indictment for the unlawful sale of spirituous liquors charging the sale to have been made to a woman by her maiden name, the woman having changed her name by marriage after the sale and before the indictment was found, could not be supported by proof of the sale to her under her maiden name.

1. See *supra*, II. 5. *Names in Common Use and Assumed Names*.

2. *Wetherill Casting Co.*, 5 Pa. Co. Ct. Rep. 337. And see Am. and Eng. Encyc. of Law (2d ed.), title *Corporations*.

New York Statute. — Thus the New York Act of 1847, permitting the court to change a name if the judge is satisfied that the applicant will derive any pecuniary benefit upon assuming another name, was held to mean that the judge was to be judicially satisfied, upon proper proof, that the effect of the change would be of pecuniary benefit to the applicant, and that a mere petition which shows that the petitioner believes that it will be of pecuniary interest to him that his name should be changed is not sufficient to give the court authority to order such change. *Snook's Petition*, 2 Hilt. (N. Y.) 567. See also *Matter of And*, 1 N. Y. Month. L. Bul. 14.

In *Matter of Hamilton*, 10 Abb. N. Cas. (N. Y. C. Pl.) 79, the court said: "It is our rule in these matters to require evidence, by affidavit or by verified petition, whether the applicant is married or single; whether he is now a party to any and what action or proceeding in the courts; whether there are any judgments against him; whether there is any outstanding bond or commercial paper made, indorsed, or accepted by him in the name he wishes to abandon; of his age and birthplace, and the name of his parents."

An Infant applying to change his name must have a guardian appointed to represent him. *Matter of Mayer*, 1 N. Y. Month. L. Bul. 87.

Discretion of Court. — Under the provisions of chapter 322 of New York Laws 1870, which authorized the court to grant an order changing the name of a corporation where it appears "that there is no reasonable objection to such corporation changing its name," the granting or refusal of the order was put within the discretion of the court. The moving party has no absolute right to make the change or to have the consent of the court thereto. The court has to determine whether or not there is any reasonable objection, which is only another mode of saying that it may exercise its discretion, and its action will not be revised unless there is an abuse of that discretion. *Matter of U. S. Mercantile Reporting, etc., Agency*, 115 N. Y. 177.

It is only when the court is satisfied that there is no reasonable objection to the proposed change in a corporate name that it is empowered to make an order authorizing the alteration. *Matter of U. S. Mercantile Reporting, etc., Assoc.*, (Supreme Ct.) 22 N. Y. St. Rep. 494.

In *Pennsylvania* the court will not change the name of a corporation unless good reason is shown, and it is not a sufficient reason that the new name proposed for a bank will enable it to do more business. *Bank of America*, 2 Pa. Co. Ct. Rep. 97.

Revocation of Order Changing Name. — If there be a reasonable objection which has not been fully and fairly brought to the notice of the court, the power to revoke an order changing the name of a religious corporation must exist, for no record founded upon fraud or imposition or ignorance of facts can be suffered to remain when the court, either upon its own motion or upon application of innocent third parties

IV. EFFECT OF MISNOMER — OBJECTIONS — 1. How and When Objections Made — a. IN GENERAL — Plea in Abatement. — Under the common-law rule which is fully recognized in the United States, when a party is misnamed the proper method of taking advantage of the misnomer is by plea in abatement,¹ and this is true where there is a mistake in the declaration as to the plaintiff's

affected thereby, deems it proper to vacate such record. *In re Abyssinian Baptist Church*, (C. Pl.) 13 N. Y. Supp. 919.

1. *Alabama*. — *Melvin v. Clark*, 45 Ala. 286; *Lynes v. State*, 5 Port. (Ala.) 240; *Cantley v. Moody*, 7 Port. (Ala.) 443; *Gerrish v. State*, 53 Ala. 476; *Washington v. State*, 68 Ala. 88.

Colorado. — *Taylor v. Insley*, 7 Colo. App. 175.

Illinois. — *Salisbury v. Gillett*, 3 Ill. 290; *Moss v. Flint*, 13 Ill. 570; *Hammond v. People*, 32 Ill. 473; *Pennsylvania Co. v. Sloan*, 125 Ill. 72; *Parmelee v. Raymond*, 43 Ill. App. 610; *Chicago, etc., R. Co. v. Heinrich*, 57 Ill. App. 401, *affirmed* 157 Ill. 388.

Indiana. — *Sinton v. The Steamboat R. R. Roberts*, 46 Ind. 478.

Iowa. — *Wilson v. Baker*, 52 Iowa 427; *Davis v. David*, 1 Greene (Iowa) 429.

Maine. — *State v. Knowlton*, 70 Me. 201.

Maryland. — *Baltimore First Nat. Bank v. Jagers*, 31 Md. 47; *Rich v. Boyce*, 39 Md. 324.

Massachusetts. — *Gilbert v. Nantucket Bank*, 5 Mass. 97 [*citing* *Com. v. Dedham*, 16 Mass. 141]; *Minot v. Curtis*, 7 Mass. 441; *Com. v. Darcey*, 12 Allen (Mass.) 539; *Com. v. Lewis*, 1 Met. (Mass.) 151.

Mississippi. — *Hudson v. Poindexter*, 42 Miss. 304.

Missouri. — *Hanley v. Blanton*, 1 Mo. 49; *Carpenter v. State*, 8 Mo. 291.

Nebraska. — *Smelt v. Knapp*, 16 Neb. 54.

New Hampshire. — *Sunapee v. Eastman*, 32 N. H. 470.

New Jersey. — *Seely v. Boon*, 1 N. J. L. 161.

New York. — *Methodist Episcopal Church Soc. v. Tryon*, 1 Den. (N. Y.) 451; *Collman v. Collins*, 2 Hall (N. Y.) 569.

Ohio. — *Smith v. State*, 8 Ohio 296; *Slocum v. McBride*, 17 Ohio 607; *State v. Bell Telephone Co.*, 36 Ohio St. 296; *Moodey v. Shaw*, Tappan (Ohio) 330.

Pennsylvania. — *Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. St. 514; *Whittier v. Gould*, 8 Watts (Pa.) 485.

South Carolina. — *Wiltlaus v. Ludecus*, 5 Rich. L. (S. Car.) 326; *Myers v. Sealy*, 5 Rich. L. (S. Car.) 473; *State v. Lorey*, 2 Brev. (S. Car.) 396; *Waldrop v. Leonard*, 22 S. Car. 126.

Tennessee. — *Young v. South Tredegar Iron Co.*, 85 Tenn. 201; *Maury County v. Lewis County*, 1 Swan (Tenn.) 239.

Texas. — *Shaw v. Adams*, 2 Tex. App. Civ. Cas., § 178; *Houston, etc., R. Co. v. Weaver*, (Tex. Civ. App. 1897) 41 S. W. Rep. 846.

Vermont. — *Ex p. Kellogg*, 6 Vt. 511.

England. — *Taunton Market v. Kimberley*, 2 W. Bl. 1122.

The Misnomer of One of Two Defendants when sued as a firm, if material at all, must be taken advantage of by a plea in abatement. *Whittier v. Gould*, 8 Watts (Pa.) 485; *Davenport v. State*, 38 Ga. 186.

Party Not Served with Process. — Under a plea of *non est factum* by two different obligors, it was held that it could not be proved that the name of the third obligor (who was not served with process) was incorrectly designated, but that the objection could only be made by a plea in abatement. *Thompson v. Elliott*, 5 Mo. 118. But in *Waterbury v. Mather*, 16 Wend. (N. Y.) 611, which was a suit against two defendants in assumpsit, and in which one of the defendants was arrested and the other was returned not found, and it appeared that the plaintiff not brought in was misnamed in the declaration, it was held that the plaintiff would be nonsuited for the variance, though had both defendants been arrested the misnomer could have been taken advantage of by plea in abatement.

Demurrer. — The objection cannot be raised by demurrer. Demurrer admits that the matter set forth in the pleading is proper. *Hudson v. Poindexter*, 42 Miss. 304; *Com. v. Kelcher*, 3 Metc. (Ky.) 484; *Morningstar v. Wiles*, 96 Ind. 458; *Hahn v. Behrman*, 73 Ind. 121; *Rich v. Boyce*, 39 Md. 324; *Slocum v. McBride*, 17 Ohio 607. See *supra*, II. 3. *Initials*.

name, as well as where the mistake concerns the defendant's name.¹

Statutory Provisions. — This general rule is subject to such changes as have been variously made by statute, as where pleas in abatement have been abolished or specific methods of objection have been adopted,² or provision has been made for the correction of names improperly designated as soon as the correct name appears.³

A Dilatory Objection. — All the cases recognize the dilatory nature of this objection, as well as the necessity of making it as such. There has been some uncertainty, however, as to exactly what is the proper method to raise the objection. Thus in code states where the plea in abatement has been abolished, such a plea, or its equivalent, has been recognized as the appropriate method.⁴

1. **Misnomer of Plaintiff.** — *Hanley v. Blanton*, 1 Mo. 51, referring to the doubt expressed in 1 Chitty's Pl. 440, as having existed at one time as to whether a mistake of the plaintiff's Christian or surname were not a ground of nonsuit, and reciting that such a doubt certainly did not exist at the time of the decision in *Stafford v. Bolton*, 1 B. & P. 40. See also *Benjamin v. Boyce*, 2 Harr. (Del.) 316; *Taylor v. Insley*, 7 Colo. App. 175; *Moss v. Flint*, 13 Ill. 570; *Salisbury v. Gillett*, 3 Ill. 290; *Taylor v. Littell*, 21 La. Ann. 665; *Hudson v. Poindexter*, 42 Miss. 304; *Smelt v. Knapp*, 16 Neb. 54; *Collman v. Collins*, 2 Hall (N. Y.) 569; *Barnes v. Perine*, 9 Barb. (N. Y.) 202; *Methodist Episcopal Church Soc. v. Tryon*, 1 Den. (N. Y.) 451; *Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. St. 514; *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 162; *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 326; *Myers v. Sealy*, 5 Rich. L. (S. Car.) 473.

2. **In Arkansas** the common-law plea of misnomer no longer prevails under the criminal code of procedure in that state, and therefore *State v. Hand*, 6 Ark. 165, is no longer authority. *Phillips v. State*, 35 Ark. 384. See *infra*, IV. 3. *Amendment*.

Motion. — Where parties to an action are incorrectly designated, as where the Christian names are written with initials instead of in full, the proper remedy is by motion to require the complaint to be corrected or amended. *Kenyon v. Semon*, 43 Minn. 180. See also *Walgamood v. Randolph*, 22 Neb. 494; *Beavers v. Baucum*, 33 Ark. 722.

3. See *infra*, IV. 3. *Amendment*.

4. See the cases cited *supra* in this section.

Answer Quasi in Abatement. — In *New York* it is said that a misnomer should be set up *quasi* in abatement. *White v. Miller*, 7 Hun (N. Y.) 433; *Traver v. Eighth Ave. R. Co.*, 3 Keyes (N. Y.) 498.

Motion to Set Aside Summons and Complaint. — In *Elliott v. Hart*, 7 How. Pr. (N. Y. Supreme Ct.) 25, it was held that a misnomer of the defendant could be taken advantage of by motion to set aside the summons and complaint, and that, as it was doubtful whether under the code there was any remedy for such a defect by answer, there should be some remedy. *Contra*, *Miller v. Stettiner*, 22 How. Pr. (N. Y. Super. Ct.) 518.

In Indiana it was said that the decided cases in that state were not explicit on the subject of misnomer, but that a fair inference from the cases was that the common-law rule was still recognized, and that a misnomer might still be pleaded in abatement. *McCrory v. Anderson*, 103 Ind. 12; *Morningstar v. Wiles*, 96 Ind. 458; *Sinton v. Steamboat R. R. Roberts*, 46 Ind. 478; *Hahn v. Behrman*, 73 Ind. 120.

In Colorado it was said, in a case where the objection to the plea was that the name of a party was indicated by the initials of his Christian name, that there was no legal presumption that this was not the whole name, unless the fact was brought to the knowledge of the court "by a plea in abatement, or in some manner that will inform the court not only that the letters used are initial, but what the name is; in the language of the books,

b. VARIANCE BETWEEN WRIT AND DECLARATION — How Objection Made. — A variance between a declaration and a writ is the subject of objection by plea in abatement,¹ and it has been held that misnomer of the defendant in process may be raised by motion to set aside the process for the irregularity before appearance.²

Appearance by True Name. — But if a defendant is sued by a wrong name and appears by his right name, it is proper to declare against him in the name by which he appears.³

'give the plaintiff a better writ.'" Taylor v. Insley, 7 Colo. App. 175.

1. Wilson v. Shannon, 6 Ark. 198; Pendleton v. State Bank, 1 T. B. Mon. (Ky.) 174; Oakley v. Giles, 3 East 167.

2. Bull v. Traynham, 3 Rich. L. (S. Car.) 433; Herf v. Shulze, 10 Ohio 265. See also Waldrop v. Leonard, 22 S. Car. 119; Mann v. Carley, 4 Cow. (N. Y.) 155, wherein it was ordered that in future the court would not entertain a motion to set aside process or proceedings on the ground of misnomer, but would leave the party to his remedy by plea in abatement.

3. Oakley v. Giles, 3 East 167; Doo v. Butcher, 3 T. R. 611, 1 Chit. Pl. (16th Am. ed.) 342; Hare v. Harrington, Wright (Ohio) 290. See *infra*, IV. 3. *Amendment*.

Amendment of Declaration by Summons.

— But it has been held that if the correct name is used in the declaration the defendant has a right to plead the variance in abatement of the writ, and the plaintiff cannot avoid it unless by replication and proof that the defendant was as well known by one name as by the other, though where the proper name is used in the summons, a declaration containing the improper name may be amended. Schoonhoven v. Gott, 20 Ill. 47.

Whether Writ Is Cured by Declaration.

— Where a mistaken name of the plaintiff was inserted in the writ and the correct name was carried into the declaration with an averment that the defendant was served with process issued in the mistaken name, it was held that the variance might be pleaded in abatement and that the defect was not cured by the declaration. Beene v. Cahawba, etc., R. Co., 3 Ala. 660, *distinguishing* the rule stated by Chitty, to the effect that a misnomer in a writ might be cured by the declaration, in that the said rule applied only to the misnomer of defendants, as evidenced by the cases cited by that author; Find-

lay v. Pruitt, 9 Port. (Ala.) 195. But see Caldwell v. Branch of State Bank, 11 Ala. 549, holding that where the writ was at the suit of the Branch Bank at Mobile, and the declaration was in the name of the Branch of the Bank of the State of Alabama at Mobile (the designation employed in the charter), the variance was not a ground of abatement, because if the names were not substantially the same, the writ might have been amended on motion so as to make it conform to the declaration.

Appearance. — In Dring v. Dickenson, 11 East 225, it was held that if a defendant is served with a writ by a wrong Christian name, and does not appear, the plaintiff cannot file common bail for him in his right name as having been sued by a wrong name, nor declare against him *de bene esse* in that form, and the proceedings in this case were set aside after interlocutory judgment signed for want of plea. This decision was made by a court almost identical as to the judgments with that which had previously decided Oakley v. Giles, 3 East 167, and Delanoy v. Cannon, 10 East 328, and, although these latter cases were cited and relied on by counsel, no notice is taken of them in the decision and no effort is made to distinguish them. The only distinction apparent between this case and that of Oakley v. Giles, 3 East 167, is that here there was only an interlocutory judgment, while there the judgment was final. Waldrop v. Leonard, 22 S. Car. 118.

Proceedings Set Aside Before Plea. — In Delanoy v. Cannon, 10 East 328, it was held that after a writ sued out and common bail filed against a defendant by the name of "J.," it is irregular for the plaintiff to declare against him by the name of "R.," sued by the name of J., and the defendant may set aside the proceedings before plea. *Distinguishing* Oakley v. Giles, 3 East 167,

c. **WAIVER OF OBJECTION** — (1) *In General*. — The objection for misnomer must be taken *in limine*. If a party appears by his true name, or answers to the merits without raising the question, he is concluded,¹ whether the proper method to raise the objection in the trial court is by plea in abatement, as indicated by the cases last cited, or otherwise.²

After Verdict or in Appellate Court. — The objection cannot be raised

in that the application to set aside the proceeding for irregularity in that case was not made until after judgment, and when the defendant might have pleaded before in abatement.

1. *Arkansas*. — Harrell v. Tenant, 30 Ark. 684.

California. — McCreery v. Everding, 54 Cal. 168; Hammond v. Starr, 79 Cal. 556.

Illinois. — Chicago, etc., R. Co. v. Heinrich, 57 Ill. App. 401, *affirmed* 157 Ill. 388.

Indiana. — McCarthy v. McCarthy, 66 Ind. 133; Huntington County v. Huffman, 134 Ind. 5; Vernon Ins. Co. v. Glenn, 13 Ind. App. 340.

Iowa. — Wilson v. Baker, 52 Iowa 427.

Maryland. — Hanover Sav. Fund Soc. v. Suter, 1 Md. 503; Keech v. Baltimore, etc., R. Co., 17 Md. 32; Baltimore First Nat. Bank v. Jagers, 31 Md. 47; Bank of Metropolis v. Orme, 3 Gill (Md.) 443.

Massachusetts. — Gilbert v. Nantucket Bank, 5 Mass. 97; Minot v. Curtis, 7 Mass. 441; Com. v. Dedham, 16 Mass. 141.

Michigan. — Lake Superior Bldg. Co. v. Thompson, 32 Mich. 293; Johr v. St. Clair County, 38 Mich. 536.

New Hampshire. — Sunapee v. Eastman, 32 N. H. 470.

New York. — Methodist Episcopal Church Soc. v. Tryon, 1 Den. (N. Y.) 451.

Ohio. — Hare v. Harrington, Wright (Ohio) 291.

Pennsylvania. — Com. v. Ruff, 3 Pa. Dist. Rep. 562; Whittier v. Gould, 8 Watts (Pa.) 485; Gray v. Monongahela Nav. Co., 2 W. & S. (Pa.) 162; Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. St. 514; Fritz v. Montgomery County, 17 Pa. St. 135.

Tennessee. — Maury County v. Lewis County, 1 Swan (Tenn.) 239; East Tennessee, etc., R. Co. v. Evans, 6 Heisk. (Tenn.) 609; East Tennessee, etc., R. Co. v. Mahoney, 89 Tenn. 311; Young v. South Tredegar Iron Co., 85 Tenn. 189.

Texas. — State v. Rhodius, 37 Tex. 166; Shaw v. Adams, 2 Tex. App. Civ. Cas., § 178.

United States. — Pickens County v. Bank of Commerce, 97 U. S. 377; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Scull v. Bridle, 2 Wash. (U. S.) 200.

Answer in Abatement. — An objection that the defendant should have been sued by some other name should have been set up *quasi* in abatement, and the plaintiff, in the old language of pleading, should have been given a better writ by an allegation of the correct name. White v. Miller, 7 Hun (N. Y.) 433.

Objection to Jurisdiction. — An objection to the name in which the plaintiff designates himself cannot be raised as an objection to the jurisdiction of the court. Smelt v. Knapp, 16 Neb. 54. So also where the mistake is in the defendant's name. Kronski v. Missouri Pac. R. Co., 77 Mo. 370; Whitcomb v. Hooper, 81 Fed. Rep. 948.

Demand for Bill of Particulars. — In Oates v. Clendenard, 87 Ala. 735, it is held that a demand for a bill of particulars should not be held a waiver of the defense of misnomer. A notice of such a demand is not a plea nor in any sense a defense on the merits. It is, at most, a step preparatory to defense, should the same become necessary under the rulings of the court on the plea in abatement.

2. School Dist. No. 14 v. Griner, 8 Kan. 224, wherein an objection was made to the admission of evidence because of a defect in the statement of the name of the defendant. The objection was not allowed, the court holding that it must be raised in the pleading, and saying that "formerly it could only be taken advantage of by plea in abatement."

Motion to Insert Correct Name. — Where the parties to an action are designated by the initials of their Christian names, the proper remedy is by motion to require the complaint to be corrected or amended, and it is no ground

after verdict,¹ and it follows that where advantage of a misnomer of a party in the trial court is not properly taken, the objection cannot be raised in the appellate court.²

The Character of the Parties interested, as being natural or artificial, does not affect this rule. Corporations, like natural persons, must plead a misnomer or waive the defect.³

(2) *In Criminal Cases* — *Plea of Misnomer*. — When the defendant has been indicted by the wrong name it is too late to file a plea

for reversal of judgment. *Kenyon v. Semon*, 43 Minn. 180; *Walgamood v. Randolph*, 22 Neb. 494.

1. *Hoffield v. Board of Education*, 33 Kan. 648; *Smith v. State*, 8 Ohio 294; *Chicago, etc., R. Co. v. Heinrich*, 57 Ill. App. 401, *affirmed* 157 Ill. 388; *Taunton Market v. Kimberley*, 2 W. Bl. 1122; *Gilbert v. Nantucket Bank*, 5 Mass. 97.

A Slight Variance in the name of the defendant as described in the bill of indictment and in the judgment and other parts of the record is not a ground for arrest in judgment, because no error is apparent in the record, nor is it a ground for a new trial, because the appellate court cannot assume that the defendant was not known by either name. *State v. Vestal*, 82 N. Car. 564.

2. *Merchants', etc., Bank v. Meyer*, 56 Ark. 499; *Hahn v. Behrman*, 73 Ind. 122; *Brashear v. Stothard*, 4 Bibb (Ky.) 265; *County Treasurer v. Bunbury*, 45 Mich. 79; *Boyd v. Platner*, 5 Mont. 226; *Seely v. Boon*, 1 N. J. L. 161; *Havana Bank v. Magee*, 20 N. Y. 355; *Hare v. Harrington*, *Wright* (Ohio) 291; *Monroe Cattle Co. v. Becker*, 147 U. S. 58; *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413.

After Trial Before Justice. — A mistake in the given name of one of several plaintiffs should be taken advantage of by plea in abatement; it is too late to raise such an objection after trial upon the merits before a justice of the peace. *Moss v. Flint*, 13 Ill. 570; *Ball v. Kuykendall*, 2 Ark. 195.

3. *Dependent upon Character of Misnomer*. — The cases very generally support the proposition of the text. See article CORPORATIONS, vol. 5, p. 52. But some distinctions have been drawn depending upon the character of the misnomer as affecting the identity of the party. Thus it is held that where a corporation whose name is composed of several words is sued by a name in which a word in the corporate name is

omitted, such omission or misnomer, unless pleaded in abatement, will be disregarded by the court. *State v. Bell Telephone Co.*, 36 Ohio St. 296. But on the other hand it has been said that, as seen in the case of a natural person, when the name of a defendant is mistaken, and he is sued by a name varying materially from his true name, the process will not warrant any proceedings against him. "And when a corporation is sued, if the name of the corporation is mistaken materially and substantially, the corporation cannot be affected by the proceedings. There is, in these cases, a distinction made between a variance in words and syllables only, and a variance in substance. If a corporation be sued by a name varying only in words and syllables, and not in substance, from the true name, the misnomer must be pleaded in abatement, otherwise it will not be regarded. But if the name be mistaken in substance the suit cannot be regarded as against the corporation. This seems to us to be the law as established by adjudged cases." *Burnham v. Savings Bank*, 5 N. H. 449.

Judgment in Right Name. — A municipal corporation should always be sued in its proper name, but where it is not so sued and goes to trial without objection, and judgment is rendered without objection in its proper name, there is no error. *Kingfisher v. Pratt*, 4 Okla. 284.

Receivers of Two Companies. — Where the defendants were the receivers for two companies, neither of which was correctly named in the præcipe, summons, return of service, and complaint, they were bound, if they chose to answer to the merits, to suggest the right name, and not to tender a false issue; but having taken the latter course, they waived all objections to the character or service of the process, and came under the jurisdiction of the court. *Whitcomb v. Hooper*, 81 Fed. Rep. 948. See, also, article RECEIVERS.

of misnomer after arraignment and a plea of not guilty.¹

Objections on the Trial as in Arrest of Judgment. — After appearing and pleading to the indictment on the merits, a prisoner cannot avail himself of a misnomer, either on the trial or in arrest of judgment or on motion for a new trial.²

(3) **Effect of Misnomer When Defendant Does Not Appear — Authorities Holding Judgment Void.** — Whether or not a defendant who is incorrectly designated in a summons must appear and take advantage of this defect, or may ignore the proceeding and avoid the effect of a judgment thereafter, has not been uniformly decided. Some cases have held a judgment to be absolutely void when rendered in the absence of the defendant under such circumstances,³ following the ruling in certain English cases that

1. *Golden v. State*, 19 Ark. 590; *People v. Kelly*, 6 Cal. 213; *Dutton v. State*, 92 Ga. 14; *Davenport v. State*, 38 Ga. 186; *State v. White*, 32 Iowa 19; *State v. Winstrand*, 37 Iowa 112; *State v. Knowlton*, 70 Me. 201; *State v. Burns*, 8 Nev. 256; *Smith v. State*, 8 Ohio 296; *Wilcox v. State*, 31 Tex. 588.

"If the party be indicted by a wrong Christian name, surname, or addition, and he plead to that indictment 'not guilty' or answers to that indictment upon his arraignment by that name, he shall not be received after to plead misnomer, or falsity of his addition, for he is concluded and estopped by his plea by that name, and of that estoppel the gaoler and sheriff that doth execution shall have advantage." 2 Hale P. C. 175. See also 2 Hawk. P. C., c. 23, § 125; *R. v. Warren*, 1 Sid. 247.

Arraignment — Identity. — Identity is established by arraignment. The principal office of the arraignment is to fix the personal identity of the accused. *Hendrick v. State*, 6 Tex. 342. See article ARRAIGNMENT AND PLEA, vol. 2, p. 760.

2. *Wells v. State*, 88 Ala. 239; *Miller v. State*, 54 Ala. 155; *Welsh v. State*, 96 Ala. 92; *Uterburgh v. State*, 8 Blackf. (Ind.) 202; *Com. v. Dedham*, 16 Mass. 141; *Com. v. Lewis*, 1 Met. (Mass.) 151; *Turns v. Com.*, 6 Met. (Mass.) 224; *Com. v. Butler*, 1 Allen (Mass.) 4; *Com. v. Darcey*, 12 Allen (Mass.) 539; *Com. v. Fredericks*, 119 Mass. 199; *Carpenter v. State*, 8 Mo. 291; *State v. Johnson*, 93 Mo. 321; *State v. Thompson*, 20 N. H. 250; *People v. Smith*, 1 Park. Cr. Rep. (Columbia Oyer & T. Ct.) 329; *People v. Byrnes*, 33 Hun (N. Y.) 105; *Smith v. State*, 8 Ohio 294; *State v. Farr*, 12

Rich. L. (S. Car.) 24; *State v. Thompson*, Cheves L. (S. Car.) 31; *Wilcox v. State*, 31 Tex. 588.

Initials. — Pleading guilty to the charge of necessity admits the correctness of the initials and of the surname. If incorrectly designated, the defendant could plead in abatement; but after verdict, or its legal equivalent, plea of guilty, it is too late to raise the point. Besides, the doctrine is fast gaining ground that designating the defendant in a criminal case, by the initials of his Christian name, where he is accustomed to be so designated, and where the use of his initials and surname plainly indicates who is meant, is adequate in an indictment. *State v. Johnson*, 93 Mo. 317.

Continuance Without Presence of Accused. — Where the case is continued without requiring the presence of the defendant in order to enter his pleas, he is entitled, on his arraignment at a subsequent term, to plead misnomer and abatement, and a refusal to allow the defendant to put in such a plea is ground for a new trial. *State v. Jackson*, 82 N. Car. 568; 2 Hale's P. C. 216, 219.

After Appeal from Trial Justice. — A defendant in a criminal case who has been convicted by a trial justice upon a plea of not guilty, and has appealed to the Superior Court, is not entitled to plead a misnomer in the Superior Court. *Com. v. Darcey*, 12 Allen (Mass.) 539.

3. *Hoffman v. Fish*, 18 Abb. Pr. (Genesee County Ct.) 76; *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277. See also *Atwood v. Landis*, 22 Minn. 559, which seems to have turned upon the point that it did not appear from the

in actions for trespass for the seizure of property or for false imprisonment the defendant cannot justify under such process.¹

The Weight of Authority, however, is that if a party who is intended to be sued is served with process in which he is incorrectly designated he must appear and object to the misnomer, otherwise the judgment is good and he will be bound by it.²

complaint or summons that the incorrect name was used because the real name of the defendant was not known. The court cites *Farnham v. Hildreth*, 32 Barb. (N. Y.) 277, which construction seems to be borne out by *Gardner v. Kraft*, 52 How. Pr. (N. Y. C. Pl.) 500, decided under a statute providing for the use of fictitious names.

1. *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East 328, holding that a defendant could not justify for an assault and false imprisonment without an averment in his plea that the person taken was known as well by the name in the process as by his true name, *Lawrence, J.*, saying that the plea in *Cole v. Hindson*, 6 T. R. 234, was held not good because this averment was not made therein; *Kelly v. Lawrence*, 3 H. & C. 1, based upon *Walley v. M'Connell*, 13 Q. B. 903, 66 E. C. L. 903, in which case, under a plea of justification in an action of trespass for false imprisonment, the evidence was that the defendant, having a debt against a person, entered a complaint against him by a name which was an entirely different name from that of the plaintiff. The plaintiff was served with process under the supposition that he was the person named. He was not, in fact, the person, and denied the identity at the time of the service and uniformly thereafter, and it was held that the plea was not proved, the court saying that the process was against another man by his proper name and was intended to be against him, and was served on the plaintiff only by reason of the mistaken supposition that he was the debtor.

Warrant of Arrest. — There is no difference between a criminal warrant and a warrant for arrest in civil cases as to the necessity of setting out the correct name of the party to be arrested. *Hoye v. Bush*, 1 M. & G. 775, 39 E. C. L. 649, referring to the judgment of *Lawrence, J.*, in *Cole v. Hindson*, 6 T. R. 234, as showing that there is no distinction, as he cites the opinion of *Foster* (Fost. 312), which was a criminal case, as governing the case then

before the court, which was a civil arrest. This will also appear from many other cases where the authorities in criminal matters are indiscriminately relied upon in civil matters, and *vice versa*. See generally *Johnston v. Riley*, 13 Ga. 137; *Harris v. McReynolds*, (Colo. App. 1898) 51 Pac. Rep. 1016; *Melvin v. Fisher*, 8 N. H. 407; *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 462; *Scott v. Ely*, 4 Wend. (N. Y.) 555; *Mead v. Haws*, 7 Cow. (N. Y.) 332; *West v. Cabell*, 153 U. S. 85. See more particularly article WARRANTS.

Mesne and Final Process. — In *Baltimore First Nat. Bank v. Jagers*, 31 Md. 47, it is said that *Cole v. Hindson*, 6 T. R. 234, falls within the distinction taken by Lord Tenterden in *Reeves v. Slater*, 7 B. & C. 486, 14 E. C. L. 91, between mesne and final process. In the latter case A B executed a warrant of attorney in the name of C B, under which name judgment was entered by an execution issued against him, and it was held that this was right, and that the sheriff was bound to execute it. But in *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 462, it was said that there was no difference to be observed between mesne and final process in construing the effect of a misnomer in process for arrest, and that no such distinction is drawn in this respect in *Cole v. Hindson*, 6 T. R. 234.

2. *Illinois*. — *Pond v. Ennis*, 69 Ill. 341; *Hammond v. People*, 32 Ill. 473.

Indiana. — *Kingen v. Stroh*, 136 Ind. 610; *Vogel v. Brown Tp.*, 112 Ind. 299; *Bloomfield R. Co. v. Burress*, 82 Ind. 83.

Iowa. — *Peterson v. Little*, 74 Iowa 224.

Kansas. — *Hoffield v. Board of Education*, 33 Kan. 644.

Maryland. — *Baltimore First Nat. Bank v. Jagers*, 31 Md. 47.

Massachusetts. — *Smith v. Bowker*, 1 Mass. 76.

Mississippi. — *Alabama, etc., R. Co. v. Bolding*, 69 Miss. 263.

Missouri. — *Parry v. Woodson*, 33 Mo. 347; *Martin v. Barron*, 37 Mo. 301.

New York. — *Whittlesey v. Frantz*, 74 N. Y. 461.

d. PROVINCE OF COURT AND JURY. — The question of identity is one for the jury.¹ If two names spelled differently are neces-

Oregon. — *Foshier v. Narver*, 24 Oregon 441.

South Carolina. — *Waldrop v. Leonard*, 22 S. Car. 127.

United States. — *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

England. — *Smith v. Patten*, 6 Taunt. 115, 1 E. C. L. 330; *Crawford v. Satchwell*, 2 Stra. 1218; *Oakley v. Giles*, 3 East 167. See further, *infra*, IV. 3. *Amendment*; and *supra*, IV. 1. b. *Variance Between Writ and Declaration*.

Cases in the last preceding note holding otherwise refer to and distinguish two of the cases cited above in the note, *Crawford v. Satchwell*, 2 Stra. 1218, and *Smith v. Bowker*, 1 Mass. 76, upon the ground that the defendant in the original action in each of these cases had appeared without objecting to the misnomer. This distinction is first drawn in respect to *Crawford v. Satchwell*, 2 Stra. 1218, by Lord Kenyon, in *Cole v. Hindson*, 6 T. R. 234, and is reiterated in *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 462, and *Gardner v. Kraft*, 52 How. Pr. (N. Y. C. Pl.) 500, in which cases the same distinction is drawn in respect to *Smith v. Bowker*, 1 Mass. 76. It does not appear from the report of *Crawford v. Satchwell*, 2 Stra. 1218, that the fact is as has been stated by the cases referred to, and from the report of *Smith v. Bowker*, 1 Mass. 76, it appears affirmatively that the defendant did not appear in the original action, and the court in that case bases its ruling directly upon *Crawford v. Satchwell*, 2 Stra. 1218.

Constructive Notice. — Where a citation is by publication, it is held that a person who does not bear the name designated in the publication will not be bound, although it would be different if actual service were made. *Freeman v. Hawkins*, 77 Tex. 500, [citing *Dunlap v. Southerlin*, 63 Tex. 38; *McRee v. Brown*, 45 Tex. 506]; *Entrekin v. Chambers*, 11 Kan. 368. See also *Clary v. O'Shea*, (Minn. 1898) 75 N. W. Rep. 115, which was an action of ejectment, on the trial of which the plaintiff offered in evidence a patent from the United States to one "John O'Shea" and the judgment and judgment roll in an action brought by the plaintiff to determine adverse claims to the property in question.

The court refused to receive the evidence because the defendant named in the summons in that action was "John O. Shea." The only service in that case was by publication, and it was held that it could not be presumed that the John O'Shea named in the patent was the same person as the John O. Shea named in the summons and proof of service thereon in that action. A similar rule was made in *Skelton v. Sackett*, 91 Mo. 377, in which case a judgment by default against Quinces R. Noland, upon published notice to Q. R. Noland, was held to be void, but this case was *overruled* in effect in *Mosely v. Reily*, 126 Mo. 124.

Summons Left at House. — Where personal service is not had upon the defendant, but the summons is left at his house, he is not precluded if he does not appear. *Fitzgerald v. Salentine*, 10 Met. (Mass.) 436; *Enewold v. Olsen*, 39 Neb. 59, holding that under section 148 of the *Nebraska Code Civ. Pro.*, if a defendant is sued by any but his true name, except in actions brought under section 23 of said code, no jurisdiction is acquired by the sheriff leaving a copy of the summons at the defendant's usual place of residence.

Idem Sonans. — In *Robertson v. Winchester*, 85 Tenn. 171, it was held that the court acquires jurisdiction of a nonresident although his name was incorrectly written in the proceedings, his true name and that by which he is designated being *idem sonans*.

Legal Name. — It is also held that while a defendant must appear and object to a misnomer, if the name in the process is such that the law does not recognize it as a name, a judgment by default, even though personal service was had, is erroneous. *Schmidt v. Thomas*, 33 Ill. App. 111; *Elberson v. Richards*, 42 N. J. L. 69.

1. *Allen v. Ogden*, 12 Vt. 12; *Siebert v. State*, 95 Ind. 472; *Com. v. Coponi*, 155 Mass. 534, citing *Com. v. Gormley*, 133 Mass. 580.

And after verdict the court will not say that names spelled differently and which may be sounded alike are not *idem sonans*. *Smurr v. State*, 88 Ind. 504. See also *supra*, II. 5. *Names in Common Use and Assumed Names*; II. 5. b. *Replication to Plea of Misnomer*.

sarily sounded alike, the court, as a matter of law, may pronounce them to be *idem sonans*, though if they are not necessarily sounded alike the question whether they are *idem sonans* is one of fact for the jury.¹

2. Sufficiency of Plea of Misnomer — Correct Name Must Be Disclosed. — A plea of misnomer must disclose the full and correct name alleged to be improperly designated,² and that the party was not known or called by the name by which he is designated in the pleading objected to.³

1. *Com. v. Warren*, 143 Mass. 569; *Lynes v. State*, 5 Port. (Ala.) 241; *Munkers v. State*, 87 Ala. 94; *Hoffman v. Bircher*, 22 W. Va. 540; *State v. Thompson*, 10 Mont. 549.

English Equivalent for Foreign Name.

— In *Weitzel v. State*, 28 Tex. App. 523, the name of the owner of stolen property was written in the indictment "Fraude." He spelled his name, and the proper spelling was "Freude." An expert German and English scholar testified that he would pronounce "Fraude" as "Frowdy," and "Freude" as "Froydy," and that when corrupted "Freude" was also pronounced "Friday." The trial court held the two names "Fraude" and "Froydy" to be *idem sonans*, and refused to submit to the jury a specially requested instruction on behalf of the defendant that "if the jury believe from the evidence that the name of the party alleged to be the owner of the property alleged to have been stolen is different in sound from the name alleged in the indictment, to wit, William Freude, they will acquit the defendant." This was held error under *Bell v. State*, 25 Tex. 574, where the rule was laid down that "when any question arises concerning the name of the person upon whom the indictment alleges that the injury was inflicted, the practice should be analogous to the practice in the case of a plea of misnomer by the prisoner. The fact should be submitted to the jury." This question was reserved in *Rooks v. State*, 83 Ala. 79.

Interpretation of Name Defectively Written in Pleading. — Where the trial court determines the meaning of a letter which is part of a name and is uncertainly written, the appellate court will not examine the original pleading and overrule the judgment of the trial court. *Oneil v. State*, 48 Ga. 66; *People v. Douglass*, 87 Cal. 281.

2. *State v. Hughes*, 1 Swan (Tenn.)

261; *Louisville, etc., R. Co. v. Hall*, 12 Bush (Ky.) 133; *Taylor v. Insley*, 7 Colo. App. 178; *Hoffman v. Bircher*, 22 W. Va. 540; *White v. Miller*, 7 Hun (N. Y.) 433; *Melvin v. Clark*, 45 Ala. 286; *Savannah, etc., R. Co. v. Buford*, 106 Ala. 303; *Cantley v. Moody*, 7 Port. (Ala.) 443; *Humphrey v. Whitten*, 17 Ala. 31; *State v. Homer*, 40 Me. 438, wherein the defendant pleaded in abatement that the name was "Mary Y. Homer" and not "Mary Homer," and it was said that if the letter "Y" is to be regarded merely as the initial letter of the middle name, it might well be questioned whether the plea was sufficient, and that the name of which that letter was the initial should have been set forth in the plea, as in *Com. v. Perkins*, 1 Pick. (Mass.) 388.

3. *Washington v. State*, 68 Ala. 88; *Savannah, etc., R. Co. v. Buford*, 106 Ala. 303; *Wilson v. State*, 69 Ga. 224; *Wiggins v. State*, 80 Ga. 470; *McCrary v. Anderson*, 103 Ind. 12; *U. S. v. Janes*, 74 Fed. Rep. 543; *Lyons v. Rafferty*, 30 Minn. 527.

Commencement. — A plea in abatement which commences "and the said A B [the defendant] comes," is defective in substance, because it admits the defendant to be the proper party. *State v. Newmans*, 2 Law Repos. (N. Car.) 74.

A plea which commences "and the said Basil Watson," admits the party to be the person sued. It should have commenced, "and Basil Watson, against whom the said plaintiffs have exhibited their said declaration by the name of Baswell Watson, comes and defends." *Hyde v. Watson*, 1 Den. (N. Y.) 670 [*citing* 2 Saund. 209, *6. note*; *Roberts v. Moon*, 5 T. R. 487; *Haworth v. Spraggs*, 8 T. R. 515]. See also *Feasler v. Schriever*, 68 Ill. 322, wherein the plea commenced "and the defendant," etc., and it was held that by these words the defendant admitted himself to be the person sued.

3. Amendment — Statutory Provisions. — Misnomer of parties is not a defect attended by grave consequences, by reason of the statutory provisions so generally prevailing under which the defect may be remedied by amendment.¹ In *England* the effect of a misnomer of a defendant was altogether obviated by the statute of 3 & 4 William IV., c. 42, whereby the plaintiff's declaration might be amended by inserting the true name of the defendant,² and this is the general practice in the *United States*,³ amendments being allowed either in the writ or in the declaration or complaint,

1. See, for general treatment, article AMENDMENTS, vol. I, p. 458.

2. *McCrary v. Anderson*, 103 Ind. 12, citing Chit. Pl. 266; Saund. Pl. and Ev. 10.

3. After Bail Given and Plea Filed the defendant cannot object to a misnomer by a motion in arrest, and proceedings are properly amended by the recognition of bail, the name of the defendant in the recognition being inserted in the declaration. *Scull v. Briddle*, 2 Wash. (U. S.) 200.

Amendment Not Affecting Substantial Rights. — Where there is a mistake in the name of a party which is amendable in the trial court and the parties proceed to trial upon the merits, the defect is one which does not prejudice substantial rights and will not be regarded thereafter. *Bauman v. Grubbs*, 26 Ind. 419; *Havana Bank v. Magee*, 20 N. Y. 355; *Pickens County v. Bank of Commerce*, 97 U. S. 377; *Traver v. Eighth Ave. R. Co.*, 3 Keyes (N. Y.) 498; *Mansfield v. Shipp*, 128 Ind. 56; *Pape v. Capitol Bank*, 20 Kan. 446.

Amendment Affecting Third Person. — In *Terry v. Sisson*, 125 Mass. 560, a writ was sued out against S. S. and a savings bank, the latter being summoned as trustee. The writ was served on S. F. S. and was afterwards amended to run against the latter, but, in the meantime, the trustee bank had paid the funds in its possession to S. F. S., without notice or knowledge that the latter was the person intended by the summons served upon it. It was held that the bank was not chargeable.

Amendment After Lapse of Period of Limitation. — In *Pennsylvania Co. v. Sloan*, 125 Ill. 72, an amendment was allowed in the name of the defendant after the lapse of the period of limitation, and the defendant in the name as amended pleaded the statute of limitations. It was held that the issue made by the plaintiff's replication that the

suit as originally brought was in fact against the defendant was an issue of fact.

Answer in True Name. — If a defendant answer in his true name, the defect in his name as given in the complaint is cured. *Sherrod v. Shirley*, 57 Ind. 13.

When the correct name of the defendant is set forth in his answer, he cannot object to an amendment to the complaint in respect of his name as set forth therein. *Ramsey v. Cortland Cattle Co.*, 6 Mont. 499; *Martin v. Martin*, 95 Va. 26.

Judgment in Right Name. — If the judgment is rendered against the defendant in his right name the amendment will be considered as made. *Mahon v. San Rafael Turnpike Road Co.*, 49 Cal. 270.

Judgment in Wrong Name. — If an answer is adjudged to be defective and a demurrer thereto is overruled, and the defendant fails to plead further or to disclose his true name, he cannot complain that the judgment is rendered against him in the wrong name in which he is sued. *Louisville, etc., R. Co. v. Hall*, 12 Bush. (Ky.) 132.

Motion. — Where, before judgment, the attention of the trial court is called to the fact that the defendant has been sued by initials of his Christian name, the court may permit an amendment *instantly* by inserting the full name, but if no such objection is made the defendant will be concluded by the judgment. *Oakley v. Pegler*, 30 Neb. 628. The proper practice in such a case is by motion to require the complaint to be amended. *Kenyon v. Semon*, 43 Minn. 180; *Hoffman v. Dickinson*, 31 W. Va. 142, where the plea in abatement for misnomer is not allowed, but the declaration and summons may, on motion of either party, be amended by inserting the correct name. *Empire State Sav. Bank v. Beard*, 81 Hun (N. Y.) 184.

though the same conflict heretofore noted in regard to the effect of a failure of a misnamed defendant to appear also occurs here, the two questions being governed by the same principle.¹

Third Persons. — When the name of a third person is incorrectly set out in an indictment it may be amended where there is no proof to controvert the identity of the person, and it does not appear that the accused was prejudiced or surprised.²

1. Amendments Allowed. — The summons may be amended by inserting the full name of the defendant. *Burnham v. Savings Bank*, 5 N. H. 573; *Martin v. Godwin*, 34 Ark. 682.

Where the declaration and writ are in the wrong name, the declaration may be amended, *East Tennessee, etc., R. Co. v. Mahoney*, 89 Tenn. 311; *Shackman v. Little*, 87 Ind. 182; *Mestaer v. Hertz*, 3 M. & S. 450; on motion of entire party. *Empire State Sav. Bank v. Beard*, 81 Hun (N. Y.) 184.

Where the plaintiff is incorrectly named in the writ but is correctly named in the complaint, the writ may be amended by the complaint. *Haines v. Bottorff*, 17 Ind. 348.

Amendment and Judgment by Default. — While an amendment may be allowed in the names of defendants who have appeared, such amendments will not be permitted in the case of defendants who have not appeared so as to support a judgment by default. *Hoffman v. Fish*, 18 Abb. Pr. (Genesee County Ct.) 76; *Atwood v. Landis*, 22 Minn. 559; *Southern Pac. Co. v. Block*, 84 Tex. 21, wherein the defendant was designated "The Southern Pacific Railway Company" in the citation, and the return of the sheriff showed service on the "Southern Pacific Company," whereupon an amendment was filed by the plaintiff designating the defendant as in the return, but the amendment was not served and judgment by default was rendered against the Southern Pacific Company. This was held to be error.

On the other hand, it is held that a plaintiff may amend his surname after service of the writ and take a judgment by default. *Boisse v. Langham*, 1 Mo. 572; *Ford v. Gardner*, 1 Johns. Cas. (N. Y.) 243, holding that as the defendant did not appear he could not thereafter take advantage of the fact that the plaintiff had declared before the justice in a different name from that mentioned in the summons, there being no question as to the identity of the person.

And it is also held that the name of a defendant in a complaint may be amended, and that judgment by default entered thereafter will not be set aside. *Parry v. Woodson*, 33 Mo. 347; *McDonald v. Swett*, 76 Cal. 258. See *supra*, IV. 1. c. (3) *Effect of Misnomer When Defendant Does Not Appear*; and IV. 1. b. *Variance Between Writ and Declaration*.

2. *State v. Beatty*, 45 Kan. 492; *State v. McDonald*, 57 Kan. 538; *State v. Holmes*, 23 La. Ann. 604; *State v. Christian*, 30 La. Ann. 369; *State v. Dominique*, 39 La. Ann. 323; *Unger v. State*, 42 Miss. 649; *Haywood v. State*, 47 Miss. 1; *Miller v. State*, 53 Miss. 403; *Peebles v. State*, 55 Miss. 434; *People v. Johnson*, 104 N. Y. 213; *People v. Richards*, 44 Hun (N. Y.) 286; *People v. Dunn*, 53 Hun (N. Y.) 386; *Rasmussen v. State*, 63 Wis. 1.

Effect of Amendment — Change of Name, Not of Person. — The amendment is not for the purpose of changing the person, but merely of correcting the name of the same person. Thus, in *Blumenberg v. State*, 55 Miss. 528, an illegal sale of liquor was charged to have been made to "J. T. Middlebrook." Upon the trial the proof was to the effect that the sale was made to "A. T. Middlebrook," whereupon the district attorney was permitted to amend the indictment against the objection of the accused. The Supreme Court held that if this could be regarded as a mere mistake in the name, and the correction as conforming the indictment to the person intended by the grand jury, the amendment would be proper, but that proof showed that this was not the case, there being both a J. T. Middlebrook and an A. T. Middlebrook in the county. J. T. Middlebrook being the person who appeared before the grand jury, it was to him that the indictment charged the liquor to have been sold, and the amendment allowed by the trial court changed the person and not merely the name. See also *State v. Taylor*, 49 La. Ann. 320.

In Criminal Procedure — Insertion of True Name When Disclosed. — Under the common-law system of criminal procedure, if a plea in abatement for misnomer was found to be true the defendant was discharged, or proceedings against him for the alleged crime by the name disclosed in the plea must have been begun *de novo*. But this rule was changed by statute,¹ under which the true name when disclosed, was inserted by order of the court, and like statutory provisions have been adopted in many of the United States.²

Constitutionality of Statutes. — Such statutes have been held not to be in contravention of the constitutional provision that a person shall not be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of the grand jury.³

In England, also, the right to make such amendment has been conferred by statute. 14 & 15 Vict., c. 100, § 1. See *People v. Johnson*, 104 N. Y. 213.

1. 7 Geo. IV., c. 64. — To avoid the delay and inconvenience of this method of procedure, it was provided by the statute 7 Geo. IV., c. 64, that "no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition, of the party offering such plea, if the court shall be satisfied by the affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded." *Burroughs v. State*, 17 Fla. 656. See also *State v. Webster*, 30 Ark. 168.

2. **Construction of Statute.** — Under these provisions the objection for a misnomer is of no force, except for the purpose of having the name of the defendant properly set out, because when called upon to plead, he must, under the provisions of some of the statutes, state his true name, if the name by which he is charged is not the true one, whereupon the name suggested

by him is inserted; or if he refuses to state his true name, or pleads to the indictment or information as it stands, he will be concluded thereafter from raising any objection. *State v. Webster*, 30 Ark. 168; *People v. Kelly*, 6 Cal. 213; *People v. Jim Ti*, 32 Cal. 64; *People v. Maroney*, 109 Cal. 277; *Burroughs v. State*, 17 Fla. 654; *State v. White*, 32 Iowa 19; *State v. Schricker*, 29 Mo. 265; *State v. Burns*, 8 Nev. 256; *Lasure v. State*, 19 Ohio St. 49; *Bassett v. State*, 4 Tex. App. 43; *Morris v. State*, 4 Tex. App. 589; *Patillo v. State*, 3 Tex. App. 443; *State v. Manning*, 14 Tex. 405; *Sinclair v. State*, 34 Tex. Crim. Rep. 453.

At Any Time Before Execution, if the true name of the defendant is discovered, it may be inserted on the minutes of the court, the entry also referring to the fact that the defendant was improperly named in the indictment, and subsequent proceedings may be ordered to be in the correct name. *Com. v. Kelcher*, 3 Metc. (Ky.) 485; *People v. Le Roy*, 65 Cal. 613. As to the insertion of the true name when discovered, where the defendant was charged by a fictitious name, see also *supra*, II. 6. *Name Unknown — Fictitious Name.*

3. *Lasure v. State*, 19 Ohio St. 48; *People v. Kelly*, 6 Cal. 214; *State v. Schricker*, 29 Mo. 265.

NATIONAL BANKS.

See article *BANKS AND BANKING*, vol. 3, p. 251.

NATURALIZATION.

BY ALFRED PIZEY.

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CROSS-REFERENCES.

For matters of *Substantive Law and Evidence*, see the article *CITIZENSHIP*, AM. AND ENG. ENCYC. OF LAW (2d ed.), vol. 6, p. 14.

1. JURISDICTION OF COURTS — *Constitutional Provision*. — By the constitution of the United States power is given Congress to establish a uniform rule of naturalization.¹

Exclusiveness of Power Conferred on Congress. — It has been generally considered that the power thus conferred is exclusive.² How-

- 1. Const. U. S., art. 1, § 8.
- 2. *United States*. — *Chirac v. Chirac*, 2 Wheat. (U. S.) 261; *U. S. v. Rhodes*, 1 Abb. (U. S.) 45; *Golden v. Prince*, 3 Wash. (U. S.) 313; *Day v. Buffinton*, 3 Cliff. (U. S.) 386; *Matthew v. Rae*, 3 Cranch (C. C.) 699; *Scott v. Sandford*, 19 How. (U. S.) 533; *Thurlow v. Massachusetts*, 5 How. (U. S.) 504, 585; *Smith v. Turner*, 7 How. (U. S.) 283, 556; *Houston v. Moore*, 5 Wheat. (U. S.) 49; *Ex p. Clarke*, 100 U. S. 412.
- Contra*, *Collet v. Collet*, 2 Dall. (U. S.) 294.
- Massachusetts*. — *Stephens, Petitioner*, 4 Gray (Mass.) 559.
- Michigan*. — *Andres v. Arnold*, 77 Mich. 87.
- New Jersey*. — *Rushworth v. Judges*, 58 N. J. L. 97.
- New Hampshire*. — *Beavins's Petition*, 33 N. H. 89.
- New York*. — *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584.

ever, Congress enacted a statute upon the subject at an early day, and no question as to the authority of the several states, in the event of the failure by Congress to exercise the power, has ever arisen.¹

What Courts Given Power by Congress. — It has been provided by Congress that the proceedings may be had before a circuit or district court of the United States or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal or clerk.²

State Courts Not Compelled to Entertain Jurisdiction. — This provision is binding only upon the federal courts, which are ordinarily the only courts that may transact the judicial business of the federal government. State courts may, however, when otherwise competent, entertain naturalization proceedings; but they are not compelled to do so unless the state legislatures so direct. They are merely agencies acting from comity and for convenience to carry out this delegated power.³

North Carolina. — *Rouche v. Williamson*, 3 Ired. L. (N. Car.) 141; *State v. Manuel*, 4 Dev. & B. L. (N. Car.) 20.

South Carolina. — *Davis v. Hall*, 1 Nott & M. (S. Car.) 293.

Wisconsin. — *In re Wehlitz*, 16 Wis. 443, 84 Am. Dec. 700.

1. Expressions as to Exclusive Power of Congress. — Some judges have said *obiter* on the strength of adjudications upon the constitutional power of Congress to regulate proceedings in bankruptcy, that the mere existence of the power without its exercise would not prohibit the states from acting. *Holmes v. Jennison*, 14 Pet. (U. S.) 597; *Matter of Ramsden*, 13 How. Pr. (N. Y. Super. Ct.) 429.

Others have noted distinctions between the admission of aliens to citizenship and bankruptcy, and hold that the former was vested exclusively in Congress by the constitutional provision. *Ogden v. Saunders*, 12 Wheat. (U. S.) 277; *Golden v. Prince*, 3 Wash. (U. S.) 313.

2. Summary of Existing Naturalization Law. — "Congress provided that an alien might 'be admitted to become a citizen of the United States' by declaring on oath before certain courts of the United States, 'or a court of record of any of the states having common-law jurisdiction, and a seal and clerk, two years at least prior to his admission,' that it was *bona fide* his intention to become a citizen of the United States, and to renounce other allegiance, and making to appear to the satisfaction of

the court that he had resided within the United States five years, and during that time had behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and that an alien who had resided in the United States three years next preceding arriving at twenty-one might be admitted without having made the previous declaration of intentions. Rev. Stat., §§ 2165, 2167." *U. S. v. Gleason*, 78 Fed. Rep. 396.

3. Alabama. — *Scott v. Strobach*, 49 Ala. 477.

Arkansas. — *State v. Penney*, 10 Ark. 621.

California. — *Ex p. Knowles*, 5 Cal. 301; *Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427.

Kentucky. — *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Maine. — *Gilroy, Petitioner*, 88 Me. 199.

Massachusetts. — *Stephens, Petitioner*, 4 Gray (Mass.) 559.

New Hampshire. — *Beavins's Petition*, 33 N. H. 89; *State v. Whittemore*, 50 N. H. 245.

New Jersey. — *Rushworth v. Judges*, 58 N. J. L. 97.

New York. — *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 358; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; *Matter of Ramsden*, 13 How. Pr. (N. Y. Super. Ct.) 429.

Pennsylvania. — *Rump v. Com.*, 30

State Court of Record. — The court of a state to be competent to naturalize aliens must be a court of record, but it need not have general common-law jurisdiction. If it exercises any jurisdiction of the kind thus denominated it will suffice.¹

Pa. St. 475; Lab's Petition, 3 Pa. Dist. Rep. 728; *In re* Naturalization, 5 Pa. Dist. Rep. 597.

South Carolina. — *Ex p.* McKenzie, 51 S. Car. 244.

Power Rather than Obligation of State Courts. — "There is no provision of the federal constitution which requires the courts or judges of a state to perform any duties respecting the admission of aliens to citizenship. It is well established that such courts and magistrates may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation. *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 622. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States." Gilroy, Petitioner, 88 Me. 199.

Ordinarily Duty of United States Courts Only. — "No law imposes upon state courts the duty of passing upon applications for naturalization. This belongs legitimately to the federal courts. It is only where the latter are inconvenient that the state courts act, and then only as an accommodation." *In re* Naturalization, 5 Pa. Dist. Rep. 597.

State Courts Forbidden to Exercise Jurisdiction. — "My conclusion therefore is, that it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and therefore it could lay any restraint, regulation, limitation or condition upon the practice in such cases which it might deem expedient or proper." *Rushworth v. Judges*, 58 N. J. L. 97.

1. *United States.* — *U. S. v. Lehman*, 39 Fed. Rep. 49, 768; *Ex p.* Tweedy, 22 Fed. Rep. 84; *U. S. v. Power*, 14 Blatchf. (U. S.) 223.

California. — *Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427; *overruling Ex p.* Knowles, 5 Cal. 301.

Illinois. — *People v. McGowan*, 77 Ill. 649, 20 Am. Rep. 254, *overruling Knox County v. Davis*, 63 Ill. 403, and *Mills v. McCabe*, 44 Ill. 194; *Beards-*

town v. Virginia, 81 Ill. 541, 76 Ill. 34; *Dale v. Irwin*, 78 Ill. 170.

Kentucky. — *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Maine. — Gilroy, Petitioner, 88 Me. 199; *Dean, Petitioner*, 83 Me. 489.

New York. — *People v. Pease*, 30 Barb. (N. Y.) 588; *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 358; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; *Matter of Harstrom*, 7 Abb. N. Cas. (N. Y. Surrogate Ct.) 391.

Ohio. — Anonymous, 2 Wkly. L. Gaz. (Ohio) 278, 3 Ohio Dec. (Reprint) 47; *Ex p.* Wingard, 4 Wkly. L. Gaz. (Ohio) 169, 3 Ohio Dec. (Reprint) 174; 1 West. L. M. (Ohio) 453.

Texas. — *Ex p.* Burkhardt, 16 Tex. 470.

"Common-law Jurisdiction" Defined. — "When it speaks of courts having 'common-law jurisdiction,' it refers to such courts as had been or might be established in the several states to administer justice under that system of jurisprudence, as contradistinguished from merely local, municipal or police courts intended for purely local government." *Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427, *overruling Ex p.* Knowles, 5 Cal. 301.

Limited Jurisdiction Sufficient. — "We apprehend the state courts mentioned in the act of Congress as having common-law jurisdiction, are such as exercise their powers according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the states that would possess the requisite 'common-law jurisdiction.'" *People v. McGowan*, 77 Ill. 649, 20 Am. Rep. 254.

"If the court may exercise any part of that jurisdiction it is within the language of the statute and its meaning as well." *Dean, Petitioner*, 83 Me. 489.

Police Court of District of Columbia. — By Rev. Stat. U. S., § 2173, the police court of the District of Columbia is prohibited from entertaining jurisdiction of proceedings to naturalize aliens.

Court Must Have Clerk and Seal. — The court must have a clerk distinct from the judge; not necessarily an officer denominated clerk, but a permanent "recording officer charged with the duty of keeping a true record of its doings and afterwards of authenticating them;"¹ and the court must possess a seal.²

II. THE NATURALIZATION PROCEEDINGS — 1. In General. — It is a matter of common notoriety that naturalization proceedings are often conducted with undue haste, and little regard to the formalities required in other cases. This is due in large measure to the *ex parte* nature of the application and the inferior character of many of the judges presiding over the courts which exercise the jurisdiction.³

2. Parties. — For the persons who are entitled to become naturalized under the laws of the United States, see article *Citizenship*, Am. and Eng. Encyc. of Law (2d ed.), vol. 6, p. 14.⁴

3. Declaration of Intention — Before Court or Clerk. — Receiving the declaration of an alien of his intention to become a citizen of the United States is a ministerial act, and the declaration may be made as well before the clerk of the court as before the court itself.⁵

1. Dean, Petitioner, 83 Me. 489; *per* Whitehouse, J., quoting Shaw, C. J., in Gladhill, Petitioner, 8 Met. (Mass.) 168. See also *Ex p. Cregg*, 2 Curt. (U. S.) 98, 6 Fed. Cas. No. 3,380; Gladhill, Petitioner, 8 Met. (Mass.) 168; State *v.* Webster, 7 Neb. 469; State *v.* Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Com. *v.* Lee, 1 Brews. (Pa.) 273; Moran *v.* Rennard, 3 Brews. (Pa.) 601.

2. Rev. Stat. U. S., § 2165, subd. 1; Com. *v.* Sheriff, 1 Brews. (Pa.) 183.

3. **Applications Immediately Before Elections.** — The large number of applications immediately preceding an important election has also had considerable influence on this state of affairs. It has been said that twenty thousand persons were naturalized in 1868 in the city of New York, of whom eighteen thousand four hundred and thirty-two were in the month of October alone. Matter of Coleman, 15 Blatchf. (U. S.) 406.

New Jersey Statute. — In the state of New Jersey a law has been passed forbidding any naturalization proceedings to be entertained by a court of that state within thirty days prior to an election. Rushworth *v.* Judges, 58 N. J. L. 97.

4. **Married Women and Infants.** — A married woman may be naturalized upon her own application. Priest *v.* Cummings, 16 Wend. (N. Y.) 625.

Otherwise of an infant, whose petition for naturalization must, it seems, be

made by his guardian. Le Forestiere's Petition, 2 Mass. 419; Lawler's Application, 5 Montg. Co. Rep. (Pa.) 77.

5. Rev. Stat. U. S., § 2165, subd. 6; Butterworth's Case, 1 Woodb. & M. (U. S.) 323.

Declaration Made Elsewhere than in Clerk's Office or in Open Court. — It was decided in *Andres v. Arnold*, 77 Mich. 85, Morse, J., *dissenting*, that so long as a declaration of intention was made before the proper person it was immaterial where it was made. See also Boso's Application, 6 Kulp (Pa.) 83, and Hodgins's Election Cas. 500, the latter being a similar holding as to administering the oaths required by the alien act, 34 Vict., c. 22, § 2.

But taking the declaration otherwise than in the office of the clerk or in open court was severely criticised by Mr. Justice Field in *In re Langtry*, 12 Sawy. (U. S.) 467, and its legality doubted. In *Santo Scola's Case*, 8 Pa. Co. Ct. Rep. 344, it was decided that such practice was illegal. So also in *State v. Olin*, 23 Wis. 309, a case where a deputy clerk had received the declaration away from his office, the decision, however, being based on local statutes.

Before Deputy Clerks. — In naturalization as in other proceedings acts which may be performed by the clerk may be done by his legally constituted deputy. *State v. Hoeffinger*, 35 Wis. 393; *U. S. v. Lehman*, 39 Fed. Rep. 49, 768; *Andres v. Arnold*, 77 Mich. 85.

4. Final Proceedings—In General—The Requisite Care.—Every step in the final proceedings of admission, whether a duty devolving upon the applicant or upon the court, should be taken with the same degree of carefulness necessary in litigation in general.¹

Judicial in Character.—The final proceedings though *ex parte* are, it is well settled, judicial, and necessitate a hearing before the court upon evidence to be weighed by it and judgment rendered thereon as in other cases.²

Before Justices of the Peace.—Authority cannot be conferred by the clerk of a court upon a justice of the peace to receive such declarations. *State v. Stumpf*, 23 Wis. 630.

Requisites of Declaration of Intention—Time When Intention Was Formed.—The declaration of intention under Rev. Stat. U. S., § 2167, relating to the naturalization of minors, should allege facts which show the time when the intention to become a citizen was actually formed. *In re Randall*, 14 Phila. (Pa.) 224, 37 Leg. Int. (Pa.) 377.

Must Be Under Oath.—The declaration of intention, whether made under section 2165 or 2167 of the U. S. Rev. Stat., must be under oath. *U. S. v. Walsh*, 22 Fed. Rep. 644.

The Name of the Sovereign or Ruler of the country to which the applicant owes allegiance need not be stated. *Ex p. Smith*, 8 Blackf. (Ind.) 395.

1. In *In re Bodek*, 63 Fed. Rep. 813, 3 Pa. Dist. Rep. 725, Dallas, J., said: "I have dealt with this subject at greater length than I otherwise would have done, because I deem it to be desirable that the views I have expressed should be better understood than they appear to be; and with like object—not in censure of this particular applicant—I take this occasion to further remark that naturalization petitions must be filed at or before the time of their presentation, and that judgment upon them will be formally entered, as well in cases where it is adverse as in those in which it is favorable to the petitioner. I see no sufficient reason for waiving in these proceedings the incidents which regularly pertain to all others of similar character, and I have found that omission of those I have mentioned tends to facilitate the reprehensible repetition of identical applications, without disclosure of the fact of prior adjudication."

2. *United States*.—*Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140; *In re*

Bodek, 63 Fed. Rep. 813, 3 Pa. Dist. Rep. 725; *Matter of Coleman*, 15 Blatchf. (U. S.) 406; *The Acorn*, 2 Abb. (U. S.) 434.

Alabama.—*Scott v. Strobach*, 49 Ala. 477.

California.—*Bode v. Trimmer*, 82 Cal. 513; *Prentice v. Miller*, 82 Cal. 570; *Ex p. Knowles*, 5 Cal. 301.

Kentucky.—*Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Nebraska.—*State v. Boyd*, 31 Neb. 682, 143 U. S. 135.

New York.—In *Matter of* —, 7 Hill (N. Y.) 137; *Matter of Clark*, 18 Barb. (N. Y.) 444, 10 How. Pr. (N. Y.) 246, 1 Abb. Pr. (N. Y.) 90.

Pennsylvania.—*Rump v. Com.*, 30 Pa. St. 475.

Requisite Facts Must Be Established.—

"The right of citizenship is finally conferred by the judgment of the court. This judgment can only be rendered when the court has become satisfied that all the conditions of naturalization have been complied with. By the first section of the Act of April 14, 1802, aliens are to be admitted as citizens on the conditions specified, 'and not otherwise.' The court therefore must, in the language of the act, be 'satisfied' that all these conditions have been complied with; that the residence of the applicant, and his behavior, have been such as the law requires; and that his attachment to our form of government is firm and sincere. These are imperative duties resting upon the court, which cannot be evaded or overlooked. Judgment cannot in these cases pass by default, or as a matter of course. There is no one to be defaulted, and the judgment of the court should be the result of an honest conviction, wrought in the mind by the evidence given, and the declarations of the applicant. If the applicant thus establishes his case, he has proved a right to which he is entitled; but if he fails to establish the requisite facts, he has no honest claim to a judgment in his

Requisite Allegations of Petition. — The application should be by a petition, containing allegations of fact from which it appears that the applicant is fully qualified under the naturalization act to be admitted to citizenship.¹

III. JUDGMENT AND RECORD — 1. In General — Formal Judgment Should Be Entered. — It is always best that a formal judgment of admission should be entered and a complete record of the proceedings kept.² It has not been strictly required, however, as

favor." *Matter of —*, 7 Hill (N. Y.) 137.

1. In *In re Bodek*, 63 Fed. Rep. 813, 3 Pa. Dist. Rep. 725, Dallas, J., said: "An applicant for naturalization, then, is a suitor, who, by his petition, institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts, and the fulfilment of all conditions, upon the existence and fulfilment of which the statutes which confer the right asserted have made it dependent, and I believe that the petitions usually presented conform to this rule."

See generally, as to the character of the proceedings in state courts, as it is exhibited in various cases:

New York. — *Matter of —*, 7 Hill (N. Y.) 137; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5.

Pennsylvania. — *Lab's Petition*, 3 Pa. Dist. Rep. 728.

United States. — *Green v. Salas*, 31 Fed. Rep. 106.

Alleging Residence in State or Territory Where Proceedings Are Had. — The petition need not show that the applicant had resided in the state or territory where the final proceedings are had for the year immediately preceding his application. It is sufficient for him to allege his residence therein for any one of the five years of his residence in the United States. *Cummings's Petition*, 41 N. H. 270; *Ex p. Randall*, 9 W. N. C. (Pa.) 159.

Petition under the United States Revised Statutes, Section 2167. — The petition of an applicant under section 2167 of the United States Rev. Stat. must allege the time when he conceived the intention of becoming a citizen of the United States. *Cummings's Petition*, 41 N. H. 270.

2. In *re Bodek*, 63 Fed. Rep. 813, 3 Pa. Dist. Rep. 725; *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140.

Recording Declaration of Intention. — The preliminary step required by the naturalization act, the making of a declaration of intention to become a citizen, need not be done in the same court in which the final proceedings are had. *McCarthy v. Marsh*, 5 N. Y. 263; *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187. *Contra*, *Vaux v. Nesbit*, 1 McCord Eq. (S. Car.) 366.

And it seems from the wording of the act that such declaration need not be entered of record in the court where it was made, or indeed in any court. *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187; but see *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; *State v. Barrett*, 40 Minn. 65.

Record of Final Proceedings. — Final proceedings for admission to citizenship should be made a matter of record. Rev. Stat. U. S., § 2165, subd. 2; *Green v. Salas*, 31 Fed. Rep. 106; *Bode v. Trimmer*, 82 Cal. 513; *Miller v. Reinhart*, 18 Ga. 239; *State v. Boyd*, 31 Neb. 682, 143 U. S. 135.

Registry of Name, Birthplace, etc. — Under an early provision of the law, since repealed, before an alien could become a naturalized citizen he must in addition to having declared his intention, have entered a report and registry of his name, birthplace, age, nation, etc., before the clerk of some court of record, and such registry was required by the act to be entered of record. *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187; *Green v. Salas*, 31 Fed. Rep. 106.

Residence of Applicants. — The particular residence of the applicant need not be made a matter of record. But the record should show a residence in the United States, and in the state or territory where the proceedings are had, for the length of time required by the law. *Com. v. Paper*, 1 Brews. (Pa.) 263; *Priest v. Cummings*, 16 Wend. (N. Y.) 618.

Jurisdiction. — The jurisdiction of courts of the United States to natural-

essential to the validity of the naturalization. Where it can be gathered from the record that the applicant was in fact admitted, not only is the absence of the formal judgment immaterial, but it little matters what else the record shows or omits to show.¹

Form of Judgment Immaterial. — The form of the judgment record showing the admission of an alien to citizenship, so far as no express provision for it is made by act of Congress, is utterly immaterial. As long as it constitutes a memorial or remembrance of the adjudication made it is sufficient.²

ize aliens is derived directly from the statutes of the United States, and does not depend upon the statutory qualifications necessary to give jurisdiction to state courts. Hence those qualifications need not appear of record in a naturalization proceeding in a United States Court. *U. S. v. Walsh*, 22 Fed. Rep. 644.

1. *United States*. — *Campbell v. Gordon*, 6 Cranch (U. S.) 176; *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420; *Ex p. Cregg*, 2 Curt. (U. S.) 98, 6 Fed. Cas. No. 3,380; *U. S. v. Gleason*, 78 Fed. Rep. 396; *Green v. Salas*, 31 Fed. Rep. 106; *In re McCoppin*, 5 Sawy. (U. S.) 630; *The Acorn*, 2 Abb. (U. S.) 434; *U. S. v. Walsh*, 22 Fed. Rep. 644; *Matter of Coleman*, 15 Blackf. (U. S.) 406; *Raymond v. Raymond*, (Indian Ter. 1896) 37 S. W. Rep. 202, 83 Fed. Rep. 721.

Alabama. — *Scott v. Strobach*, 49 Ala. 477; *Harley v. State*, 40 Ala. 689.

Arkansas. — *State v. Penney*, 10 Ark. 621.

California. — *Bode v. Trimmer*, 82 Cal. 513.

Illinois. — *People v. McGowan*, 77 Ill. 644.

Kentucky. — *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Minnesota. — *State v. Macdonald*, 24 Minn. 48; *State v. Barrett*, 40 Minn. 65.

New York. — *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5; *McCarthy v. Marsh*, 5 N. Y. 263; *People v. Pease*, 30 Barb. (N. Y.) 588; *Matter of Ramsden*, 13 How. Pr. (N. Y. Super. Ct.) 429; *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584; *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524; *Priest v. Cummings*, 16 Wend. (N. Y.) 625.

Pennsylvania. — *Com. v. Paper*, 1 Brews. (Pa.) 263.

South Carolina. — *M'Call v. Oliver*, 1 McCord Eq. (S. Car.) 371, note a; *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187, 2 Nott & M. (S. Car.) 352.

Virginia. — *Com. v. Towles*, 5 Leigh (Va.) 743.

Wisconsin. — *State v. Hoefflinger*, 35 Wis. 393.

Contra. — In several of the early cases it was held that the judgment and record should show compliance with the conditions of the naturalization act in all particulars, otherwise they were merely *prima facie* evidence of a valid admission to citizenship. *McCarty v. Hodges*, 2 Edm. Sel. Cas. (N. Y.) 433; *Banks v. Walker*, 3 Barb. Ch. (N. Y.) 438; *Com. v. Leary*, 1 Brews. (Pa.) 270; *Vaux v. Nesbitt*, 1 McCord Eq. (S. Car.) 366.

Minutes. — The minutes of naturalization proceedings need not be entered upon the general minute docket, but may be kept in a separate book. *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5.

2. *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5. To the same effect see *Matter of Coleman*, 15 Blackf. (U. S.) 406.

If the Oath Be Administered and nothing appears to the contrary, it must be presumed that the court before whom the oath was taken was satisfied as to the character of the applicant. The oath when taken confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. *Campbell v. Gordon*, 6 Cranch (U. S.) 176.

Judgment Evidence of Its Own Validity. — "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity." *Spratt v. Spratt*, 4 Pet. (U. S.) 406.

2. **Amendments.** — The record of naturalization proceedings may be amended as in other cases, *nunc pro tunc*, to make the record conform to the truth.¹

Where There Is No Record of the Admission one cannot be supplied in this way, based on parol evidence, that the applicant was in fact naturalized.²

3. **Collateral and Direct Attacks upon the Judgment — Judgment in Rem.** — A judgment admitting an alien to citizenship is an adjudication on personal status, and in the nature of a judgment *in rem*.³

Collateral Attack. — It is not open to collateral attack even upon allegations charging fraud in its procurement.⁴

Direct Action to Impeach. — A direct action to impeach a judgment of naturalization can be brought only by the United States or by the state in one of whose courts the proceedings were had;⁵ but

Harmless Omissions. — In *Com. v. Towles*, 5 Leigh (Va.) 743, it was said: "Nor does this court think that it would be warranted in looking behind the judgment in this case, for any irregularity in the previous proceedings, unless that irregularity were such as plainly to show that the terms of the act of Congress had been violated, and those conditions disregarded, upon which only the alien could claim, or the court be empowered, to grant naturalization. In the record of the declaration which was made by Shultice, it is not stated that the declaration was made on oath, or that it included the renunciation of allegiance to all foreign princes, etc., and particularly to him, by name, to whom Shultice had before been subject. The record does not show positively any matter which contravened the act of Congress; it only omits to show certain matters involved in the declaration, which are required by that act."

1. *State v. Macdonald*, 24 Minn. 48; *Matter of Christern*, 43 N. Y. Super. Ct. 523.

2. *Matter of Desty*, 8 Abb. N. Cas. (N. Y. Super. Ct.) 250; *Dryden v. Swinburne*, 20 W. Va. 89.

3. *U. S. v. Gleason*, 78 Fed. Rep. 396; *Esker v. McCoy*, 6 Am. L. Rec. (Ohio) 694, 5 Ohio Dec. (Reprint) 573; *Scott v. Strobach*, 49 Ala. 477, where the court said: "A judgment admitting an alien to citizenship has none of the properties or qualities of a judicial proceeding *in personam*. It is rather *in rem*. It simply ascertains and defines the status of the individual, and of itself and in itself works no public or private injury.

It is designed to be the indisputable muniment of the title to citizenship. The alien must, and it is intended he should, confidently rely on its inviolability. If, whenever his right or duty as a citizen is involved in any of the courts of the United States, or of the several states, the judgment of naturalization can be assailed, and he be put on proof of all the facts proved, or which were involved when the judgment was rendered, its value and dignity is lessened; and that which our constitutions and laws teach him to regard as inestimable, would degenerate into a fruitful source of vexation and litigation."

4. *U. S. v. Ragazzini*, 50 Fed. Rep. 923; *The Acorn*, 2 Abb. (U. S.) 434; *Scott v. Strobach*, 49 Ala. 477; *Behrens-meyer v. Kreitz*, 135 Ill. 591, 125 Ill. 141; *Ackerman v. Haenck*, 147 Ill. 514; *Anonymous*, 1 Lack. L. Rec. (Pa.) 481; *In re Conroy*, 1 Leg. Rec. (Pa.) 57; *In re Contested Elections of 1868*, 2 Brews. (Pa.) 58.

5. *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140; *Raymond v. Raymond*, (Indian Ter. 1896) 37 S. W. Rep. 202, 83 Fed. Rep. 721; *McCarran v. Cooper*, 16 N. Y. App. Div. 311; *Matter of McKenna*, 31 Abb. N. Cas. (N. Y. C. Pl.) 416, 8 Misc. Rep. (N. Y.) 482; *In re Shaw*, 2 Pa. Dist. Rep. 250; *Com. v. Paper*, 1 Brews. (Pa.) 263.

In Behalf of All Persons Interested. — An allegation that the action is brought in behalf of all persons interested will not sustain a petition where the party bringing it was not authorized to do so by the United States. *Pintsch Compressing Co. v. Bergin*, 84 Fed. Rep. 140.

it seems to be questionable whether such an attack will be sustained in any event.¹

Absence of Jurisdiction.—In accordance with the general rule it would seem that a judgment admitting to citizenship by a court which lacked the jurisdictional qualifications required by the acts of Congress would be void.²

IV. FEES OF CLERKS—Not Emoluments.—The fees received in naturalization proceedings by the clerks of state courts do not constitute extra emoluments of the clerk. Their disposition is controlled by state laws generally relating to the clerk's fees.³ But it is otherwise in the case of clerks of the federal courts, where the laws governing their fees admit of such a construction,

1. See the following cases for dicta to the effect that judgments in naturalization proceedings may be thus impeached: *U. S. v. Norsch*, 42 Fed. Rep. 417; *U. S. v. Ragazzini*, 50 Fed. Rep. 923; *In re McCoppin*, 5 Sawy. (U. S.) 620; *McCarran v. Cooper*, 16 N. Y. App. Div. 311; *Matter of McKenna*, 31 Abb. N. Cas. (N. Y. C. Pl.) 416, 8 Misc. Rep. (N. Y.) 482; *Com. v. Paper*, 1 Brews. (Pa.) 263.

Cases Involving the Question.—It was held in *U. S. v. Norsch*, 42 Fed. Rep. 417, that a bill in equity would be entertained in the federal courts for relief against the judgment of a state court admitting an alien to citizenship. The bill, however, was dismissed because it alleged only errors and irregularities, and set up no ground for equitable relief. The court, *per* Thayer, J., said: "The right of the United States to sue for the cancellation of a certificate of decree of naturalization that has been obtained by fraud is probably coextensive with the right now accorded the United States to sue for the cancellation of patents that have been fraudulently procured."

In a later decision, however, *U. S. v. Gleason*, 78 Fed. Rep. 396, a bill for relief against such a judgment, which charged that it was procured by fraudulent representations as to the period of residence in the United States, was not entertained. The court, *per* Wheeler, J., after referring to the conclusive effect of decisions on matters of personal status, said: "Thayer, J., in *U. S. v. Norsch*, 42 Fed. Rep. 417 (much relied upon in behalf of the plaintiff) seems to treat the liability of a judgment of naturalization to be set aside for fraud like a patent as conceded, and to have considered only the

power of courts of the United States to set aside such judgments of state courts, and to intimate that the relief would be accomplished by setting aside the certificate or by injunction against exercising the right. Such would seem to be the only modes of relief, if any could be granted, for technically no court not authorized by law to review a judgment could directly set it aside. *Barrow v. Hunton*, 99 U. S. 80. And a court of equity can affect a judgment only by decree to prevent carrying it out or enforcing it. 2 Story Eq., § 885. The surrender of the certificate, which is only evidence of the judgment, would not affect the citizenship established by the judgment; and an injunction which could only run against further exercise of the rights of citizenship would not affect past acts."

And see the same doubt as to the power of a court to set aside the judgment of naturalization expressed in *Com. v. Paper*, 1 Brews. (Pa.) 263. See also *Esker v. McCoy*, 6 Am. L. Rec. (Ohio) 694, 5 Ohio Dec. (Reprint) 573.

2. *Mills v. McCabe*, 44 Ill. 194. But see *Com. v. Sheriff*, 1 Brews. (Pa.) 183.

The Executive Department of the United States government has refused protection abroad to one whose naturalization was obtained by fraudulent statements as to his length of residence in the United States. *Raymond v. Raymond*, 83 Fed. Rep. 721.

3. *Matter of Palmer*, 21 N. Y. App. Div. 180, affirmed 154 N. Y. 776.

The Amount of Fees in naturalization cases which may be charged by prothonotaries outside the city of Philadelphia, was considered in *Naturalization Fee*, 15 Pa. Co. Ct. Rep. 225.

and the practice of considering the fees as emoluments has existed for a long period of time.¹

V. STATUTORY CRIMES. — The opportunity for fraud and false swearing which obtains in such *ex parte* proceedings, and in the use of naturalization certificates, has been guarded against by acts of Congress which attach severe penalties for their violation.²

Alleging Fraud. — The acts which constitute the fraud must be alleged in the indictment, general statements that fraud was perpetrated being insufficient.³

1. U. S. v. Hill, 120 U. S. 169; *In re Moy Chee Kee*, 13 Sawy. (U. S.) 123.

2. **Jurisdiction of Courts.** — It was decided in *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 358, that state courts in matters relating to naturalization act as United States courts, and that perjury committed in the course of the proceedings is punishable only in the courts of the United States. *Contra*, *Rump v. Com.*, 30 Pa. St. 475; *State v. Whittemore*, 50 N. H. 245, where the court said: "False swearing in a state court, if allowed to go unpunished, has a tendency to impair the general usefulness of the tribunal and the dignity of the state. If it is to be optional with the prosecuting officers of the general government whether perjury in a state court is to be punished, we have the extraordinary spectacle of a state unable to punish an offense committed in its own courts. It would certainly seem almost as proper that the state courts should have power to punish a witness who has testified falsely before them in a naturalization case, as that they should have the power to punish contempt of court committed during the pendency of such a case." See also *State v. Kirkpatrick*, 32 Ark. 117.

Parties Defendant. — An indictment for false swearing, under Rev. Stat. U. S., § 5424, will lie against a witness who testifies that a minor applicant for naturalization under section 2167 has resided in the United States the requisite length of time. *U. S. v. Lehman*, 39 Fed. Rep. 49.

That such an indictment will not lie against the applicant himself, whether the application is made under section 2165 or 2167, see *U. S. v. Grottkau*, 30 Fed. Rep. 672, cited in *U. S. v. Bell*, 81 Fed. Rep. 852. Also *U. S. v. Lehman*, 39 Fed. Rep. 49.

Joinder of Offenses. — The false swearing defined in Rev. Stat. U. S., § 5392, as perjury, is punishable as a felony, and a count therefor may be properly joined with counts under sections 5425 and 5427 which relate to fraud in naturalization proceedings. *U. S. v. Lehman*, 39 Fed. Rep. 768.

3. *U. S. v. Lehman*, 39 Fed. Rep. 768, where the court said: "If the fraud consisted in making a false oath or statement whereby the court was deceived, the indictment ought to say so, and aver what the statement was. It will not do to say that the fraud in the procurement of the certificate of citizenship consisted in the fact that a person obtained citizen's papers who was not legally entitled to them, but that the means by which they were so obtained is unknown, because the means resorted to (the acts done to obtain the certificate) are the very things which the law requires to be alleged and proven; and furthermore, the certificate, although unlawfully issued, may not have been issued under such circumstances as amounted to a fraud."

False Swearing. — An indictment under Rev. Stat. U. S., § 5395, which punishes false swearing in naturalization proceedings, but in which the crime is not denominated perjury, is good if it states facts constituting an offense under that section and concludes "contrary to the form of the statutes," although it describes the crime as perjury. *U. S. v. Lehman*, 39 Fed. Rep. 768.

Such an indictment need not aver that the deputy clerk of the state court who administered the oath taken was duly appointed, or that he was authorized to administer the oath. *U. S. v. Lehman*, 39 Fed. Rep. 49.

It is not necessary to allege that the oath taken was "required" by the naturalization laws. It is sufficient to

Unlawful Use of Certificate. — An affidavit for a complaint for unlawfully using a certificate of citizenship, knowing that such certificate had been unlawfully issued or made, and the warrant issued upon such affidavit, must set out facts which show the unlawful use. General statements alone do not show probable cause.¹

allege that it was "authorized." (U. S.) 406, in which case the proceedings were under Rev. Stat. U. S.,
U. S. v. Lehman, 39 Fed. Rep. 49.
1. Matter of Coleman, 15 Blatchf. § 5426.

NAVIGABLE WATERS.

See article *WATERS AND WATERCOURSES*.

NAVIGATION.

See article *SHIPPING*.

NECESSARY PARTIES.

See article *PARTIES*.

NE EXEAT.

By ARCHIBALD C. BOYD.

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Use of the Writ in a Bill for Divorce and Alimony, see article *ALIMONY*, vol. 1, p. 440.
Use of the Writ in Other Proceedings, consult the General Index to this work.

I. HISTORY AND NATURE OF WRIT. — The writ of *ne exeat regno* was originally a high prerogative writ issued for political or state purposes, to forbid, as its name implies, the departure of a subject from the realm.¹

Date of Origin. — The time of the first use of the writ is not certain.² From the fact that King John in Magna Charta granted to all subjects unlimited freedom to go from and return to the kingdom, some writers assign the period between John and Edward I. as the probable time of its introduction.³

A Common-law Prerogative. — According to another view, the right to the writ was one of the prerogatives of the crown at common law.⁴

When First Used to Aid Chancery. — The time when the writ was first diverted from its office as an instrument of the crown to aid chancery in the administration of remedial justice is also a matter of speculation. The first application seems to have occurred in the reign of Queen Elizabeth.⁵ In the reign of James I. this use

1. Daniell's Ch. Pr. (6th Am. ed.) 1698; Story Eq. Jur., § 1467; 1 Black. Com. 137, 266; Beames on Ne Exeat 1; McGee v. McGee, 8 Ga. 295; Samuel v. Wiley, 50 N. H. 353; Forrest v. Forrest, 10 Barb. (N. Y.) 46; Cable v. Alvord, 27 Ohio St. 654; Jackson v. Petrie, 10 Ves. Jr. 164; Flack v. Holm, 1 Jac. & W. 406; Exp. Brunker, 3 P. Wms. 312; Anonymous, 1 Atk. 521.

2. 2 Story Eq. Jur., § 1465; Beames on Ne Exeat 1; Bushnell v. Bushnell, 15 Barb. (N. Y.) 399.

Time of Introduction. — Fleta and Brit-

ton mention a proceeding similar in its nature and objects. Fleta 383, §§ 1, 2; Britton, c. 122, cited in Beames on Ne Exeat 4, 5.

The Statute 5 Rich. II., c. 2, §§ 6, 7. prohibited all persons from departing the realm excepting lords, great men, merchants, and soldiers. Beames on Ne Exeat 6.

3. 2 Story Eq. Jur., § 1465.

4. Fitz. Nat. Brev. 85; Co. Inst. 54; Com. Dig., title Chancery, 4 B; 1 Black. Com. 137, 266.

5. Beames on Ne Exeat 16; 2 Story

of the writ had become so common as to be the subject of one of Lord Chancellor Bacon's ordinances.¹

Its Use in United States. — In several of the United States the writ has been abolished, either in direct terms or by judicial construction, being considered as contrary to the spirit of American institutions.²

As a Means of Obtaining Equitable Bail. — In the states where it is in use it is treated as a writ of right,³ is resorted to merely for the purpose of obtaining equitable bail,⁴ and is governed by the same principles that apply to the writ as used in *England*.⁵

II. DEFINITION OF MODERN WRIT. — A writ of ne exeat is a writ issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain amount conditioned that

Eq. Jur., § 1467; *Bushnell v. Bushnell*, 15 Barb. (N. Y.) 399.

1. Beames' Ord. in Chan., p. 39, ord. 89; Beames on Ne Exeat 16, 17. See also *Ex p. Brunker*, 3 P. Wms. 313, note L.

2. In *Arkansas* the writ is abolished. Sand. & Hill Stat. 1894, § 5614.

In *California* it has been held that the writ is not included among the proceedings by which a person can be arrested in a civil action. *Ex p. Harker*, 49 Cal. 465.

In *Kentucky*, *Pennsylvania*, and *Vermont* any restraint on emigration is forbidden by the constitution. Ky. Const., § 24; Pa. Const. 1873, art. 1, § 26; Vt. Const., c. 1, art. 19.

In *New York* the act to abolish imprisonment for debt was held not to have deprived the court of chancery of the power to issue a writ of ne exeat in cases of equitable cognizance, where such writ would have been allowed previous to the passage of the act. *Ashworth v. Wrigley*, 1 Paige (N. Y.) 301; *Brown v. Haff*, 5 Paige (N. Y.) 235; *Bushnell v. Bushnell*, 15 Barb. (N. Y.) 399.

Code Civ. Pro., § 548, abolished the writ and provided that no arrest should be made in civil actions or special proceedings except as prescribed by statute. *Boucicault v. Boucicault*, 59 How. Pr. (N. Y. Supreme Ct.) 131; *Collins v. Collins*, 80 N. Y. 24; *Johnston v. Johnston*, 25 How. Pr. (N. Y. Super. Ct.) 181.

In *Ohio* it has been held that the writ is abolished in all civil actions. *Cable v. Alvord*, 27 Ohio St. 654.

3. 2 Story Eq. Jur., § 1469; *Rice v. Hale*, 5 Cush. (Mass.) 238; *Samuel v. Wiley*, 50 N. H. 353; *Gleason v. Bisby*, Clarke Ch. (N. Y.) 551; *Gibert v. Colt*, Hopk. (N. Y.) 406; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46; *People v. Barton*, 16 Colo. 75. See also Act Cong. March 2, 1793, c. 22, § 5.

4. 2 Story Eq. Jur., § 1470. *Arkansas*. — *Gresham v. Peterson*, 25 Ark. 377.

Illinois. — *Malcolm v. Andrews*, 68 Ill. 101.

Maryland. — *Cox v. Scott*, 5 Har. & J. (Md.) 384; *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463.

New Hampshire. — *Samuel v. Wiley*, 50 N. H. 353.

New York. — *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; *Brown v. Haff*, 5 Paige (N. Y.) 235; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 441; *De Rivaflinoli v. Corsetti*, 4 Paige (N. Y.) 264; *Neville v. Neville*, 22 How. Pr. (N. Y. Supreme Ct.) 500; *Johnston v. Johnston*, 25 How. Pr. (N. Y.) 181; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46.

South Carolina. — *Ex p. Dawson*, McMull. Eq. (S. Car.) 405.

Vermont. — *Adams v. Whitcomb*, 46 Vt. 708.

Virginia. — *Rhodes v. Cousins*, 6 Rand. (Va.) 191.

Wisconsin. — *Dean v. Smith*, 23 Wis. 483.

5. 2 Story Eq. Jur., § 1469; *Rice v. Hale*, 5 Cush. (Mass.) 238; *Bailey v. Cadwell*, 51 Mich. 217; *Samuel v. Wiley*, 50 N. H. 353.

he will not leave the state without leave of the court, and for want of such bail that he (the sheriff) do commit the defendant to prison.¹

III. JURISDICTION TO ISSUE — *Dependent upon Statute.* — The courts out of which writs of ne exeat may issue are usually designated by statute.²

IV. THE APPLICATION — **1. Mode of Application** — *Motion or Petition.* — The application for a writ of ne exeat may be made by motion or petition supported by an affidavit, or the writ may be prayed for in the bill.³

2. Time of Application. — The writ may be applied for at any stage of the proceedings in equity after the filing of the bill,⁴ and

1. Bouv. Law Dict., title *Ne Exeat Republica*.

A Mesne Process Issuing from Chancery. — "The writ of ne exeat, as at present used in this country, is a mesne process issuing from the court of chancery to hold a party to equitable bail, that he may not depart from the realm or the jurisdiction of the court, but be present with his body to answer any decree which the court of chancery may make in the case against him, and commanding the arrest and imprisonment of the defendant if he or she fails to furnish such bail." *Per* Ross, J., in *Adams v. Whitcomb*, 46 Vt. 708.

Not a Mere Provisional Remedy. — The writ of ne exeat is not a mere provisional remedy in the sense that it can be issued only pending the suit and must expire with the rendition of judgment. Its issuance may be provided for in the final decree, and it will continue in force until dissolved by the court or until the decree is satisfied. *Lewis v. Shainwald*, 48 Fed. Rep. 492.

2. See the statutes of the several states; Rev. Stat. U. S., § 717, and Act Cong. March 2, 1793, c. 22, § 5.

In *Colorado*, District Courts, under the provisions of the statute (Gen. Stat., § 1604) authorizing such courts to make all orders necessary to compel a guardian to account, may issue a writ of ne exeat to protect the rights of the ward. The jurisdiction of County Courts in guardianship matters is not exclusive. *People v. Barton*, 16 Colo. 75.

In *Georgia* writs of ne exeat must be granted by a judge of the Superior Court (Code, § 247, par. 2), except in cases of emergency (Code, § 3231). *Bleyer v. Blum*, 70 Ga. 558.

In *Illinois* masters in chancery are vested, by statute, with authority to order the issuing of writs of ne exeat,

in the absence or inability of the judge to act. *Bassett v. Bratton*, 86 Ill. 152.

In *Michigan* ne exeat is not issuable by a Circuit Court commissioner or injunction master as a matter of interlocutory chancery practice. *Bailey v. Cadwell*, 51 Mich. 217.

In *New York* a writ of ne exeat cannot be regularly issued without the special allowance and order of a justice of the Supreme Court. *Viadero v. Viadero*, 7 Hun (N. Y.) 313.

Federal District Judges. — The district judges of the courts of the United States have no authority to issue writs of ne exeat. *Gernon v. Boecaline*, 2 Wash. (U. S.) 130. But see *Lewis v. Shainwald*, 48 Fed. Rep. 492.

3. *Beames on Ne Exeat* 62; *Daniell's Ch. Pr.* (6th Am. ed.) 1706; *People v. Barton*, 16 Colo. 75; *Bassett v. Bratton*, 86 Ill. 152; *Bayly v. Bayly*, 2 Md. Ch. 326; *Samuel v. Wiley*, 50 N. H. 353; *Dunham v. Jackson*, 1 Paige (N. Y.) 629; *Lewis v. Shainwald*, 48 Fed. Rep. 492; *Collinson v. —*, 18 Ves. Jr. 353; *Moore v. Hudson*, 6 Madd. 218.

Parties to Application. — A complaint for a writ of ne exeat may be had against one party to a promissory note, without joining as plaintiff or defendant another who is jointly liable with such party. *Fitzgerald v. Gray*, 59 Ind. 254.

4. *Samuel v. Wiley*, 50 N. H. 353; *Dunham v. Jackson*, 1 Paige (N. Y.) 629; *Mattocks v. Tremain*, 3 Johns. Ch. (N. Y.) 75; *Georgia Lumber Co. v. Bissell*, 9 Paige (N. Y.) 225; *Neville v. Neville*, 22 How. Pr. (N. Y. Supreme Ct.) 500; *Lewis v. Shainwald*, 48 Fed. Rep. 492; *Ex p. Bruncker*, 3 P. Wms. 312; *Collinson v. —*, 18 Ves. Jr. 353. And see *Bassett v. Bratton*, 86 Ill. 152.

Before Filing Bill. — In *Hughes v. —* Volume XIV.

may even be granted after decree.¹

Promptness Essential. — The application should, however, be made as promptly as possible.²

3. Notice of Application. — No notice of application for the writ is required, as the very purpose of the writ might thereby be defeated.³

4. Amendment of Application. — The petition for a writ of ne exeat may be amended.⁴

5. Presence of Defendant Within State. — **It Is Not Necessary** that the defendant should be actually in the state when application is made for the writ.⁵

Ryan, Beat. 327, it was held that the writ was improperly issued on an affidavit sworn to the day previous to the filing of the bill. To the same effect is *Bylandt v. Bylandt*, 6 N. J. Eq. 28. But see *Clark v. Clark*, 51 N. J. Eq. 404, where it was held that the writ might issue on affidavits made before any suit was pending in court.

Contemporaneously with Service of Summons. — In *Bushnell v. Bushnell*, 7 How. Pr. (N. Y. Supreme Ct.) 389, it was held that where the writ was issued and served with the summons it was sufficient; that it was not necessary to file the complaint first. And see *Bleyer v. Blum*, 70 Ga. 558.

1. *Lewis v. Shainwald*, 7 Sawy. (U. S.) 403; *Moore v. Hudson*, 6 Madd. 218; *Collinson v. —*, 18 Ves. Jr. 353; *Elliot v. Sinclair*, 1 Jac. 545; *Stewart v. Stewart*, 1 B. & B. 73.

2. *Jackson v. Petrie*, 10 Ves. Jr. 164; *Dick v. Swinton*, 1 Ves. & B. 371.

3. *Bleyer v. Blum*, 70 Ga. 558, wherein it is said: "The very purpose of the writ of ne exeat would be defeated if it issued upon notice to the defendant; hence, the application is made by an *ex parte* motion, and may be made before service of a copy of the bill; the reason of which is that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction." *Citing 2 Daniell's Ch. Pr.* (6th Am. ed.) 1706. See also *Samuel v. Wiley*, 50 N. H. 353; *Collinson v. —*, 18 Ves. Jr. 353; *Moore v. Hudson*, 6 Madd. 218; *Elliot v. Sinclair*, 1 Jac. 545.

4. *Fisher v. Stone*, 4 Ill. 70, wherein there was an omission of an allegation of a removal of his property by the defendant, and it was held that the omission amounted at most to a defective

statement of the complaint, which, upon demurrer being put in, could be supplied by an amendment of the bill. See also *Bassett v. Bratton*, 86 Ill. 152; *Viadero v. Viadero*, 7 Hun (N. Y.) 313; *Louderback v. Rosengrant*, 4 Ind. 563.

Amendment of Undertaking. — The undertaking which the *Indiana* statute (2 Rev. Stat. 1876, p. 275, § 665) requires to be filed in a proceeding for a writ of ne exeat may be amended by filing a new undertaking. *Fitzgerald v. Gray*, 59 Ind. 254.

5. *Parker v. Parker*, 12 N. J. Eq. 105, wherein it was said: "Is it necessary that the defendant should be actually in the state when application is made for the writ? If he is a resident of the state, and is absent only temporarily, when the writ is granted, there certainly can be no irregularity in granting it during such absence. * * * The object of the writ is to secure his presence to answer such decree as may be made against him, and the propriety of the ne exeat arises from the fact of his absenting himself from the state to avoid the jurisdiction of the court. It is of no effect unless it can be served upon him, and it must be served upon him while he is in the state. It is said the affidavits must show that he intends quickly to depart out of the state; and it is asked, how can he entertain an intention to depart unless he is actually in the state? But he may contemplate coming into the state, concealing himself while here, and then to depart quickly, to avoid the service of process upon him. I think a ne exeat under such circumstances would not be irregularly issued. It is true that the statute requires that there shall be satisfactory proof to the chancellor that the defendant designs quickly to depart out of the state. I think a person may have this

V. THE AFFIDAVIT — 1. By Whom Made — Any One Conversant with Facts. — The affidavit in support of the application for the writ should be made by the complainant or some person conversant with the facts.¹

2. Necessary Allegations — a. CERTAINTY AS TO DEBT. — The affidavit should contain positive allegations that there is an equitable debt due, certain in amount;² except in cases of account, where it is sufficient if the affiant swears to the amount to the

design without actually being in the state at the time. He may design to come quickly and to depart quickly."

1. *McGee v. McGee*, 8 Ga. 295; *Cable v. Alvord*, 27 Ohio St. 666; *Dawson v. Dawson*, 7 Ves. Jr. 173.

By Stranger. — In *Collinson v. —*, 18 Ves. Jr. 353, the affidavit was by a third person as to the party's intent to go abroad. The lord chancellor said that the circumstance that the party had not made the affidavit was immaterial.

Affidavit by Wife. — The affidavit of a wife suing for divorce is sufficient foundation for the issuance of the writ. *Bayly v. Bayly*, 2 Md. Ch. 326; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Forrest v. Forrest*, 5 How. Pr. (N. Y. Supreme Ct.) 125; *Boucicault v. Boucicault*, 59 How. Pr. (N. Y. Supreme Ct.) 131. But see *Sedgwick v. Walkins*, 1 Ves. Jr. 49.

Affidavit in Behalf of Lunatic. — In case of lunacy the affidavit may be made by the lunatic's committee. *Stewart v. Graham*, 19 Ves. Jr. 313.

Affidavit by Agent. — An agent may verify the application for a ne exeat, provided he can, of his own knowledge, state the facts as positively and distinctly as is required of the complainant himself. *Orme v. McPherson*, 36 Ga. 571.

2. *Jackson v. Petrie*, 10 Ves. Jr. 164, wherein Lord Eldon says: "The affidavit must be as positive as to the equitable debt as an affidavit of a legal debt to hold to bail."

And see the following cases, wherein the doctrine finds support:

Alabama. — *Lucas v. Hickman*, 2 Stew. (Ala.) 111.

Georgia. — *Holliday v. Riodan*, 25 Ga. 629; *Redd v. Wood*, Ga. Dec., pt. II. 174; *Wallace v. Duncan*, 13 Ga. 41.

Maryland. — *Cox v. Scott*, 5 Har. & J. (Md.) 384.

Massachusetts. — *Rice v. Hale*, 5 Cush. (Mass.) 238.

New Jersey. — *Williams v. Williams*, 3 N. J. Eq. 130.

New York. — *Gibert v. Colt*, Hopk. (N. Y.) 500; *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189; *Mattocks v. Tremain*, 3 Johns. Ch. (N. Y.) 75.

Virginia. — *Rhodes v. Cousins*, 6 Rand. (Va.) 188.

United States. — *Gernon v. Boecaline*, 2 Wash. (U. S.) 130.

England. — *Rico v. Gualtier*, 3 Atk. 501; *Darley v. Nicholson*, 1 Dr. & War. 66; *Sherman v. Sherman*, 3 Bro. C. C. 370; *Howden v. Rogers*, 1 Ves. & B. 129; *Collinson v. —*, 18 Ves. Jr. 353.

Belief as to Acts of Others. — Where, on an application for a writ of ne exeat, the bill was verified by the affidavit of the complainant, who swore that the facts stated were true so far as they concerned herself, and so far as they concerned the acts and deeds of others she believed them to be true, and the bill alleged that the defendant had threatened to leave the state, it was held that this was sufficient. *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407.

Against Administrator. — To entitle the heirs at law of an intestate to a writ of ne exeat against the administrator, it is not necessary that the bill should charge that the securities upon the administration are insolvent. *Sheppard v. Blue*, 26 Ga. 117.

Reference to Bill. — It is sufficient, in an affidavit to be used as the basis for a writ of ne exeat, to refer to the facts charged in the bill as showing the grounds of the complainant's demand, without restating them in the affidavit, if the facts so charged are such as entitle the complainant to the writ. *Clayton v. Mitchell*, 1 Del. Ch. 32. See also *Gibert v. Colt*, Hopk. (N. Y.) 500.

Objections to Affidavit. — In an action on a ne exeat bond it is too late to raise an objection to the sufficiency of the affidavit on which the writ was issued. *Blue v. Sheppard*, 28 Ga. 566.

best of his knowledge and belief.¹

b. INTENTION TO DEPART — Affidavit Must Be Positive. — The affidavit should also be positive as to the defendant's intention to go abroad,² or to his threats or declarations to that effect, or to facts evincing it.³

1. *Clayton v. Mitchell*, 1 Del. Ch. 32; *McGehee v. Polk*, 24 Ga. 406; *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189; *Gernon v. Boecaline*, 2 Wash. (U. S.) 130; *Rico v. Gualtier*, 3 Atk. 501; *Roddam v. Hetherington*, 5 Ves. Jr. 91; *Jackson v. Petrie*, 10 Ves. Jr. 164; *Jones v. Sampson*, 8 Ves. Jr. 593; *Howden v. Rogers*, 1 Ves. & B. 129.

Belief as to Amount of Debt. — The plaintiff must swear positively that something is due him, though as to the amount of the debt he may swear as to his belief. *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189; *MacDonough v. Gaynor*, 18 N. J. Eq. 249. And see *Amsinck v. Barklay*, 8 Ves. Jr. 597, where Lord Eldon said that he should, in future, pause upon a general statement of belief as to the balance of an account, unless facts or declarations as to the ground of that belief were given.

2. *Georgia.* — *Orme v. McPherson*, 36 Ga. 571; *Moore v. Gleaton*, 23 Ga. 142; *Blue v. Sheppard*, 28 Ga. 566; *Redd v. Wood*, Ga. Dec., pt. ii. 174; *Bryan v. Ponder*, 23 Ga. 480; *Wallace v. Duncan*, 13 Ga. 41; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201.

Illinois. — *Fisher v. Stone*, 4 Ill. 68.

New Jersey. — *Yule v. Yule*, 10 N. J. Eq. 138; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60.

New York. — *Bushnell v. Bushnell*, 7 How. Pr. (N. Y. Supreme Ct.) 389; *Mattocks v. Tremain*, 3 Johns. Ch. (N. Y.) 75; *Gibert v. Colt*, Hopk. (N. Y.) 500; *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189.

Virginia. — *Rhodes v. Cousins*, 6 Rand. (Va.) 188.

United States. — *Gernon v. Boecaline*, 2 Wash. (U. S.) 130; *Shainwald v. Lewis*, 46 Fed. Rep. 839.

England. — *Etches v. Lance*, 7 Ves. Jr. 417; *Shermam v. Shermam*, 3 Bro. C. C. 370; *Oldham v. Oldham*, 7 Ves. Jr. 410.

Mere Apprehensions of the plaintiff of the defendant's intention to go abroad, or to misuse a trust, are not sufficient to warrant the issuance of the writ. *Shermam v. Shermam*, 3 Bro. C. C. 370; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46; *Woodward v. Schatzell*, 3 Johns. Ch.

(N. Y.) 412; *Lehman v. Logan*, 7 Ired. Eq. (N. Car.) 296. See also *Wallace v. Duncan*, 13 Ga. 41.

Departure Without Leaving Property. —

In *Fisher v. Stone*, 4 Ill. 68, it was held that the petition should allege that the defendant was about to remove from the state without leaving any property behind.

Showing of Fraud. — In *Malcolm v. Andrews*, 68 Ill. 100, it was held that "the plaintiff * * * must show by his petition, by facts stated and circumstances detailed, that the debtor has been guilty of fraud, or that there is a strong presumption of fraud."

Exemption of Property from Execution.

— In *Jones v. Kennicott*, 83 Ill. 484, it was held that a petition for a ne exeat on the ground that the defendant has sold all his property and is about to depart from the state is defective, if it fails to show that the property alleged to have been sold was not exempt from execution. And see *Fitzgerald v. Gray*, 59 Ind. 254, wherein it was held that a complaint alleging that the defendant was indebted to the plaintiff on a promissory note as maker, with another as surety, and that the defendant was about to leave the state without paying or making provision for the payment of the same, taking with him property, etc., subject to execution, with intent to defraud the plaintiff and his surety, was sufficient.

Removal of Property. — Under a statute extending the right to a writ of ne exeat to cases where the property for the forthcoming of which the surety (petitioner) is liable is about to be removed, a petition stating that the petitioners are informed and believe that the property is about to be removed, but not stating the facts which are the grounds of the belief, is insufficient. *Woods v. Symmes*, 25 Ga. 69. To the same effect are *Holliday v. Riodan*, 25 Ga. 629; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201.

3. *Daniell's Ch. Pr.* (6th Am. ed.) 1707.

Georgia. — *Woods v. Symmes*, 25 Ga. 69; *McGee v. McGee*, 8 Ga. 295; *Redd v. Wood*, 2 Ga. Dec., pt. ii. 174; *Bryan*

c. ENDANGERMENT OF DEBT. — The affidavit should also allege that the debt will be endangered by the defendant's going abroad.¹

d. AVOIDING JURISDICTION OF COURT. — The affidavit, however, need not allege that the defendant's purpose in going abroad is to avoid the jurisdiction of the court.²

VI. THE WRIT — 1. Signature and Seal. — The writ should be signed by the clerk and sealed with the seal of the court.³

2. Marking of Writ. — The writ should be marked with the sum for which the defendant is to give security.⁴

3. Service of Writ. — The rules applicable to the service of ordinary process apply to the service of writs of ne exeat.⁵

4. Return of Writ. — The writ should be made returnable to the term at which an ordinary writ is returnable.⁶

VII. BAIL — 1. Amount of Bail — Ascertainment by the Court. — The

v. Ponder, 23 Ga. 480; *Moore v. Gleaton*, 23 Ga. 142; *Orme v. McPherson*, 36 Ga. 571.

New Jersey. — *Yule v. Yule*, 10 N. J. Eq. 138.

Virginia. — *Rhodes v. Cousins*, 6 Rand. (Va.) 188.

England. — *Oldham v. Oldham*, 7 Ves. Jr. 410; *Etches v. Lance*, 7 Ves. Jr. 417; *Amsinck v. Barklay*, 8 Ves. Jr. 597; *Jones v. Alephsin*, 16 Ves. Jr. 470; *Shermam v. Shermam*, 3 Bro. C. C. 370.

1. *McGee v. McGee*, 8 Ga. 295, wherein it was said that "the complainant must not only show that the demand will be endangered by the defendant's going abroad, but must charge positively that the defendant is going out of the state or that he has said so." See also *Mattocks v. Tremain*, 3 Johns. Ch. (N. Y.) 75; *Etches v. Lance*, 7 Ves. Jr. 417.

2. *Yule v. Yule*, 10 N. J. Eq. 138, wherein it was said: "The sufficiency of the affidavit is further objected to because it does not allege that the defendant is about leaving the state to avoid the jurisdiction of the court. In *Etches v. Lance*, 7 Ves. Jr. 417, the lord chancellor asks the question, 'Must not something more positive be sworn as to the facts of his going abroad, or declaration; and ought not the affidavit to state that he is going to avoid the jurisdiction of the court?' But such an allegation is not necessary, if the facts stated show that the defendant's departure will defeat the complainant's claim, or that he is leaving the state for that purpose. *Boehm v. Wood*, 1 T. & R. 344; *Atkinson v. Leonard*, 3 Bro. C. C. 218. In *Tom-*

linson v. Harrison, 8 Ves. Jr. 32, the lord chancellor expressed some doubt whether the affidavit was sufficient, not alleging that the defendant was going abroad to avoid the demand. But upon being reminded by Mr. Leach (*amicus curia*) of the search for precedents when the question was asked by Lord Eldon, and the result of that investigation, the order was made." See also *Stewart v. Graham*, 19 Ves. Jr. 313; *King v. Huntley*, 2 Hawaiian 457.

3. *Bonesteel v. Bonesteel*, 28 Wis. 245, wherein it was held that a writ signed by the judge in chambers was void. See also *Viadero v. Viadero*, 7 Hun (N. Y.) 313.

4. *Gibert v. Colt*, Hopk. (N. Y.) 500; *Harris v. Hardy*, 3 Hill (N. Y.) 393; *Viadero v. Viadero*, 7 Hun (N. Y.) 313. See also *infra*, VII. 1. *Amount of Bail.*

Presumption as to Marking. — A ne exeat should be marked by the officer issuing it, at the time, with the sum in which the defendant is to be held to bail; but where it is marked by the clerk it will be presumed to have been so marked in pursuance of a fiat of the proper officer. *Gleason v. Bisby*, Clarke Ch. (N. Y.) 551.

5. *Jewett v. Bowman*, 27 N. J. Eq. 275, wherein it was held that the service of a writ of ne exeat on Sunday was void, and that a bond given on issuing a writ so served should be cancelled. And see generally article SUMMONS AND PROCESS.

6. *Crocker v. Dunkin*, 6 Blackf. (Ind.) 535; *Fitzgerald v. Gray*, 61 Ind. 109. And see generally article SUMMONS AND PROCESS.

sum in which the defendant is to be held to bail, upon a writ of ne exeat, is determined by the court,¹ and the sheriff must take a bond in the sum so determined, without any addition.²

2. Condition of Bond — Not to Depart Beyond Court's Jurisdiction. — The bond given by the defendant to secure his release after being taken on a ne exeat should be conditioned that he will not go beyond the jurisdiction of the court without its permission.³

3. Leave of Absence. — By consent of parties, leave of absence may be granted to a defendant who has given bail upon a ne exeat.⁴

VIII. DISCHARGE OF WRIT — 1. Mode of Application — Motion. — Application for the discharge of the writ may be made by motion.⁵

1. Gibert v. Colt, Hopk. (N. Y.) 500; Viadero v. Viadero, 7 Hun (N. Y.) 313; Harris v. Hardy, 3 Hill (N. Y.) 393; Gleason v. Bisby, Clarke Ch. (N. Y.) 551.

Amount of Bail. — In fixing the amount of security to be given by the defendant in a writ of ne exeat, the court will exercise a sound discretion. *Denton v. Denton, 1 Johns. Ch. (N. Y.) 441; McGee v. McGee, 8 Ga. 295.* But the sum should be sufficient to cover the debt, costs, and interest. *Gibert v. Colt, Hopk. (N. Y.) 500; McNamara v. Dwyer, 7 Paige (N. Y.) 239; Gleason v. Bisby, Clarke Ch. (N. Y.) 551.*

2. Gibert v. Colt, Hopk. (N. Y.) 500.

3. Basket v. Scott, 5 Litt. (Ky.) 208; Haberstro v. Bedford, 43 Hun (N. Y.) 201; Union Dist. Com'rs v. Phillips, 2 Hill L. (S. Car.) 631. And see Lewis v. Shainwald, 7 Sawy. (U. S.) 403.

Unauthorized Condition. — In *Burnsides v. Blythe, 11 B. Mon. (Ky.) 6*, it was held that no obligation should be imposed but that which the law requires.

Bond in Alternative. — Act Ga. 1830 (Cobb 527), allowed a bond given on the issuance of a writ of ne exeat to run in the alternative, that the defendant should not go beyond the seas, or that he should pay the eventual condemnation money. *McGehee v. Polk, 24 Ga. 406; McGee v. McGee, 8 Ga. 295.*

Validity of Bond. — A bond given on a writ of ne exeat conditioned that the obligor "appear at the court of Common Pleas to be holden at Union Court House * * * on the fourth Monday in June next [when no court was to sit] to answer to S. in a bill in equity," etc. (a subject over which the court had no jurisdiction), was held to be void. *Darby v. Hunt, 3 Brev. (S. Car.) 541.*

Discharge of Sureties. — A ne exeat bond only binds the sureties to the extent of the final decree of the court; and if the defendant continually remains in the district, according to the condition of the bond, the sureties will be discharged. *Zantzinger v. Weightman, 2 Cranch (C. C.) 478.*

4. Dupont v. Goffe, 1 Desaus. (S. Car.) 143, where, on motion of the defendant with the consent of the plaintiff, the defendant was given leave of absence for one month, but without prejudice to the party complainant on the bail bond.

5. 2 Daniell's Ch. Pr. (6th Am. ed.) 1712; Miller v. Miller, 1 N. J. Eq. 386; Cowdin v. Cram, 3 Edw. Ch. (N. Y.) 231; O'Connor v. Debraine, 3 Edw. Ch. (N. Y.) 230; Allen v. Hyde, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 197; Pratt v. Wells, 1 Barb. (N. Y.) 425.

In *Iowa* the filing of an answer is the basis of a motion to set aside a writ of ne exeat, and no affidavit is necessary to predicate a motion for that purpose. *Fitch v. Richardson, 1 Morr. (Iowa) 245.*

In *Massachusetts* the Supreme Court may discharge the defendant from custody under a writ of ne exeat, in the same manner as if he were a poor debtor committed in execution. *Rice v. Hale, 5 Cush. (Mass.) 238.*

Estoppel to Move to Discharge. — Giving the usual security to the sheriff to abide the decree does not preclude the defendant from applying for a discharge of the writ and the giving up and canceling of the bond. *Jesup v. Hill, 7 Paige (N. Y.) 95; Allen v. Hyde, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 197.*

But where the defendant had been arrested on a ne exeat and had given the usual bail to the sheriff on such arrest, and afterwards, by an agreement with the complainant, the ne

2. Notice of Application — Cancellation of Bond. — If security has been given, the notice of the motion should state that application will be made as well for the discharge of the writ as that the bond may be given up and canceled.¹

3. Time of Application. — A motion to discharge a writ of ne exeat should be seasonably made or the application will be refused.²

4. Grounds of Discharge — a. PAYMENT INTO COURT OR GIVING SECURITY. — Upon payment of the amount of the complainant's claim into court,³ or upon giving security to abide the decree, the writ will be discharged as of course.⁴

exeat was discharged on the defendant's executing the usual bond to answer the bill and abide the decree, it was held that as the defendant had not, in his agreement, reserved the right of questioning the propriety of issuing the ne exeat, he was precluded from moving that the bond be given up and cancelled on the ground that the ne exeat was improvidently issued. *Jesup v. Hill*, 7 Paige (N. Y.) 95.

Collateral Inquiry. — On an application to vacate a writ of ne exeat on the ground that the defendant had taken the benefit of an insolvent act, the court will not look into suggested fraud and informality in obtaining the discharge under such act. *O'Connor v. Debraine*, 3 Edw. Ch. (N. Y.) 230.

1. 2 Daniell's Ch. Pr. (6th Am. ed.) 1712.

2. *Miller v. Miller*, 1 N. J. Eq. 386, where an application made after the cause was noticed for final hearing was refused.

Application Before Answer. — One in custody under a ne exeat may, before answer, apply for a discharge. *Cary v. Cary*, 39 N. J. Eq. 3 [*disapproving* *MacDonough v. Gaynor*, 18 N. J. Eq. 249]; *Parker v. Parker*, 12 N. J. Eq. 105; *Cowdin v. Cram*, 3 Edw. Ch. (N. Y.) 231; *Smith's Ch. Pr.* 551; *Grant v. Grant*, 3 Russ. 598.

3. *Evans v. Evans*, 1 Ves. Jr. 96; *Dick v. Swinton*, 1 Ves. & B. 371; *Stewart v. Graham*, 19 Ves. Jr. 313.

Discharge Under Nonimprisonment Act. — Where a defendant in a bill for an account has been discharged under the nonimprisonment act, a writ of ne exeat against him will be discharged though a certiorari has been allowed for the purpose of reviewing the discharge under the nonimprisonment act. *Ashworth v. Wrigley*, 1 Paige (N. Y.) 301.

Taking Benefit of Prison Bounds Act. — The bail of one who has been arrested by virtue of a writ of ne exeat is not discharged because he had taken the benefit of the Prison Bounds Act and assigned his whole estate in another case in which he had been held to bail. *Ex p. Dawson*, McMull. Eq. (S. Car.) 405.

Pendency of Another Action. — The pendency of an action in the United States Circuit Court, sitting within the state, on a judgment of the state court in which the defendant has been held to bail, is a sufficient ground for discharging a ne exeat issued in a suit on the same judgment in the court of chancery, unless the complainant elects to release the defendant from arrest in the former action on his entering an appearance or filing common bail. *Mitchell v. Bunch*, 2 Paige (N. Y.) 606.

4. *Maryland.* — *Cox v. Scott*, 5 Har. & J. (Md.) 384.

New Hampshire. — *Samuel v. Wiley*, 50 N. H. 353.

New Jersey. — *Parker v. Parker*, 12 N. J. Eq. 105; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60.

New York. — *Woodward v. Schatzell*, 3 Johns. Ch. (N. Y.) 412; *Gleason v. Bisby*, Clarke Ch. (N. Y.) 551; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239; *Georgia Lumber Co. v. Bissell*, 9 Paige (N. Y.) 225; *Jesup v. Hill*, 7 Paige (N. Y.) 95; *Ellingwood v. Stevenson*, 4 Sandf. Ch. (N. Y.) 366.

Rhode Island. — *Griswold's Petition*, 13 R. I. 125.

England. — *Baker v. Dumaresque*, 2 Atk. 66; *Ferningham v. Glass*, 3 Atk. 409; *Howden v. Rogers*, 1 Ves. & B. 129; *Atkinson v. Leonard*, 3 Bro. C. C. 218.

In *Georgia* the defendant in a ne exeat may be relieved by giving a

b. DENIAL OF DEBT OR INTENTION TO DEPART. — The Defendant's Unsupported Affidavit denying the debt or an intention to depart is not sufficient to discharge a writ of ne exeat.¹

c. ISSUANCE FOR GREATER SUM THAN DUE. — A writ of ne exeat will not be discharged because issued for a greater sum than is due. In such case the court will order the sum reduced.²

IX. ACTION ON BOND — 1. Pleading — Breaches of the Bond. — The declaration, in an action on a bond given to procure the issuance of a writ of ne exeat, should merely allege the breaches of the bond.³

2. Damages. — The damages recoverable in an action on a ne exeat bond are only such as naturally result from the issuing of the writ and can be measured by a pecuniary standard.⁴

bond in double the value of the claim (Code, § 3228), but the court cannot impose other conditions to relief. *Bleyer v. Blum*, 70 Ga. 558.

Security to Perform Decree. — On discharging a writ of ne exeat the court may, in its discretion, require the respondent to give security to perform the decree. *Griswold's Petition*, 13 R. I. 125; *MacDonough v. Gaynor*, 18 N. J. Eq. 249.

1. *Conyers v. Gray*, 67 Ga. 329; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60; *Myer v. Myer*, 25 N. J. Eq. 28; *Glenton v. Clover*, 10 Abb. Pr. (N. Y. Supreme Ct.) 422; *Breck v. Smith*, 54 Barb. (N. Y.) 212; *Hammond v. Hammond*, Clarke Ch. (N. Y.) 151; *Amsinck v. Barklay*, 8 Ves. Jr. 594; *Boehm v. Wood*, 1 T. & R. 332.

Prima Facie Showing. — But if from the affidavit of the plaintiff and the answer of the defendant a strong *prima facie* case is made that nothing is due, the writ will be discharged. *Leo v. Lambert*, 3 Russ. 417. And see *Bayly v. Bayly*, 2 Md. Ch. 326, where it was held that where the writ issues upon the naked unsupported oath of the complainant it should be discharged upon the counter oath of the defendant.

2. *Grant v. Grant*, 3 Russ. 598.

3. *Burnap v. Wight*, 14 Ill. 301,

where it was held that a declaration, in an action on a ne exeat bond, alleging that the suit was not prosecuted with effect, that the plaintiff was deprived of the use of his labor for a specified time, and that he necessarily incurred expense in defending the suit, in procuring his release from arrest, and in supporting himself while in custody was good, and was not vitiated by allegations claiming damages for injuries to the plaintiff's business and credit. And see generally article BONDS vol. 3, p. 645 *et seq.*

Objections to Affidavit. — In an action on a ne exeat bond it is too late to raise an objection to the sufficiency of the affidavit on which the writ was issued. *Blue v. Sheppard*, 28 Ga. 566.

Effect of Appeal. — The perfecting of an appeal in a ne exeat proceeding may be ground for a temporary suspension of the action of the recognizance taken therein, but is not ground of abatement. *Fitzgerald v. Gray*, 61 Ind. 109.

4. *Burnap v. Wight*, 14 Ill. 301, wherein it was held that damages for suing out the writ maliciously and without probable cause could not be recovered in an action on the bond, but only in an action for malicious prosecution or false imprisonment.

NEGATIVE PREGNANT.

See article *ANSWERS IN CODE PLEADING*, vol. 1, p. 796,
and see the General Index to this work.

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CROSS-REFERENCES

- As to *Contributory Negligence*, see article *CONTRIBUTORY NEGLIGENCE*, vol. 5, p. 1.
- Damages Caused by Negligence*, see article *DAMAGES*, vol. 6, p. 700.
- Negligence at Crossing*, see article *CROSSINGS*, vol. 6, p. 688.
- Negligence Causing Death or Personal Injuries*, see article *DEATH BY WRONGFUL ACT*, vol. 6, p. 848 ; *PERSONAL INJURIES*.
- Negligence in Care, Disposition, or Use of Property or Instrumentality*, see articles *BRIDGES*, vol. 3, p. 701 ; *FERRIES*, vol. 8, p. 920 ; *FIRES*, vol. 9, p. 1 ; *GAS AND GAS COMPANIES*, vol. 9, p. 878 ; *LOGS AND LUMBER*, vol. 13, p. 333 ; *RAILROADS* ; *SHIPPING* ; *STREETS AND HIGHWAYS* ; *WATER AND WATER-COURSES*.
- Negligence of Parties Occupying Special Relations*, see articles *ATTORNEYS*, vol. 3, p. 104 ; *BANKS AND BANKING*, vol. 3, p. 251 ; *CARRIERS*, vol. 3, p. 812 ; *DRUGGISTS*, vol. 7, p. 226 ; *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650 ; *FACTORS AND BROKERS*, vol. 8, p. 828 ; *FERRIES*, vol. 8, p. 920 ; *GUARDIANS*, vol. 9, p. 886 ; *INNS AND INNKEEPERS*, vol. 10, p. 1130 ; *LANDLORD AND TENANT*, vol. 12, p. 842 ; *MASTER AND SERVANT*, vol. 13, p. 891 ; *OFFICE AND OFFICER* ; *PARENT AND CHILD* ; *PHYSI-*

CIANS AND SURGEONS; PLEDGES; PRINCIPAL AND AGENT; SHERIFFS AND CONSTABLES; TELEGRAPHS AND TELEPHONES; TRUSTS AND TRUSTEES; WAREHOUSES.

As to *Negligence of Municipal Corporations*, see article *MUNICIPAL CORPORATIONS*, *ante*, p. 221.

I. SCOPE OF ARTICLE. — This article is limited by the plan of this work to a treatment of questions of pleading and procedure in actions for negligence independent of distinctions peculiar to classes of persons or species of property. Matters relating to actions of negligence in respect of duties incident to particular personal relations, occupations, or employments are excluded, and will be found, as indicated by the cross-references in the next preceding paragraphs and the General Index to this work, in articles dealing specifically with such relations, occupations, or employments. In illustration of the general principles herein treated, however, cases are, of necessity, cited from the class of matter excluded.

II. VENUE OF ACTION. — See article *VENUE*.

III. JOINDER OF CAUSES OF ACTION. — See article *ACTIONS*, vol. I, p. 108.¹

IV. PARTIES TO ACTION. — See article *PARTIES*.

V. THE COMPLAINT OR DECLARATION — 1. **Allegation of Duty** — *a. NECESSITY OF ALLEGATION.* — The complaint or declaration in an action for negligence should allege a duty owing the plaintiff by the defendant,² or state facts from which the law will

1. **Joinder of Causes.** — Where, by means of the same negligent act, injuries are inflicted on the plaintiff, his wife, and his minor child, all the injuries constitute but a single cause of action and may be united in a single paragraph of a complaint. *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297.

Where, in a count charging several acts of negligence, each act is stated separately and not disjunctively, and each averment contains a substantive cause of action, the count is not demurrable. *Louisville, etc., R. Co. v. Mothershed*, 97 Ala. 261, in which case the court observed: "The distinction must be kept in mind where a single count contains several distinct, independent averments, each presenting a substantive cause of action, and a count containing several averments, all entering into as a part of and contributing to make up but one cause of action. As to the former, proof of either will authorize a recovery, whereas in the latter case it is necessary to prove all the averments which, accord-

ing to the pleadings, constitute the negligence." *Distinguishing Highland Ave., etc., R. Co. v. Dusenberry*, 94 Ala. 413.

2. *Alabama.* — *Ensley R. Co. v. Chewing*, 93 Ala. 24.

Indiana. — *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221; *Indianapolis v. Emmelman*, 108 Ind. 530; *Thiele v. McManus*, 3 Ind. App. 132; *Louisville, etc., Consol. R. Co. v. Hicks*, 11 Ind. App. 588.

Iowa. — *Ross v. Clinton*, 46 Iowa 606.

Maryland. — *Maenner v. Carroll*, 46 Md. 193.

Michigan. — *Flint, etc., R. Co. v. Stark*, 38 Mich. 714; *Fox v. Spring Lake Iron Co.*, 89 Mich. 387; *Addison v. Lake Shore, etc., R. Co.*, 48 Mich. 155; *Thompson v. Flint, etc., R. Co.*, 57 Mich. 300; *Schindler v. Milwaukee, etc., R. Co.*, 77 Mich. 136.

New York. — *Splitdorf v. State*, 108 N. Y. 205; *Nicholson v. Erie R. Co.*, 41 N. Y. 529.

West Virginia. — *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661.

imply the duty.¹

6. SUFFICIENCY OF ALLEGATION. — A General Averment that it was the defendant's duty to do the thing alleged to have been omitted is insufficient; the facts or circumstances from which the law will imply the duty should be stated.²

2. Allegation as to Breach of Duty — a. NECESSITY OF ALLEGATION. — The complaint or declaration in an action for negligence should allege a breach or a negligent performance of the duty owing the plaintiff by the defendant.³

Particular Duty. — In *Norwich v. Breed*, 30 Conn. 535, the defendant made an excavation on his own land near the street and removed a fence which had stood between his land and the street. In the night a person got off the sidewalk and fell into the hole. Damages were recovered of the city, which sued for indemnity. It was held that it was not necessary, in consequence of the allegation in the declaration of a general duty on the part of the city to protect the sidewalk by a railing, to allege a particular duty on the part of the defendant to erect the railing in this instance, but that the general allegation of the defendant's negligence in leaving the excavation exposed and the subjection of the city to damages in consequence was sufficient.

Objection for Want of Allegation. — A failure to aver in a declaration in a negligence case that it was the duty of the defendant to have exercised due care in those respects wherein his acts are charged to have been negligent may be taken advantage of by special demurrer, but not after verdict. *Fox v. Spring Lake Iron Co.*, 89 Mich. 387.

1. *West Chicago St. R. Co. v. Coit*, 50 Ill. App. 640; *Angus v. Lee*, 40 Ill. App. 304; *Gibson v. Leonard*, 37 Ill. App. 344; *Ward v. Chicago, etc.*, R. Co., 61 Ill. App. 530; *Ayers v. Chicago*, 111 Ill. 406; *West Chicago St. R. Co. v. James*, 69 Ill. App. 609; *Louisville, etc., Canal Co. v. Murphy*, 9 Bush (Ky.) 522; *Geveke v. Grand Rapids, etc.*, R. Co., 57 Mich. 589; *Brennan v. Lachat*, (City Ct.) 5 N. Y. St. Rep. 882; *Seymour v. Maddox*, 16 Q. B. 326, 71 E. C. L. 326.

In *Marvin Safe Co. v. Ward*, 46 N. J. L. 19, it was said that the sufficiency of the pleading is to be determined on the facts from which the legal duty is deduced.

2. *Funk v. Piper*, 50 Ill. App. 163; *Angus v. Lee*, 40 Ill. App. 304; *Jeffer-*

sonville, etc., R. Co. *v. Dunlap*, 29 Ind. 426; *Buffalo v. Holloway*, 7 N. Y. 493; *Taylor v. Atlantic Mut. Ins. Co.*, 2 Bosw. (N. Y.) 106; *Kennedy v. Morgan*, 57 Vt. 46; *Priestley v. Fowler*, 3 M. & W. 1.

In What Respect Defendant Was Negligent. — In *Gautret v. Egerton*, L. R. 2 C. P. 371, Willes, J., said that a declaration in an action for negligence "ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others."

Duty Resulting from Relation. — In *Smith v. Tripp*, 13 R. I. 152, it was said that "it is not enough to state a relation from which the duty may arise under certain circumstances, but, unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated."

The Allegation of Duty Is Superfluous where the facts stated show a legal liability, and it is useless where they do not. *Brown v. Mallett*, 5 C. B. 599, 57 E. C. L. 599.

3. *Ensley R. Co. v. Chewning*, 93 Ala. 24; *East St. Louis Connecting R. Co. v. Wabash, etc.*, R. Co., 123 Ill. 594; *Ward v. Chicago, etc.*, R. Co., 61 Ill. App. 530; *Thiele v. McManus*, 3 Ind. App. 132; *Louisville, etc., Consol. R. Co. v. Hicks*, 11 Ind. App. 588; *Indianapolis, etc., R. Co. v. Brucey*, 21 Ind. 215; *Terre Haute, etc.*, R. Co. *v. Smith*, 19 Ind. 42; *Sweeney v. Old Colony, etc.*, R. Co., 10 Allen (Mass.) 368; *Flint, etc.*, R. Co. *v. Stark*, 38 Mich. 714; *Pomroy v. Granger*, 18 R. I. 624; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661.

Certainty to a Common Intent is all that is required in the declaration, and this is attained, in actions of trespass

b. STATEMENT OF ACTS CONSTITUTING NEGLIGENCE—(1) *Necessity to Aver Specific Acts.*—The rule is well-nigh universal that, in an action for negligence, the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence.¹

on the case for negligence, when the neglect of duty relied on, and resultant injury, are described with substantial accuracy." *Per* Champlin, J., in *Merkle v. Bennington*, 68 Mich. 133. And see *Mayton v. Texas*, etc., R. Co., 63 Tex. 77.

Substantial Elements of Cause of Action.

—A declaration is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given. *Poling v. Ohio River R. Co.*, 38 W. Va. 645. To the same effect is *Clarke v. Ohio River R. Co.*, 39 W. Va. 732.

Manner in Which Breach of Duty Caused Injury.—A complaint alleging a breach of duty and consequent injury is good though it does not show in what way the alleged breach of duty caused the injury. *Johnson v. St. Paul*, etc., R. Co., 31 Minn. 283.

Negligent Permission of Act.—A declaration in an action against a city for damages caused by the bursting of a cannon in a public street, alleging that the city knowingly, wrongfully, and negligently did permit, etc., will be construed to mean that the permission charged was the failure of the city to interfere and stop the acts complained of, and not as a positive permission given in advance. *Arms v. Knoxville*, 32 Ill. App. 604. See also *Robinson v. Greenville*, 42 Ohio St. 625.

Complaint Good in Part.—A complaint stating a good cause of action as to certain failures of duty on the part of the defendant is not bad on general demurrer because it attempts, but fails, to state other failures of duty on the part of the defendant. *Drefahl v. Connell*, 85 Wis. 109.

1. *Alabama.*—*Leach v. Bush*, 57 Ala. 145; *Mobile*, etc., R. Co. *v. Crenshaw*, 65 Ala. 566; *Ensley R. Co. v. Chewing*, 93 Ala. 24.

Colorado.—*McGonigle v. Kane*, 20 Colo. 292.

Connecticut.—*Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24.

Illinois.—*Illinois Cent. R. Co. v. Larson*, 42 Ill. App. 264; *Andrew v. Chicago*, etc., R. Co., 45 Ill. App. 269.

Indiana.—*Pittsburg*, etc., R. Co. *v. Welch*, 12 Ind. App. 433; *Ohio*, etc., R. Co. *v. Selby*, 47 Ind. 471; *St. Louis*, etc., R. Co. *v. Mathias*, 50 Ind. 65; *Louisville*, etc., R. Co. *v. Cauley*, 119 Ind. 142; *Louisville*, etc., R. Co. *v. Berkey*, 136 Ind. 181; *Hindman v. Timme*, 8 Ind. App. 416; *Jones v. White*, 90 Ind. 255; *Jeffersonville*, etc., R. Co. *v. Dunlap*, 29 Ind. 426; *Island Coal Co. v. Clemmitt*, (Ind. App. 1898) 49 N. E. Rep. 38; *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433; *Duffy v. Howard*, 77 Ind. 182; *Ohio*, etc., R. Co. *v. Walker*, 113 Ind. 196.

Iowa.—*Scott v. Hogan*, 72 Iowa 614.

Massachusetts.—*Benjamin v. Holyoke St. R. Co.*, 160 Mass. 3.

Michigan.—*Lucas v. Wattles*, 49 Mich. 380.

Minnesota.—*Keating v. Brown*, 30 Minn. 9; *Clark v. Chicago*, etc., R. Co., 28 Minn. 69; *Ekman v. Minneapolis St. R. Co.*, 34 Minn. 24; *Rogers v. Truesdale*, 57 Minn. 126.

Missouri.—*Mack v. St. Louis*, etc., R. Co., 77 Mo. 233; *Schneider v. Missouri Pac. R. Co.*, 75 Mo. 295; *Pope v. Kansas City Cable R. Co.*, 99 Mo. 404.

New York.—*Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89; *Edgerton v. New York*, etc., R. Co., 35 Barb. (N. Y.) 392.

Ohio.—*Davis v. Guarnieri*, 45 Ohio St. 470.

Rhode Island.—*Parker v. Providence*, etc., Steamboat Co., 17 R. I. 376.

Texas.—*San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443; *Rowland v. Murphy*, 66 Tex. 534.

West Virginia.—*Hawker v. Baltimore*, etc., R. Co., 15 W. Va. 628; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661.

Primary Facts.—The declaration need not state the particular facts that are not primary or main facts, but are only evidence of primary facts. *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661.

A General Averment of negligence in the particular act complained of, resulting in damages, is good, at least as against a general demurrer.¹

(2) *Sufficiency of Averments.* — Accordingly, a declaration specifying the act the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice.²

1. *Alabama.* — *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376; *Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171.

California. — *Smith v. Buttner*, 90 Cal. 95; *House v. Meyer*, 100 Cal. 592; *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561.

Indiana. — *Indianapolis, etc., R. Co. v. Keely*, 23 Ind. 133; *Pittsburgh, etc., R. Co. v. Nelson*, 51 Ind. 150; *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47; *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Meidsker v. Pogue*, 1 Ind. App. 197; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; *Del-ler v. Hofferberth*, 127 Ind. 414; *Rushville v. Adams*, 107 Ind. 475; *Lebanon v. McCoy*, 12 Ind. App. 500; *Coal Bluff Min. Co. v. Watts*, 6 Ind. App. 347; *Louisville, etc., Consol. R. Co. v. Hicks*, 11 Ind. App. 588; *Hammond v. Schweitzer*, 112 Ind. 246; *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196.

Iowa. — *Grinde v. M. & St. P. R. Co.*, 42 Iowa 376.

Kentucky. — *Chiles v. Drake*, 2 Metc. (Ky.) 149; *Louisville, etc., R. Co. v. Wolfe*, 80 Ky. 82.

Massachusetts. — *Ware v. Gay*, 11 Pick. (Mass.) 106.

Minnesota. — *McCauley v. Davidson*, 10 Minn. 418.

Missouri. — *Schneider v. Missouri Pac. R. Co.*, 75 Mo. 295; *Dolan v. Moberly*, 17 Mo. App. 436; *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165; *Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617; *Berkley v. Chicago, etc., R. Co.*, (Mo. App. 1886) 3 West. Rep. 765. But see *Waldhier v. Hannibal, etc., R. Co.*, 71 Mo. 514; *Current v. Missouri Pac. R. Co.*, 86 Mo. 62.

Nebraska. — *Omaha, etc., R. Co. v. Wright*, 49 Neb. 456, *overruling* 47 Neb. 886.

New York. — *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310.

Texas. — *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371; *Gulf, etc., R. Co. v. Smith*, 74 Tex. 276; *Gulf, etc., R. Co. v. Montier*, 61 Tex. 122.

Wisconsin. — *Shenners v. West Side St. R. Co.*, 74 Wis. 447.

United States. — *Gulf, etc., R. Co. v. Washington*, 49 Fed. Rep. 347; *Clark v. Chicago, etc., R. Co.*, 15 Fed. Rep. 588.

In Oregon it has been held that a general averment of negligence is insufficient; that the facts from which an inference arises must be pleaded. *Heilner v. Union County*, 7 Oregon 83; *McPherson v. Pacific Bridge Co.*, 20 Oregon 486; *Woodward v. Oregon R., etc., Co.*, 18 Oregon 289.

2. *Alabama.* — *Leach v. Bush*, 57 Ala. 145; *Mobile, etc., R. Co. v. Crenshaw*, 65 Ala. 566; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Alabama, etc., R. Co. v. Waller*, 48 Ala. 459.

Connecticut. — *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24.

Illinois. — *Chicago City R. Co. v. Jennings*, 57 Ill. App. 376.

Indiana. — *Ohio, etc., R. Co. v. Craycraft*, 5 Ind. App. 335; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; *Chicago, etc., R. Co. v. Barnes*, 2 Ind. App. 213; *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385; *Louisville, etc., Consol. R. Co. v. Hicks*, 11 Ind. App. 588; *Ohio, etc., R. Co. v. Engerer*, 4 Ind. App. 261; *Hammond v. Schweitzer*, 112 Ind. 246.

Kentucky. — *Chiles v. Drake*, 2 Metc. (Ky.) 149.

Minnesota. — *Rogers v. Truesdale*, 57 Minn. 126; *Clark v. Chicago, etc., R. Co.*, 28 Minn. 69; *Rolseth v. Smith*, 38 Minn. 14.

Missouri. — *Mack v. St. Louis, etc., R. Co.*, 77 Mo. 232; *Otto v. St. Louis, etc., R. Co.*, 12 Mo. App. 168; *Wills v. Cape Girardeau Southwestern R. Co.*, 44 Mo. App. 51; *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *Crane v. Missouri Pac. R. Co.*, 87 Mo.

Reasonable Degree of Particularity. — But the act done or omitted which constitutes the negligence complained of should be stated with a reasonable degree of particularity.¹

(3) **Want of Knowledge of Facts.** — Particular facts of negligence implied from a negligent act need not be alleged when it is not in the power of the pleader to allege them.²

(4) **Alleging Acts Not Negligent** — **Sufficiency of Some Acts Charged.** — A count in a complaint charging several concurring acts of negligence is not bad because some of the acts charged do not constitute negligence, if the other acts are sufficient to establish a cause of action.³

588; *Senate v. Chicago, etc.*, R. Co., 57 Mo. App. 223.

New York. — *McCarthy v. New York Cent., etc.*, R. Co., (Buffalo Super. Ct.) 6 N. Y. Supp. 560; *Oldfield v. New York, etc.*, R. Co., 14 N. Y. 310; *Campbell v. U. S. Foundry Co.*, 73 Hun (N. Y.) 576.

Tennessee. — *East Tennessee Coal Co. v. Daniel*, (Tenn. 1897) 42 S. W. Rep. 1062.

Texas. — *Galveston, etc.*, R. Co. v. *Croskell*, 6 Tex. Civ. App. 160.

Wisconsin. — *Young v. Lynch*, 66 Wis. 514.

Vagueness and Uncertainty. — "Negligence may be pleaded in general terms. * * * The allegations must not be so general as to culminate in vagueness, and be so uncertain as to admit of almost any kind of proof. If enough be averred to show the existence of a legal duty, and its breach, a very slight designation that the act done or omitted to be done was committed or omitted in the absence of due care is sufficient to support a charge of negligence." *Lotz, J.*, in *Louisville, etc.*, *Consol. R. Co. v. Hicks*, 11 Ind. App. 588.

Allegation of Specific Acts. — But where the plaintiff sets out general allegations of negligence and follows them with a statement of specific acts of negligence, he will be confined to the acts specifically alleged. *Gulf, etc.*, R. Co. v. *Younger*, 10 Tex. Civ. App. 141; *Wallace v. San Antonio, etc.*, R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 865.

1. *Connecticut.* — *Healey v. New Haven*, 47 Conn. 305.

Indiana. — *Coal Bluff Min. Co. v. Watts*, 6 Ind. App. 347; *Holland v. Barch*, 120 Ind. 46; *Deller v. Hofferberth*, 127 Ind. 414.

Michigan. — *Addison v. Lake Shore*

etc., R. Co., 48 Mich. 155; *Shaddock v. Alpine Plank-road Co.*, 79 Mich. 7.

Missouri. — *Gurley v. Missouri Pac. R. Co.*, 93 Mo. 445; *Wills v. Cape Girardeau Southwestern R. Co.*, 44 Mo. App. 51; *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567.

North Carolina. — *Conley v. Richmond, etc.*, R. Co., 100 N. Car. 602.

Texas. — *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155.

2. *Chicago City R. Co. v. Jennings*, 157 Ill. 274; *Cox v. Providence Gas Co.*, 17 R. I. 199; *San Antonio, etc.*, R. Co. v. *Adams*, 6 Tex. Civ. App. 102.

3. *Louisville, etc.*, R. Co. v. *Hall*, 91 Ala. 112. See also *infra*, X. 4. *Proof of All Acts Pleaded.*

Immaterial Charges Harmless. — "I do not understand the authorities to hold that uniting such immaterial charges in a declaration with those that are material and necessary precludes a recovery." *Grant, J.*, in *Thompson v. Toledo, etc.*, R. Co., 91 Mich. 255. But see *Thorsen v. Babcock*, 68 Mich. 523.

Conjunctive Allegations. — A count alleging several acts of negligence conjunctively is not demurrable. *Highland Ave, etc.*, R. Co. v. *Sampson*, 112 Ala. 425; *Kansas City, etc.*, R. Co. v. *Burton*, 97 Ala. 240.

Alternative Allegation. — A complaint alleging negligence on the part of the defendant or one O. is bad. Facts should be averred importing the defendant's liability both for his own and O.'s negligence. *Louisville, etc.*, R. Co. v. *Bouldin*, 110 Ala. 185.

Election Between Counts. — A refusal to require the plaintiff to elect between two counts is not prejudicial error where both counts charge the same negligence. *Shenners v. West Side St. R. Co.*, 74 Wis. 447.

c. **FACT AND MANNER OF NEGLIGENCE.** — A declaration for negligent injury should aver the fact and the manner of negligence.¹

d. **BREACH OF STATUTORY DUTY.** — In an action for the neglect of a statutory duty, the plaintiff must allege that the defendant neglected a duty imposed by statute, that he would not have been injured if the duty had been performed, and that the duty was imposed for his benefit, or was one which the defendant owed to him for his security from the injury.²

3. Allegation that Negligence Was Cause of Injury. — In an action for negligence it must appear from the complaint or declaration, either by direct averment or from the statement of such facts as to raise the presumption, that the injury was the natural and proximate result of the defendant's negligence.³

1. *Marquette, etc., R. Co. v. Marcott*, 41 Mich. 433, wherein it was said that "reason and good sense, as well as law, compel the plaintiff by his declaration in these cases to inform the defendant and the tribunal what the complaint is, and he must not only show that the defendant has been negligent, but must further show in what respect." See also *Louisville, etc., R. Co. v. Case*, 9 Bush (Ky.) 728; *Batterson v. Chicago, etc., R. Co.*, 49 Mich. 184; *Denman v. Johnston*, 85 Mich. 387; *Wilson v. New York, etc., R. Co.*, 18 R. I. 491; *Laporte v. Cook*, 20 R. I. (pt. II.) 12; *Cox v. Providence Gas Co.*, 17 R. I. 199; *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376; *Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155; *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. (Va.) 805; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661; *Hazard Powder Co. v. Volger*, 3 Wyoming 189.

2. *Smith v. Tripp*, 13 R. I. 152.
Omission of Statutory Duty. — Where the negligence charged is the omission to do a duty imposed by statute, it is necessary to allege that the defendant had the means and the opportunity to perform the duty in time to avert the injury. *Weise v. Tate*, 45 Ill. App. 626. But see *Shurtle v. Minneapolis*, 17 Minn. 308.

Setting Forth Statute. — It is not necessary to set out in the complaint a public statute creating the duty the omission of which constituted the negligence complained of. *Brennan v. Lachat*, (C. Pl.) 6 N. Y. St. Rep. 278; *Erie City v. Schwingle*, 22 Pa. St. 384; *Clark v. North Muskegon*, 88 Mich.

308, wherein the court said: "We see no reason for requiring the pleader to expressly refer to the statute. He must make a case bringing the defendant within the liability created by the statute. When this is done the defendant cannot be misled, nor can any doubt exist but that the declaration is framed under the statute."

3. *California.* — *Smith v. Buttner*, 90 Cal. 95.

Florida. — *Savannah, etc., R. Co. v. Geiger*, 21 Fla. 669.

Illinois. — *Strain v. Strain*, 14 Ill. 368; *McGanahan v. East St. Louis, etc., R. Co.*, 72 Ill. 557.

Indiana. — *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Louisville, etc., R. Co. v. Schmidt*, 81 Ind. 264; *McGahan v. Indianapolis Natural Gas Co.*, (Ind. 1894) 37 N. E. Rep. 601; *Island Coal Co. v. Clemmitt*, (Ind. App. 1898) 49 N. E. Rep. 38; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Romona Oolitic Stone Co. v. Johnson*, 6 Ind. App. 550; *Summers v. Tarney*, 123 Ind. 560; *Pittsburgh, etc., R. Co. v. Conn*, 104 Ind. 64; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Indiana, etc., R. Co. v. Adamson*, 90 Ind. 60; *Kistner v. Indianapolis*, 100 Ind. 210; *Alexander v. New Castle*, 115 Ind. 51; *Evansville, etc., R. Co. v. Krapf*, (Ind. 1894) 36 N. E. Rep. 901.

Iowa. — *Poland v. Earhart*, 70 Iowa 285.

Maine. — *Jackson v. Castle*, 82 Me. 579.
Michigan. — *Thompson v. Flint, etc., R. Co.*, 57 Mich. 300.

Minnesota. — *Dugan v. St. Paul, etc., R. Co.*, 40 Minn. 544; *Lee v. Emery*, 10 Minn. 187.

4. Allegation of Negligence in Terms. — It is not necessary to allege that the facts pleaded constitute negligence if the conclusion of negligence can be drawn from them.¹

5. Allegation as to Injuries — Nature of Injuries. — The complaint in an action to recover for personal injuries caused by negligence need not specifically state the nature of the injuries.²

The Actual Fact of Injuries, and their consequences, however, should be alleged.³

6. Allegation as to Place of Accident — Place Should Be Indicated. — The complaint or declaration in an action for injuries resulting

Missouri. — *Palmer v. Missouri Pac. R. Co.*, 76 Mo. 217; *Schultz v. Moon*, 33 Mo. App. 329; *Hudson v. Wabash*, etc., R. Co., 32 Mo. App. 667.

Texas. — *Texas*, etc., R. Co. v. McCoy, 3 Tex. Civ. App. 276; *Miller v. Itasca Cotton Seed Oil Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 366.

Wisconsin. — *Kelly v. Darlington*, 86 Wis. 432.

Wyoming. — *Hazard Powder Co. v. Volger*, 3 Wyoming 189.

Reasonable Certainty Required. — "The complaint, in an action for negligence, must show that the plaintiff's injury was caused or occasioned by the negligence alleged. It is not enough to charge the defendant with a negligent act or omission; it must also be shown with reasonable certainty that such act or omission was the direct or proximate cause of the injury, or the complaint will be bad on demurrer." *Black, J.*, in *Ohio*, etc., R. Co. v. Engerer, 4 Ind. App. 261, citing *Pittsburgh*, etc., R. Co. v. Conn, 104 Ind. 64; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Bluffton Corp. v. Mathews*, 92 Ind. 213.

A General Averment at the Close of the Complaint that the injury was caused by the negligence of the defendant is sufficient to characterize as negligence all that the defendant has done or permitted. *Louisville*, etc., R. Co. v. *Palmer*, 13 Ind. App. 161; *Pittsburgh*, etc., R. Co. v. *Jones*, 86 Ind. 496.

1. *Taylor v. Felsing*, 63 Ill. App. 624; *Knox County v. Montgomery*, 109 Ind. 69; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Louisville*, etc., Consol. R. Co. v. *Hicks*, 11 Ind. App. 588; *Dyer v. Pacific R. Co.*, 34 Mo. 127; *Quick v. Hannibal*, etc., R. Co., 31 Mo. 399; *San Antonio, St. R. Co. v. Calloutte*, 79 Tex. 341; *Clark v. Dyer*, 81 Tex. 339.

Deduction from Facts Alleged. — If the facts pleaded show that the plaintiff's

injury was the proximate result of the defendant's wrong, the plea is sufficient without a direct averment. *Wabash County v. Pearson*, 120 Ind. 426; *Louisville*, etc., R. Co. v. *Thompson*, 107 Ind. 442; *Louisville*, etc., R. Co. v. *Wood*, 113 Ind. 544.

"When the act averred to have been done is of such a character as that, under the circumstances alleged, it was necessarily negligent, it will be so regarded by the court, although it be not designated as negligently done, although it is generally the safer practice to make this allegation directly." *Per Gavin, J.*, in *Blue v. Briggs*, (Ind. 1895) 39 N. E. Rep. 885.

An Averment that the Defendant "Negligently and Carelessly" caused or suffered a street to become and remain obstructed by a pile of lumber sufficiently alleges that the piling of the lumber in the street constituted negligence. *Senhenn v. Evansville*, 140 Ind. 675.

2. *Chicago*, etc., R. Co. v. *Sullivan*, (Ill. 1888) 17 N. E. Rep. 460; *Chicago v. Sheehan*, 113 Ill. 658; *Mitchell v. Clinton*, 99 Mo. 153; *Furbush v. Buchsbaum*, 34 W. N. C. (Pa.) 147. And see generally article DAMAGES, vol. 5, p. 700. See also article PERSONAL INJURIES.

Description of Internal and Invisible Ailments. — In *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220, it is said: "We do not think a declaration in such a case as this should be held to any technicality of construction. The injury which is visible and open to common observation may be described and tested easily, and should be described reasonably. But the internal and invisible ailments which are only inferred from scientific deduction, and on which there is always room for some difference of opinion, cannot be held to so close a rule."

3. *San Antonio*, etc., R. Co. v. *Adams*, 6 Tex. Civ. App. 102.

from negligence should indicate the place where the injuries were received.¹

7. Degree of Negligence — a. NECESSITY OF ALLEGING DEGREE. — The complaint in an action for negligence need not allege the degree of the negligence, as this is a matter of proof.²

b. GROSS NEGLIGENCE. — It is not necessary, therefore, to allege that the negligence complained of was gross,³ even where the right to recover depends on the degree.⁴

8. Wilful Negligence — The Defendant's Intention. — In jurisdictions recognizing the doctrine of wilful negligence the complaint should allege that the defendant had an intent to commit the injury complained of or show that it was done under such circumstances as evinced a reckless disregard for the safety of the plaintiff.⁵

1. *Campbell v. Kalamazoo*, 80 Mich. 655; *Richmond, etc., R. Co. v. Farmer*, 97 Ala. 141.

2. 2 Chitty's Pl. 358, note *c*; *Newman on Pl. & Pr.* 415; *Louisville, etc., R. Co. v. Rains*, 15 Ky. L. Rep. 423; *Louisville, etc., R. Co. v. Mitchell*, 87 Ky. 327; *Richter v. Harper*, 95 Mich. 221; *Keating v. Detroit, etc., R. Co.*, 104 Mich. 418; *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Edgerton v. New York, etc., R. Co.*, 35 Barb. (N. Y.) 389; *Shumacher v. St. Louis, etc., R. Co.*, 39 Fed. Rep. 174. See also *infra*, X. 3. *Degree of Negligence*.

3. *Ramsey v. Louisville, etc., R. Co.*, 89 Ky. 99.

4. *Chicago, etc., R. Co. v. Carter*, 20 Ill. 390; *Chicago, etc., R. Co. v. Mehlsack*, 44 Ill. App. 124; *Nolton v. Western R. Corp.*, 15 N. Y. 444.

Surplusage. — The characterization of an act as having been done "recklessly and wilfully" is mere surplusage. *Moore v. Drayton*, (Supreme Ct.) 40 N. Y. St. Rep. 933. To the same effect are *Highland Ave., etc., R. Co. v. Sampson*, 112 Ala. 425; *McCord v. High*, 24 Iowa 336; *Taylor v. Holman*, 45 Mo. 371; *Panton v. Holland*, 17 Johns. (N. Y.) 92.

5. *Louisville, etc., R. Co. v. Anchors*, 114 Ala. 492; *Birmingham R., etc., Co. v. Bowers*, 110 Ala. 328; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187; *Memphis, etc., R. Co. v. Martin*, (Ala. 1898) 23 So. Rep. 231; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 298; *Louisville, etc., R. Co. v. Ader*, 110 Ind. 376; *Louisville, etc., R. Co. v. Bryan*, 107 Ind. 51; *Belt R., etc., Co. v. Mann*, 107 Ind. 89; *Hanna v. Terre Haute, etc., R. Co.*, 119 Ind. 316; *Jacobs v. Louisville, etc., R. Co.*,

10 Bush (Ky.) 263; *Louisville, etc., Canal Co. v. Murphy*, 9 Bush (Ky.) 522. See also *infra*, X. 3. *Degree of Negligence*.

Conclusions of Law Not Available. — A general charge of wilful negligence, followed by specific facts, will not make a case of wilful injury, unless the specific facts show, as matter of law, that the injury was wilfully inflicted. *Ivens v. Cincinnati R., etc., Co.*, 103 Ind. 27.

Recklessness and Gross Negligence. — An averment that the injury was caused by the recklessness and gross negligence of the defendant does not charge wilful negligence. *Chicago, etc., R. Co. v. Hedges*, 105 Ind. 398; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Cincinnati, etc., R. Co. v. Eaton*, 53 Ind. 307; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286; *McAdoo v. Richmond, etc., R. Co.*, 105 N. Car. 140; *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412; *O'Brien v. Loomis*, 43 Mo. App. 29.

Intentional Omission to Perform Duty. — A complaint alleging the mere intentional omission to perform a duty or the intentional doing of an act contrary to duty, without further averment, does not show that the injury was intentionally or wantonly inflicted. *Memphis, etc., R. Co. v. Martin*, (Ala. 1898) 23 So. Rep. 231.

Acts Done Purposely, Wilfully, and Recklessly. — A paragraph of a complaint alleging that the agents and servants of the defendant, intending to injure the plaintiff, purposely, wilfully, and recklessly ran and managed a locomotive so as to cause it to make loud and unusual noises, and thus

9. Dangerous or Defective Premises — a. ALLEGATION AS TO RIGHT TO BE ON PREMISES — Plaintiff Must Negative Trespass. — The complaint in an action for injuries caused by the defective condition of the defendant's premises should allege by what right the plaintiff was on the premises.¹

b. ALLEGATION AS TO OWNERSHIP OR POSSESSION — Allegation in Terms Unnecessary. — The complaint, in an action for injuries caused by the defective condition of premises, need not specifically allege the defendant's dominion or control over the premises, if the fact of such dominion or control can be gathered from it.²

frighten the plaintiff's horse, is good as a paragraph charging wilfulness. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82. See also *Georgia Pac. R. Co. v. Ross*, 100 Ala. 490.

1. *Mathews v. Bensel*, 51 N. J. L. 30; *South Bend Iron Works v. Larger*, 11 Ind. App. 367; *Thiele v. McManus*, 3 Ind. App. 132; *Maenner v. Carroll*, 46 Md. 193; *Hounsell v. Smyth*, 7 C. B. N. S. 731, 97 E. C. L. 731.

"Lawfully" on Premises. — An allegation that the plaintiff was "lawfully" on the premises is sufficient to show that he was not a trespasser, but will not show that he was there with greater right than that of a mere licensee. *Mathews v. Bensel*, 51 N. J. L. 30.

Must Allege Invitation as Duty Owed. — In an action against a warehouseman for injuries caused by his negligence in leaving an elevator shaft in the warehouse unguarded, a complaint which fails to state that the plaintiff was on the premises by the defendant's invitation, or that the defendant owed him any duty, is insufficient. *South Bend Iron Works v. Larger*, 11 Ind. App. 367.

That Plaintiff Belonged to Class Invited — California. — A complaint alleging that the plaintiff was at the place where the injury occurred, on business with and at the invitation of the defendant, is sufficient to show the duty on the part of the defendant as between the parties to keep the premises in a safe condition. *Schmidt v. Bauer*, 80 Cal. 565.

Indiana. — A complaint which states that the defendant invited the public to visit the building where the injury occurred, for the purpose of trade, and that the plaintiff while properly and necessarily in said building fell through a hatchway located in that part of the building used as a walkway, and where the customers of the

defendant would and naturally did go in trading, but which fails to show that the plaintiff was one of the class of persons so invited to visit the premises, is insufficient. *Thiele v. McManus*, 3 Ind. App. 132.

In an action against a railroad company for injuries to the plaintiff's horse received while being used in loading timber on the defendant's cars, an allegation that the place where the horse was injured was the usual and customary place of loading timber imports an implied invitation from the defendant to load there. *Chicago, etc., Coal R. Co. v. De Baum*, 2 Ind. App. 281.

Mississippi. — A declaration alleging that the defendants "were the owners of and had the management and control of a certain vessel," that the plaintiff "was then and there at work upon the vessel as a laborer, * * * shoveling coal" and "discharging the cargo," and that he "was then and there in the employ of one White, a stevedore then doing the work of discharging the said cargo of said vessel," will be taken to mean, on general demurrer, that the stevedore was doing the defendants' work and discharging the cargo in the course of business, and that he and the plaintiff were lawfully there in pursuance of an arrangement of some kind between the defendants and the stevedore. *Coughlin v. Boston Tow-Boat Co.*, 151 Miss. 92.

Alder by Verdict. — The failure of a declaration to allege that the plaintiff, injured while at work on the defendant's premises, was there by the defendant's procurement, is cured by verdict. *Barnum, etc., Mfg. Co. v. Wagner*, 64 Ill. App. 375.

2. *Mackey v. Vicksburg*, 64 Miss. 777.

Negligent Management of Race Track. — A declaration in an action against

c. ALLEGATION THAT PREMISES WERE UNGUARDED. — The complaint in an action for injuries caused by the dangerous condition of the defendant's premises, due to the premises being unguarded, should allege that the premises were not properly guarded at the time of the injuries.¹

d. ALLEGATION AS TO CHARACTER OF DEFECT — Whether Latent or Patent. — The complaint in an action for injuries caused by the defective condition of the defendant's premises should allege the character of the defect, whether latent or patent.²

e. KNOWLEDGE OF DEFECTIVE CONDITION. — In an action for injuries caused by the defective condition of the defendant's premises, the complaint need not allege that the plaintiff did not know of the defective condition, or that it was known to the defendant.³

10. Negligent Performance of Contract. — A complaint for negligence in doing work under a contract need not set out the contract.⁴

11. Negating Contributory Negligence. — See article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 1.

12. Prayer for Relief. — In a complaint for damages resulting from a tort committed by the defendant, an averment that such tort is "to the damage of the plaintiff" in a specified sum is a sufficient prayer for relief.⁵

13. Making Definite and Certain. — A complaint containing but a general allegation of negligence is subject to a motion requiring

the owner of a race track for injuries to a spectator at a race, caused by a runaway horse, is bad without an allegation that the horse which caused the injury was under the defendant's control. *Hart v. Washington Park Club*, 157 Ill. 9.

1. *Cotter v. Lindgren*, 106 Cal. 602; *Cowan v. Muskegon R. Co.*, 84 Mich. 583.

That Well Was Left Open. — A complaint which alleges the defendant's ownership and possession of a certain lot, that through the carelessness and negligence of the defendant a well therein was left open, and that the plaintiff, without negligence, carelessness, or fault on his part, fell into said well and was injured, states a cause of action. *Holt v. Spokane, etc., R. Co.*, (Idaho 1893) 35 Pac. Rep. 39.

Unguarded Excavation. — A complaint alleging that the defendant made an excavation between certain streets which were public highways, and negligently permitted it to be without guards, and that the plaintiff, passing along one of said streets, fell into the excavation and was injured, is good as

against a demurrer. *Rathburn v. Burlington, etc., R. Co.*, 16 Neb. 441.

Proximity of Excavation to Sidewalk. — In an action for negligence in leaving an unguarded opening by the sidewalk in erecting a building on the abutting lot, the declaration should allege that such opening was so near the sidewalk as to be dangerous to people walking there. *Thamm v. Lahey*, 59 Ill. App. 73.

Unprotected Opening in Floor. — A declaration alleging that there were holes in a floor; that the floor was negligently covered with paper; that one of the holes was unprotected by a covering, and that the plaintiff stepped upon the paper over a hole, broke through, and was injured, states no cause of action. *Eilenberger v. Nelson*, 64 Ill. App. 277.

2. *Smith v. Buttner*, 90 Cal. 95.

3. *James v. Emmet Min. Co.*, 55 Mich. 335; *Knaresborough v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 446.

4. *Fender v. Mason Wrecking Co.*, 28 W. N. C. (Pa.) 93.

5. *Louisville, etc., R. Co. v. Smith*, 58 Ind. 575.

it to be made more definite and certain as to the negligence charged.¹

VI. THE DEMURRER — 1. When Lies — Negligence Alleged in General Terms. — A demurrer for want of facts will not lie to a complaint alleging negligence in general terms, the defendant's remedy in such case being a motion to make the complaint more definite and certain.²

Uncertainty as to Time. — So an objection that the complaint, in an action for negligence, is not sufficiently specific as to time cannot be reached by demurrer. Such objection should be made by motion to make more specific.³

2. Sufficiency of Demurrer — Pointing Out Defects in Complaint. — A demurrer for want of facts to a complaint in an action for negligence is sufficient if it indicates that the defects in the complaint consist in the failure to allege what in law constitutes negligence.⁴

VII. THE PLEA OR ANSWER — 1. In General — Particularity. — In an action for negligence, it is not essential that the plea, to be good on demurrer, should specify with any great degree of particularity the elements entering into the defense.⁵

1. *Cincinnati, etc., R. Co. v. Chester*, 57 Ind. 297; *Hawley v. Williams*, 90 Ind. 160; *Pittsburgh, etc., R. Co. v. Kitley*, 118 Ind. 152; *Cleveland, etc., R. Co. v. Wynant*, 119 Ind. 539; *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526; *Jones v. White*, 90 Ind. 255; *Atchison, etc., R. Co. v. O'Neill*, 49 Kan. 367; *Young v. Lynch*, 66 Wis. 514. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

Failure to State Name, Nature, or Character. — A complaint alleging the delivery to the plaintiff by the defendant of clothing impregnated with disease is subject to a motion requiring it to be made more definite and certain by allegations showing the name, nature, character, or other description of the disease. *Hattermann v. Siemann*, 1 N. Y. App. Div. 486.

Remedy by Application for Bill of Particulars. — In *New York* a complaint alleging injuries by being hit by some object thrown from the premises of the defendant by an explosion of gas thereon, which explosion was caused by the negligence of the defendant, is not subject to a motion requiring it to be made more definite and certain, the defendant's remedy being an application for an order requiring the plaintiff to furnish a bill of particulars. *Jackman v. Lord*, 56 Hun (N. Y.) 192.

2. *Hobson v. New Mexico, etc., R. Co.*, (Arizona 1886) 11 Pac. Rep. 545; *Jones v. White*, 90 Ind. 255; *Ohio, etc.,*

R. Co. v. Walker, 113 Ind. 196; *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261; *Louisville, etc., R. Co. v. Krinning*, 87 Ind. 351; *Louisville, etc., R. Co. v. Harrigan*, 94 Ind. 245; *Evansville v. Worthington*, 97 Ind. 282; *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526; *Louisville, etc., R. Co. v. Jones*, 108 Ind. 551; *Chicago, etc., R. Co. v. Summers*, 113 Ind. 10; *Pittsburgh, etc., R. Co. v. Hixon*, 110 Ind. 225; *Rushville v. Adams*, 107 Ind. 475; *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Fitts v. Waldeck*, 51 Wis. 567. See also *supra*, V. 13. *Making Definite and Certain*.

3. *Louisville, etc., R. Co. v. Shanklin*, 94 Ind. 297.

Particularity as to Place. — An objection to a complaint, in an action for injuries from negligence, that it does not point out the place of the accident with sufficient particularity, may be taken by demurrer. *Campbell v. Kalamazoo*, 80 Mich. 655.

4. *Conley v. Richmond, etc., R. Co.*, 109 N. Car. 692, where it was held that a demurrer alleging that "the negligence complained of is not sufficiently and legally set out" was sufficient. And see generally article DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, p. 292.

5. *Deller v. Hofferberth*, 127 Ind. 414, wherein the court said: "If the adverse party desires a more particular state-

2. General Denial and Contributory Negligence — Consistent Defenses. — In actions for negligence, a general denial is not inconsistent with a plea of contributory negligence on the part of the plaintiff. Accordingly, the defendant may set up both pleas.¹

3. Making Definite and Certain. — An answer, in an action for negligence, may be subject to a motion requiring it to be made more definite and certain.²

VIII. BILLS OF PARTICULARS. — See article BILLS OF PARTICULARS, vol. 3, p. 550.

IX. AMENDMENTS OF PLEADINGS. — See article AMENDMENTS, vol. 1, p. 458.

X. PLEADING AND PROOF — 1. Conformity of Proof to Pleadings — a. IN GENERAL — Prevalence of Familiar Rule. — In actions for negligence, as in other actions, the proofs must conform to the pleadings.³ Accordingly, recovery cannot be had on proof of other

ment, a motion is the appropriate method of procedure." And see generally article ANSWERS IN CODE PLEADING, vol. 1, p. 777.

1. *Wright v. Cincinnati, etc., R. Co.*, 94 Ky. 114; *Weingartner v. Louisville, etc., R. Co.*, (Ky. 1897) 42 S. W. Rep. 839. And see article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 10.

Contra — Indiana. — In *Plymouth v. Fields*, 125 Ind. 323, the answer contained a general denial and a plea alleging that the plaintiff was guilty of contributory negligence. The court said: "The plaintiff having averred that the injury occurred through the negligence of the defendant, without any fault on his part, the only appropriate answer was a denial. The defendant could not confess and avoid. In actions sounding in tort, where the defendant seeks to show that the plaintiff waived some right to which he would otherwise have been entitled, or that he released the defendant from the performance of some duty which would otherwise have been incumbent upon him, by purposely taking the risk on himself, an affirmative answer setting up the waiver or the assumption of the risk may be proper. The answer in the present case was not of that character." It should be noted that in Indiana the complaint must negative contributory negligence. See article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 4.

Setting Out Pleas in Separate Paragraphs. — In *Cincinnati, etc., R. Co. v. Wright*, 11 Ky. L. Rep. 234, it was held that, though the defendant may both traverse and plead contributory negligence, yet as the defenses are distinct

and different, they should be set out in separate paragraphs.

2. *McQuade v. Chicago, etc., R. Co.*, 68 Wis. 616, wherein an answer setting up contributory negligence on the part of the plaintiff was held to be subject to a motion requiring it to state in what particulars the plaintiff was negligent. And see generally article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

3. *Georgia.* — *Hill v. Callahan*, 82 Ga. 109.

Illinois. — *Wabash Western R. Co. v. Friedman*, 146 Ill. 583; *Chicago, etc., R. Co. v. Dickson*, 143 Ill. 368; *Chicago, etc., R. Co. v. Bell*, 112 Ill. 360; *Chicago, etc., R. Co. v. Fitzgerald*, 40 Ill. App. 476; *Stearns v. Reidy*, 135 Ill. 119; *Chicago, etc., R. Co. v. Hawk*, 42 Ill. App. 322; *Springfield City R. Co. v. De Camp*, 11 Ill. App. 475; *Toledo, etc., R. Co. v. Foss*, 88 Ill. 551; *Wabash, etc., R. Co. v. Coble*, 113 Ill. 115.

Iowa. — *Armstrong v. Ackley*, 71 Iowa 76; *Manuel v. Chicago, etc., R. Co.*, 56 Iowa 655; *Carter v. Kansas City, etc., R. Co.*, 65 Iowa 287; *Miller v. Chicago, etc., R. Co.*, 66 Iowa 364.

Kansas. — *Southern Kansas R. Co. v. Griffith*, 54 Kan. 428; *Cherokee, etc., Coal, etc., Co. v. Wilson*, 47 Kan. 460.

Maine. — *Goodwin v. Hersom*, 65 Me. 223.

Michigan. — *Pennington v. Detroit, etc., R. Co.*, 90 Mich. 505; *Cowan v. Muskegon R. Co.*, 84 Mich. 583; *Wilkinson v. Detroit Steel, etc., Works*, 73 Mich. 405; *Ashman v. Flint, etc., R. Co.*, 90 Mich. 567; *Batterson v. Chi-*

acts of negligence than the specific acts alleged in the complaint.¹

b. IN RESPECT OF INJURIES. — So, too, the proof of the injuries resulting from the negligence complained of must conform to the allegations in respect thereto in the complaint.²

- cago, etc., R. Co., 49 Mich. 184; Mitchell v. Prange, 110 Mich. 78.
- Mississippi.* — Lepnick v. Gaddis, (Miss. 1895) 18 So. Rep. 319.
- Missouri.* — Gurley v. Missouri Pac. R. Co., 93 Mo. 445; Conway v. Hannibal, etc., R. Co., 24 Mo. App. 235; Lee v. St. Louis Hame Mfg. Co., 6 Mo. App. 578; Waldhier v. Hannibal, etc., R. Co., 71 Mo. 514; Harty v. St. Louis, etc., R. Co., 95 Mo. 368; Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258.
- Nebraska.* — Elliott v. Carter White-Lead Co., (Neb. 1898) 73 N. W. Rep. 948.
- New York.* — Davis v. New York, etc., R. Co., 20 Abb. N. Cas. (Buffalo Super. Ct.) 230.
- Oregon.* — Knahtla v. Oregon Short Line, etc., R. Co., 21 Oregon 136.
- Tennessee.* — East Tennessee Coal Co. v. Daniel, (Tenn. 1897) 42 S. W. Rep. 1062.
- Texas.* — Houston City St. R. Co. v. Farrell, (Tex. Civ. App. 1894) 27 S. W. Rep. 942.
- Vermont.* — Derragon v. Rutland, 58 Vt. 128.
- England.* — Mayor v. Humphries, 1 C. & P. 251, 11 E. C. L. 379.
1. *Arizona.* — Santa Fe, etc., R. Co. v. Hurley, (Arizona 1894) 36 Pac. Rep. 216.
- Georgia.* — Georgia R., etc., Co. v. Oaks, 52 Ga. 410.
- Illinois.* — Chicago, etc., R. Co. v. Fitzgerald, 40 Ill. App. 476; Stearns v. Reidy, 135 Ill. 119; Chicago, etc., R. Co. v. Hawk, 36 Ill. App. 327; Chicago, etc., R. Co. v. Rayburn, 153 Ill. 290; Chicago, etc., R. Co. v. Lammert, 12 Ill. App. 408; Toledo, etc., R. Co. v. Foss, 88 Ill. 551; Straight v. Odell, 13 Ill. App. 232.
- Iowa.* — Carter v. Kansas City, etc., R. Co., 65 Iowa 287; Miller v. Chicago, etc., R. Co., 66 Iowa 364.
- Kansas.* — Telle v. Leavenworth Rapid Transit R. Co., 50 Kan. 455; Atchison, etc., R. Co. v. Irwin, 35 Kan. 286; Southern Kansas R. Co. v. Griffith, 54 Kan. 428; Atchison, etc., R. Co. v. Owens, 6 Kan. App. 515.
- Kentucky.* — McKain v. Louisville, etc., R. Co., (Ky. 1892) 18 S. W. Rep. 537.
- Michigan.* — Schindler v. Milwaukee, etc., R. Co., 77 Mich. 136; Batterson v. Chicago, etc., R. Co., 49 Mich. 185.
- Missouri.* — Conway v. Hannibal, etc., R. Co., 24 Mo. App. 235; Ely v. St. Louis, etc., R. Co., 77 Mo. 34; Gurley v. Missouri Pac. R. Co., 93 Mo. 445.
- Nebraska.* — Chicago, etc., R. Co. v. Grablin, 38 Neb. 90; Elliott v. Carter White-Lead Co., (Neb. 1898) 73 N. W. Rep. 948; Omaha, etc., R. Co. v. Wright, 49 Neb. 456.
- Oregon.* — Woodward v. Oregon R., etc., Co., 18 Oregon 289.
- Texas.* — Houston City St. R. Co. v. Farrell, (Tex. Civ. App. 1894) 27 S. W. Rep. 942; Galveston, etc., R. Co. v. Herring, (Tex. Civ. App. 1896) 36 S. W. Rep. 129.
- West Virginia.* — Snyder v. Wheeling Electrical Co., 43 W. Va. 661.
- Proof of Negligence Not Alleged.** — Where the petition charges that the plaintiff, who was attempting to make a crossing, was caught between two cars standing on the defendant's side track, by reason of its carelessness and negligence in driving and forcing its cars together, a recovery cannot be had for negligence of the defendant in leaving cars standing on the track without securing them. Gurley v. Missouri Pac. R. Co., 93 Mo. 445.
- Variance as to the Thing Which Was Defective.** — Where an action against a railroad is grounded on an alleged defect in the construction of the engine, the plaintiff cannot recover for an injury resulting from a defect in the track. Buffington v. Atlantic, etc., R. Co., 64 Mo. 246.
- Variance as to the Defendant's Omission.** — Where the specific negligence alleged was the failure of the defendant to stop at a station long enough for the plaintiff to alight, the plaintiff could not recover on proof that the injuries for which he sued were sustained by reason of the defendant's failure to keep the platform lighted. Price v. St. Louis, etc., R. Co., 72 Mo. 414.
2. Ehr Gott v. New York, 96 N. Y. 264; Shaddock v. Alpine Plank-road Co., 79 Mich. 7; Illinois Cent. R. Co. v. Sidons, 53 Ill. App. 607. See also article DAMAGES, vol. 5, p. 700.

2. Proof Admissible under General Denial — *a. EXERCISE OF CARE.* — Under a general denial in an action for negligence the defendant may prove acts tending to show the exercise of care on his part.¹

b. AFFIRMATIVE DEFENSE — Proof Inadmissible. — In actions for negligence, an affirmative defense cannot be shown under a general denial, but must be pleaded.²

c. NEGLIGENCE OF THIRD PERSON — Evidence Admissible. — Under a general denial in an action for negligence the defendant may show that the act complained of was done by a third person for whose negligence he was not liable.³

d. CONTRIBUTORY NEGLIGENCE. — See article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 10.⁴

3. Degree of Negligence — *a. IN GENERAL — Any Degree May Be Shown.* — Under a general averment of negligence, proof of any degree of negligence is competent.⁵

Broken Limb. — A declaration alleging that the plaintiff's arm was cut, sprained, bruised, wounded, and injured authorizes proof that the arm was broken. *Thompson v. Quincy*, 83 Mich. 173.

Bodily Injury in General. — A complaint alleging bodily injury, sickness, soreness, and disability is sufficient to authorize proof of any bodily injury resulting from the negligence complained of. *Ehrgott v. New York*, 96 N. Y. 264.

Spinal Injuries and Urinary Disorders. — Under a declaration alleging that the plaintiff was "permanently injured in her spine, stomach, and internally," she may be allowed to show, not as an independent element of injury, but as evidence of injury to the spine, a urinary difficulty as the result of her injuries. *Finn v. Adrian*, 93 Mich. 504.

Injury to Sexual Organs. — And under an averment that a woman was grievously wounded internally, evidence is admissible to show injury to the sexual organs such as to produce permanent sterility or incapacity for the marriage relation. *Lake Shore, etc., R. Co. v. Ward*, 135 Ill. 511.

Fracture and Strain of Particular Parts. — A declaration alleging that the plaintiff was hurt, bruised, and wounded will not admit proof of fractures of the shoulder or strain of the hips producing pain and permanent injury. *Shadock v. Alpine Plank-road Co.*, 79 Mich. 7.

1. *Kendig v. Overhulser*, 58 Iowa 195; *Louisville, etc., R. Co. v. Davis*, 91 Ala. 487.

Insufficiency of Declaration under Statute. — An objection that a declaration in an action for negligent injury fails to refer to the statute by virtue of which alone the right of action exists cannot be raised upon the trial under the plea of the general issue. *Clark v. North Muskegon*, 88 Mich. 308 [*citing* *Grand Rapids, etc., R. Co. v. Southwick*, 30 Mich. 446; *Fuller v. Jackson*, 82 Mich. 480].

2. *South Omaha v. Cunningham*, 31 Neb. 316, wherein it was held that the intoxication of the plaintiff could not be shown under the general issue. *Thoburn v. Campbell*, 80 Iowa 338.

3. *Roemer v. Striker*, 142 N. Y. 134. In this case, which was to recover for injuries to the plaintiff's house caused by negligent blasting, the defendant was permitted to show, under the general issue, that the blasting was done by an independent contractor for whose negligence he was not liable.

4. **Contributory Negligence.** — A plea of contributory negligence filed with the general denial admits that there is an issue of negligence between the plaintiff and the defendant, and under such plea the defendant cannot show that a third party was liable for the injuries sustained by the plaintiff. *Bomar v. Louisiana North, etc., R. Co.*, 42 La. Ann. 983, 1206.

5. *Louisville, etc., R. Co. v. Mitchell*, 87 Ky. 327; *Muldraugh's Hill, etc., Turnpike Co. v. Maupin*, 79 Ky. 101, wherein the court said: "The allegation of negligence is sufficient to entitle the plaintiff to recover in an action like

b. WILFUL NEGLIGENCE. — But under a general averment of negligence there can be no recovery for a wilful injury.¹

4. Proof of All Acts Pleading. — A complaint alleging several acts of negligence does not require proof of all the acts. It is sufficient if it be shown that the injury resulted from one of the acts alleged.²

5. Variance. — No General Rule, applicable to all cases, as to the effect of a variance between the pleadings and the proofs in actions for negligence, can be deduced from the authorities. The question is one largely depending on the facts disclosed in the particular case. The searcher is referred, by way of illustration, to the cases found in the notes.³ See also article VARIANCE.

this for any degree of culpable negligence that may be established by the evidence." See also *supra*, V. 7. *Degree of Negligence*, and see further the following cases:

Alabama. — Louisville, etc., R. Co. v. Hurt, 101 Ala. 34; Richmond, etc., R. Co. v. Farmer, 97 Ala. 141; Louisville, etc., R. Co. v. Black, 89 Ala. 317; Tanner v. Louisville, etc., R. Co., 60 Ala. 643; Montgomery, etc., R. Co. v. Stewart, 91 Ala. 427; Highland Ave., etc., R. Co. v. Sampson, 91 Ala. 563.

Illinois. — Rockford, etc., R. Co. v. Phillips, 66 Ill. 548.

Indiana. — Pennsylvania Co. v. Krick, 47 Ind. 368; Indianapolis, etc., R. Co. v. Hamilton, 44 Ind. 76; Ohio, etc., R. Co. v. Selby, 47 Ind. 471; Ft. Wayne v. DeWitt, 47 Ind. 391.

Mississippi. — Southern Express Co. v. Brown, 67 Miss. 260.

New York. — Nolton v. Western R. Corp., 15 N. Y. 444.

United States. — Shumacher v. St. Louis, etc., R. Co., 39 Fed. Rep. 174.

Allegation of Gross Negligence. — Though the plaintiff alleges gross negligence he may recover on showing actionable negligence only. Richter v. Harper, 95 Mich. 221; Keating v. Detroit, etc., R. Co., 104 Mich. 418; Hays v. Gainesville St. R. Co., 70 Tex. 602.

Wilful Negligence. — So an allegation of wilful negligence will not defeat a recovery for ordinary negligence. Faulkner v. Kean, (Ky. 1895) 32 S. W. Rep. 265. To the same effect is Richter v. Harper, 95 Mich. 221, *overruling* Montgomery v. Muskegon Booming Co., 88 Mich. 633.

But in *Alabama* it has been held that a charge that the act complained of was wilful, or that it was knowingly done, cannot be supported by evidence of mere knowledge not involving wilful-

ness or knowledge of the danger. Louisville, etc., R. Co. v. Johnston, 79 Ala. 436; Louisville, etc., R. Co. v. Coulton, 86 Ala. 129; Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 192; Highland Ave., etc., R. Co. v. Winn, 93 Ala. 306; Louisville, etc., R. Co. v. Hurt, 101 Ala. 34.

1. *Pennsylvania Co. v. Smith*, 98 Ind. 42; *O'Brien v. Loomis*, 43 Mo. App. 29. See also *supra*, V. 8. *Wilful Negligence*.

2. *Weber Wagon Co. v. Kehl*, 139 Ill. 644; *East St. Louis Connecting R. Co. v. Shannon*, 52 Ill. App. 420; *Long v. Doxey*, 50 Ind. 385; *Diamond Block Coal Co. v. Edmondson*, 14 Ind. App. 594; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443. See also *supra*, V. 2. b. (4) *Alleging Acts Not Negligent*.

Proof of Immaterial Acts. — Allegations as to immaterial acts of negligence need not be proved. Thayer v. Flint, etc., R. Co., 93 Mich. 150.

3. **When Variance Material** — *In General.* — *Central R., etc., Co. v. Tucker*, 79 Ga. 128; *Chicago, etc., R. Co. v. Hawk*, 42 Ill. App. 322; *Southern Kansas R. Co. v. Griffith*, 54 Kan. 428; *Harris v. Rayner*, 8 Pick. (Mass.) 541; *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Batterson v. Chicago, etc., R. Co.*, 49 Mich. 184; *Derragon v. Rutland*, 58 Vt. 128; *Tucker v. Cracklin*, 2 Stark. 385, 3 E. C. L. 456.

Person in Control of Engine. — There is a fatal variance between a declaration framed on the theory that a freight train which the plaintiff, a switchman, mounted for the purpose of uncoupling a car, was moving backward, uncontrolled by either brakeman or engineer and without orders, and proof that the train was moving forward under the order of the conductor. *Pennington v. Detroit, etc., R. Co.*, 90 Mich. 505.

Person in Control of Vehicle in Which

Waiver of Variance. — Failure to object in the trial court to a variance between the pleadings and the proof operates as a waiver of the variance.¹

Plaintiff Was Riding. — The variance between a declaration alleging that the plaintiff was driving when injured by an obstruction in a street, and proof that another person was driving at the time of the accident, is fatal. *Cowan v. Muskegon R. Co.*, 84 Mich. 583.

When Negligence Aggravates Instead of Causing Ailment. — Where the declaration alleges a particular ailment to have been caused, and not merely aggravated, by the injury, and the evidence shows that the plaintiff was previously affected with such ailment, there is a fatal variance. *Wilkinson v. Detroit Steel, etc., Works*, 73 Mich. 405, following *Thurstin v. Luce*, 61 Mich. 292.

As to Particular Crossing at Which Accident Occurred. — Where a declaration alleges the injury to have been inflicted at a certain crossing, and the evidence shows it to have been at another crossing than the one named, the variance is fatal. *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279.

When Variance Immaterial — In General. — *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 398; *Stearns v. Reidy*, 135 Ill.

119; *Robbins v. Diggins*, 78 Iowa 521; *Kinney v. Folkerts*, 78 Mich. 687; *Wallace v. Detroit City R. Co.*, 58 Mich. 231; *James v. Ford*, 16 Daly (N. Y.) 126.

Nature of Plaintiff's Employment. — The variance between a declaration alleging that the plaintiff was employed as a switchman and was discharging his duty as such when injured, and proof that he was foreman of a switch crew and had control of the engine, is immaterial. *Ashman v. Flint, etc., R. Co.*, 90 Mich. 567.

The Particular Servant Who Was at Fault. — So the variance between a petition alleging that the injuries were caused by the negligence of a section boss in ordering the speed of the train to be increased, and proof that it was the conductor who ordered the increase of speed, is immaterial. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637.

1. *Lake Shore, etc., R. Co. v. Ward*, 135 Ill. 511; *Chicago, etc., R. Co. v. Dickson*, 143 Ill. 368; *Wabash, etc., R. Co. v. Coble*, 113 Ill. 115; *Indianapolis, etc., R. Co. v. Estes*, 96 Ill. 470.

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CROSS-REFERENCES.

See in general in connection with this subject articles *BANKS AND BANKING*, vol. 3, p. 252; *BONDS*, vol. 3, p. 635; *CONDITIONS PRECEDENT*, vol. 4, p. 649; *DURESS*, vol. 7, p. 245; *INQUESTS AND INQUIRIES*, vol. 10, p. 1134; *JUSTICE OF THE PEACE*, vol. 12, p. 704.

I. SCOPE OF ARTICLE. — This article covers the pleading and practice in actions on bills of exchange, promissory notes, checks, and other negotiable instruments, except bonds. Non-negotiable notes are also included, as are instruments which are lacking in some of the elements strictly necessary to make them negotiable but which are nevertheless most closely related to the negotiable instruments just named.

II. JURISDICTION — 1. At Law and in Equity — a. GENERALLY. — The general rule is that jurisdiction of actions on negotiable instruments is at law and not in equity.¹ Thus in a number of cases it has been held that there was no jurisdiction in equity in suits on negotiable instruments until the remedy at law had been exhausted.² But the equitable owner of a negotiable instrument

1. See *Nelson v. Chicago First Nat. Bank*, 48 Ill. 36; *Kilgour v. Parker*, 3 J. J. Marsh. (Ky.) 577; *Senter v. Continental Bank*, 7 Mo. App. 532; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Bliss v. Weil*, 14 Wis. 35; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

Ransom of a Vessel. — A bill of exchange, expressed to be for the ransom of a vessel, and given as collateral security for the payment of the ransom bill, was held to be a contract on which an action may be sustained in a court of common law — the plaintiff and payee being an alien friend. While it was admitted that a court of common law could not even incidentally decide a question of prize, it was said: "On the whole, on this point, I have come to the conclusion, although not without diffidence, that the present action may be sustained in this court. I consider the bill of exchange, as the parties have considered it, as merely collateral to the ransom. The consideration of it, involving matter of prize, is not inquirable into at common law." *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

Deficiency on Foreclosure. — The holder of one of several notes secured by mortgage can, after the premises have been sold on foreclosure upon the notes first coming due, for less than the amount thereof, sue at law on his note. *Bliss v. Weil*, 14 Wis. 35. The Wisconsin statute of 1849, § 78, c. 84, prohibiting proceedings at law for the recovery of a mortgage debt, after bill for foreclosure filed, unless authorized by the Court of Chancery, was not in force when the action in this case was brought for a subsequent instalment of a mortgage.

Action by Payee of Check Against Bank. — That an action at law will lie by the payee of a check against the bank on which it is drawn, when the bank has promised to honor it, see *Nelson v. Chicago First Nat. Bank*, 48 Ill. 36; *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321. And compare *Senter v. Continental Bank*, 7 Mo. App. 532.

Counterfeit Bank Note. — The remedy for the recovery of money paid for a bank note which turns out to be a counterfeit is at law, and not in chancery. The chancellor has no jurisdiction over such case, unless a discovery is necessary. *Kilgour v. Parker*, 3 J. J. Marsh. (Ky.) 577.

2. *Nelson v. Chicago First Nat. Bank*, 48 Ill. 36; *Fultz v. Walters*, 2 Mont. 165; *Chillicothe Bank v. Yoe*, 4 Ohio 125. But see *contra*, *Taylor v. Reese*, 44 Miss. 89.

To Indorse Certificate of Deposit. — A certificate of deposit taken out by an agent in his own name and delivered to his principal without indorsement, was held negotiable and assignable by delivery without writing. It was held, also, that the principal could have brought an action in equity to compel his agent to indorse the certificate; but that while he had a legal remedy against the bank to obtain payment thereof he could not maintain a bill in equity against it. *Fultz v. Walters*, 2 Mont. 165.

Promise of Drawee of Check to Pay. — Where the holder of a check received it solely upon the faith of the promise of the drawee to pay it, his remedy at law is so complete, that it seems, if the objection be taken at the proper time, a court of chancery would not retain a bill filed by him to enforce the liability of the drawee. But where such a bill

may bring suit thereon in equity.¹ And on a joint note, after the death of one of the makers, the only remedy against his personal representatives has been held to be in equity.² Relief may be had in equity by a person who is forced to pay a negotiable instrument when the plaintiff's title is made through forged instruments.³

b. WHERE PAYEE IS MAKER OR VICE VERSA — Payee and Maker Same Person. — Where the payee of a promissory note is also one of the makers, or the maker one of the payees, the remedy is in equity.⁴

was filed, and the cause was brought to the appellate court, no objection being taken to the jurisdiction in chancery, the case was considered upon its merits, it not being regarded a case in which a court of chancery, for its own protection, should refuse to exercise jurisdiction. *Nelson v. Chicago First Nat. Bank*, 48 Ill. 36.

Equitable Title. — If a party goes into a chancery court to seek redress founded upon a purely equitable title to a negotiable instrument, or growing out of an equitable interest therein, he is in the proper court; and the fact that the legal tribunal will give him a remedy through the instrumentality of the holder of the legal title, is no sufficient reason for turning him out. *Taylor v. Reese*, 44 Miss. 89.

1. *Jeneson v. Jeneson*, 66 Ill. 259; *Taylor v. Reese*, 44 Miss. 89; *Easterly v. National Exch. Bank*, 3 Thomp. & C. (N. Y.) 366.

Equitable Owner. — It was held in *Easterly v. National Exch. Bank*, 3 Thomp. & C. (N. Y.) 366, that a suit in equity, and not an action of trover, was the proper remedy of a third indorser against the bank which had discounted a note, and had failed to retain collateral security deposited with it by the second indorser, though notified by the plaintiff to do so.

2. *Osgood v. Spencer*, 2 Har. & G. (Md.) 133.

3. *Herndon v. Higgs*, 15 Ark. 389.

Note Obtained by Fraud — Injunction. — An injunction may be granted to prevent the transfer of a note obtained by fraud. *Fowler v. Loomis*, 37 Ill. App. 363, but in this case it was held that an injunction would not lie to restrain an action at law on a note past due, because the note was obtained by fraud, as the fraud could be set up in defense in the action on the note.

Injunction Pending Redemption Proceedings. — In *Walker v. Jones*, L. R. 1 P.

C. 50, an injunction issued to restrain an action at law on a note, secured by a mortgage, where a proceeding to redeem and to determine the equities of the parties was pending.

4. *Alabama.* — *Ramsey v. Johnson, Minor* (Ala.) 418; *Tindall v. Childress*, 2 Stew. & P. (Ala.) 250; *Chandler v. Shehan*, 7 Ala. 251; *Hampton v. Shehan*, 7 Ala. 295; *Smyth v. Strader*, 9 Port. (Ala.) 446.

Arkansas. — *Faulkner v. Thompson*, 14 Ark. 478.

Connecticut. — *Moore v. Denslow*, 14 Conn. 238.

Illinois. — *Jeneson v. Jeneson*, 66 Ill. 259.

Massachusetts. — *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361.

New Hampshire. — *Heywood v. Wingate*, 14 N. H. 73.

Tennessee. — *Woods v. Ridley*, 11 Humph. (Tenn.) 194.

Vermont. — *Smith v. Burton*, 3 Vt. 233.

Son Giving Note Payable to Father's Heirs at Law. — Where a son, in consideration of the conveyance of land to him, gave his notes for the price, payable to the heirs at law of his father in a certain time after the death of his father and mother, the interest to be paid annually for the support of the father and his wife; it was held, that the heirs, by the form of the notes, were at least equitable holders, and inasmuch as the maker was also a payee, their payment could only be enforced in a court of equity. *Jeneson v. Jeneson*, 66 Ill. 259.

Trustee One of Makers. — Where there is an assignment of a note to trustees, and one of the trustees is one of the makers, he may be sued in equity. *Faulkner v. Thompson*, 14 Ark. 478.

Where the Payee Joins in a Note as Security. — Where the payee joins in a note as security, an action at law cannot be sustained on it against either the principal

Action by Indorsee. — But an action at law may be maintained by the indorsee of a negotiable instrument, though one of the makers is named as payee.¹

c. IN PARTNERSHIP CASES. — An action at law cannot be maintained upon a negotiable instrument, to which a firm and one of its members are parties adversely interested and where no official or trustee has been named as payee. Such instruments must be enforced in equity.²

or surety. *Ramsey v. Johnson*, Minor (Ala.) 418.

Note Against All at Law. — A promissory note, signed by several persons, and payable to one of their number, or his order, cannot, in the name of the payee, be enforced at law, as a joint promise against all the signers. *Heywood v. Wingate*, 14 N. H. 73.

Note by Executor to Co-executors. — A note made by one executor of an estate, and also by a third person as his surety, payable to the executors of the same estate, cannot be enforced against the surety by a suit at law, where the principal debtor in his character of joint executor is one of the plaintiffs. But one joint executor may lawfully take a note with surety from his co-executor, payable to himself for the purchase of property of their testator, sold by them jointly as executors, and may sustain an action at law thereon. *Hampton v. Shehan*, 7 Ala. 295.

Action at Law by One of Co-owners. — In a few cases it has been held that on an instrument payable to two persons, one of whom was also liable thereon as a prior party, an action at law might be maintained by the other co-owner. *Willis v. Neal*, 39 Ala. 464; *Waldrop v. Pearson*, 42 Ala. 636; *Quisenberry v. Artis*, 1 Duv. (Ky.) 30; *Smith v. Gregory*, 75 Mo. 121. Compare *Beecham v. Smith*, El. Bl. & El. 442, 96 E. C. L. 442. But in *Waldrop v. Pearson*, 42 Ala. 636, and *Quisenberry v. Artis*, 1 Duv. (Ky.) 36, there were statutes which gave such jurisdiction; and in *Willis v. Neal*, 39 Ala. 464, and *Smith v. Gregory*, 75 Mo. 121, there had been an assignment to the plaintiff from the other owner.

Note Payable to Trustee. — If A, B, and C own goods jointly, and agree to an auction sale upon credit, with notes payable to bearer; and agree that S shall be the bearer, and collect and pay over the proceeds of the sale; and B becomes a purchaser and gives such

a note, S can recover at law in a suit upon this note. *Smith v. Burton*, 3 Vt. 233.

1. *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 265; *Smyth v. Strader*, 9 Port. (Ala.) 446; *Moore v. Denslow*, 14 Conn. 238; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Heywood v. Wingate*, 14 N. H. 73.

Reason of Rule. — "Sawyer had unquestionable authority to indorse a note payable to himself, although signed by himself as well as others. A note drawn to and indorsed by himself would have been a valid contract from the date of its indorsement. It could not have been the less valid, as a promise, for the reason that it was a joint promise with others. Having the right, then, to negotiate the note, the promise of the signers attached, and the note became a subsisting and valid contract, immediately upon its being negotiated to the plaintiff. *Pitcher v. Barrows*, 17 Pick. (Mass.) 361. Upon the whole, we entertain no doubt that, according to the provisions of the case, the plaintiff is entitled to judgment for the amount of the note declared on." *Heywood v. Wingate*, 14 N. H. 78.

2. *Alabama*. — *Tindal v. Bright*, Minor (Ala.) 103; *Brown v. Torver*, Minor (Ala.) 370; *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259; *Lacy v. Le Bruce*, 6 Ala. 904; *Smyth v. Strader*, 9 Port. (Ala.) 446; *Rowland v. Boozer*, 10 Ala. 690; *Murdock v. Caruthers*, 21 Ala. 785.

Connecticut. — *Moore v. Denslow*, 14 Conn. 237.

Illinois. — *Hall v. Kimball*, 77 Ill. 161; *Hutchinson v. Crane*, 100 Ill. 269.

Maine. — *Woodman v. Boothby*, 66 Me. 389.

Michigan. — *Davis v. Merrill*, 51 Mich. 480. Compare *Sweet v. Woodin*, 72 Mich. 393.

Mississippi. — *Planters' Bank v. Chewning*, 5 How. (Miss.) 413.

Two Firms with Common Members. — Neither can a partnership maintain an action at law on an instrument given by another firm having a common member.¹ The remedy in such cases is in equity.²

One Partner Against Another. — Where a firm or unincorporated joint stock association takes an instrument for the payment of money from one of its members payable to its treasurer, secretary, or trustee, such officer may, it seems, sue thereon at law.³ And on engagements by one partner with another individually, an action at law will lie.⁴

Missouri. — *Hill v. McPherson*, 15 Mo. 204; *Knaus v. Givens*, 110 Mo. 58.

Nevada. — *Maples v. Geller*, 1 Nev. 233.

New York. — *Smith v. Lusher*, 5 Cow. (N. Y.) 688.

Tennessee. — *Banks v. Mitchell*, 8 Yerg. (Tenn.) 111; *Smith v. Nabry*, 9 Yerg. (Tenn.) 313.

United States. — *Van Ness v. Forrest*, 8 Cranch (U. S.) 30.

England. — *Mainwaring v. Newman*, 2 B. & P. 120; *Neale v. Turton*, 4 Bing. 149, 13 E. C. L. 382.

Reason of Rule. — "It is very obvious, that if the parties were partners, and the plaintiff had advanced to the copartnership a sum of money, and taken a company note for the amount, he could not sustain an action at law upon it, in his own name, against the other two partners. The money, in such case, would not have been received by the two only, but by all the partners; and the plaintiff, being one of them, would be liable for his share." *Moore v. Denslow*, 14 Conn. 237.

In *Kentucky* it was held in *Morrison v. Stockwell*, 9 Dana (Ky.) 172, that one partner might sue his copartner at law on a note given by the firm to the plaintiff.

Note of Partner Purchased by Firm. — Where a member of a firm made a promissory note to a third party, who indorsed the same, and the firm of which the maker was a member purchased the same, it was held that the holders could not maintain any action thereon at law against the maker, but that it still remained a valid and binding indebtedness against the maker, which a court of equity would enforce. *Hall v. Kimball*, 77 Ill. 161.

1. *Lacy v. Le Bruce*, 6 Ala. 904; *Murdock v. Caruthers*, 21 Ala. 785; *Portland Bank v. Hyde*, 11 Me. 196; *Banks v. Mitchell*, 8 Yerg. (Tenn.) 111.

2. *Banks v. Mitchell*, 8 Yerg. (Tenn.) 111.

3. *Whitcomb v. Smart*, 38 Me. 264; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Ramey v. Anderson*, 1 McMull. L. (S. Car.) 300; *Van Ness v. Forrest*, 8 Cranch (U. S.) 30. But see *Nash v. Russell*, 5 Barb. (N. Y.) 556.

Secretary of Lodge of Odd Fellows. — In *Whitcomb v. Smart*, 38 Me. 264, it was held that the secretary of an Odd Fellows' lodge, being authorized by the lodge, might sue at law on a note given by a member of the lodge to such secretary by name.

Calls on Stock of Joint Stock Association.

— The trustees of a joint stock association may sue at law for money due from members on calls on the stock. *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Cross v. Jackson*, 5 Hill (N. Y.) 478.

4. *Grigsby v. Nance*, 3 Ala. 347; *Coffee v. Brian*, 3 Bing. 54, 11 E. C. L. 25; *Neale v. Turton*, 4 Bing. 149, 13 E. C. L. 382. And see *Bonnafee v. Williams*, 3 How. (U. S.) 574.

Agreement to Indemnify Acceptor. — In *Coffee v. Brian*, 3 Bing. 54, 11 E. C. L. 25, one member of a firm accepted bills for the firm, on an agreement by another partner to hold the proceeds of certain firm property for the acceptor's indemnification; it was held that such acceptor could sue the other party for money had and received. But see *Robson v. Curtis*, 1 Stark. 78, 2 E. C. L. 39, where it was held that one partner could not sue his copartner at law on the latter's agreement to pay one-half of a bill of exchange if the plaintiff would take it up, the partnership accounts being unliquidated. Lord Ellenborough said: "If there had been partnership dealings, and only one item remained unadjusted, the difficulty as to partnership would disappear, but that is not the case here."

Note for Capital Stock. — In *Grigsby v. Nance*, 3 Ala. 347, it was held that an action at law would lie by one part-

Action by Indorsee. — If a note made by one member of a firm to the firm or by the firm to one of its members is indorsed, the indorsee may sue thereon at law.¹ But an action at law cannot be maintained by a mere assignee of a negotiable instrument

ner against another on a note given to the former by the latter in payment for part of the capital stock of the firm.

Partners Accepting Individually a bill drawn on the firm by another partner may, it seems, be sued at law by the drawer. *Neale v. Turton*, 4 Bing. 149, 13 E. C. L. 382, but in this case it was held that a bill drawn on the directors of a company and accepted for the directors would not support an action at law by the partner drawing.

1. *Alabama*. — *Brown v. Torver, Minor* (Ala.) 370; *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259; *Smyth v. Strader*, 9 Port. (Ala.) 446; *Murdock v. Caruthers*, 21 Ala. 785. But see *Tipton v. Nance*, 4 Ala. 194.

California. — *McPherson v. Weston*, 64 Cal. 275.

Connecticut. — *Nevins v. Townsend*, 6 Conn. 5.

Maine. — *Davis v. Briggs*, 39 Me. 304; *Hapgood v. Watson*, 65 Me. 510; *Woodman v. Boothby*, 66 Me. 389.

Massachusetts. — *Thayer v. Buffum*, 11 Met. (Mass.) 398; *Estabrook v. Smith*, 6 Gray (Mass.) 570.

Mississippi. — *Planters' Bank v. Chewning*, 5 How. (Miss.) 413.

Missouri. — *Smith v. Gregory*, 75 Mo. 121; *Knaus v. Givens*, 110 Mo. 58, *criticising and distinguishing* *Calhoun v. Albin*, 48 Mo. 304; *Young v. Chew*, 9 Mo. App. 387.

New York. — *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284.

Vermont. — *Norton v. Downer*, 15 Vt. 569.

Reason of Rule. — "It is well settled that a note made by a partnership to one of its own members, or his order, when indorsed, will enable the indorsee to maintain an action upon it. It is the promise of all to the order or appointee of one; and when the appointment is made by an indorsement, it is a valid contract with the indorsee." *Thayer v. Buffum*, 11 Met. (Mass.) 398.

Action by Indorsee. — If a partner indorses a note to his firm, and they indorse it to a third person, he can maintain an action at law against them on the indorsement. *Brown v. Torver, Minor* (Ala.) 370.

Firms with Common Number. — A promise in writing by one firm to pay a special sum on a certain day to the order of another firm which has a common partner, is not a promissory note until assignment. But when assigned by the latter firm, the assignee may be regarded, as between himself and the makers, as the real payee, and may maintain an action in his own name against the makers. *Murdock v. Caruthers*, 21 Ala. 785.

Indorsement for Collection Only. — An indorsee for collection may sue at law on a note to which a firm and one of its members are parties adversely interested. *McPherson v. Weston*, 64 Cal. 275.

Joint Administrators. — In *Smith v. Gregory*, 75 Mo. 121, an administrator was permitted to sue at law on a note given to himself and his co-administrator by a firm of which the co-administrator was one of the partners, which note was subsequently transferred by the co-administrator to the plaintiff.

After Dissolution of Firm. — In *Nevins v. Townsend*, 6 Conn. 5, it was held that a suit might be brought at law by the indorsee of a note given by the members of a partnership after dissolution, and payable to one of the partners.

Transfer After Maturity. — It is no objection to an action on a note given by or to a partnership by one of its members and indorsed to the plaintiff, that the transfer was made after maturity. *Nevins v. Townsend*, 6 Conn. 5; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284.

Colorable Indorsement. — In *Tipton v. Nance*, 4 Ala. 194, it was held that an indorsee could not sue at law on a bill of exchange against an indorser who was a member of a firm which had subsequently indorsed the bill to the plaintiff, another partner, for the purpose of suit only, the beneficial interest remaining in the partnership.

Copartner Indorsee. — In *Estabrook v. Smith*, 6 Gray (Mass.) 570, it was held that an indorsee could not sue on a promissory note made by one partner to a firm, where the indorsee was the other copartner in the firm.

made or indorsed to a partnership by one of the partners, or *vice versa*.¹

After Dissolution. — An action at law may be maintained on a note between a firm and one of its members after the dissolution of the firm.²

d. AS AFFECTED BY INDORSEMENT OR ASSIGNMENT.³ — The payee of a negotiable instrument may maintain an action at law thereon although he has indorsed the instrument to another person, it being presumed that it has been returned by the indorsee, and the payee remitted to his original title.⁴

Remote Indorser. — In several cases it has been held that an action at law will not lie against a remote indorser of a negotiable instrument,⁵ and in the absence of such a remedy at law a suit in equity may be maintained.⁶

Action by Assignee. — It has been held that one who takes a note by assignment without a regular indorsement may maintain an action thereon at law,⁷ and in some states it is held that equity

1. *Davis v. Merrill*, 51 Mich. 480; *Hill v. McPherson*, 15 Mo. 204.

2. *Lyon v. Malone*, 4 Port. (Ala.) 497; *Lacy v. Le Bruce*, 6 Ala. 904; *Rowland v. Boozer*, 10 Ala. 600, in which case one partner made a promissory note, payable to a third person, of which the partnership became the beneficial owner, and on a dissolution thereof and a division of its effects the note was delivered to one of the partners for collection, he to retain therefrom the share of profits ascertained to be due him, and to pay over the residue to the treasurer of the company, and it was held the partner receiving the note could maintain an action thereon at law in the name of the payee for his use.

Death of Common Member. — Where the same person was a member of two partnerships, and one made a promissory note payable to the other, the death of the common partner removes the impediment to a suit at law, and the survivors of the payees can sue the survivors of the makers. *Lacy v. Le Bruce*, 6 Ala. 904.

3. **In Partnership Cases.** — As to jurisdiction at law and in equity where notes in which a partnership and a member of the firm are adversely interested are indorsed or assigned, see *supra*, c. *In Partnership Cases*.

4. *Pitts v. Keyser*, 1 Stew. (Ala.) 154; *Carroll v. Meeks*, 3 Port. (Ala.) 226; *Herndon v. Taylor*, 6 Ala. 461; *Evans v. Gordon*, 8 Port. (Ala.) 142; *Earbee v. Wolfe*, 9 Port. (Ala.) 366; *Price v. Lavender*, 38 Ala. 389.

Proof of Ownership Unnecessary. — Where the payee of a promissory note makes an indorsement in full, purporting to transfer the interest therein to a third person, and afterwards comes to the possession of the note, it is competent for him to maintain an action thereon, without producing extrinsic proof of ownership. *Earbee v. Wolfe*, 9 Port. (Ala.) 366.

5. *Bowers v. Headen*, 4 Ind. 318; *Weaver v. Beard*, 21 Mo. 155; *Dunlap v. Harris*, 5 Call (Va.) 16; *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 331; *Mandeville v. Riddle*, 1 Cranch (U. S.) 290; and see Appendix, *Harris v. Johnston*, 3 Cranch (U. S.) 311. *Contra*, *Dunlop v. Silver*, 1 Cranch (C. C.) 27.

6. *Dorsey v. Hadlock*, 7 Blackf. (Ind.) 113, in which case it was held that an assignee would sue a remote assignor in equity. *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 331; *Harris v. Johnston*, 3 Cranch (U. S.) 311; *Riddle v. Mandeville*, 5 Cranch (U. S.) 322.

It being held in *Kentucky* that an action at law could not be maintained in that state by an indorsee against a remote indorser, it was held that recovery in such case might be had in equity in the federal courts. *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 331.

7. *Carter v. Owens*, 41 Ala. 217; *Nash v. Hogan*, 45 N. J. Eq. 108; *Ogden v. Slade*, 1 Tex. 13.

A Distributee of a Decedent's Estate, to whom a promissory note has been allotted as part of his share on a division of the estate, upon an agreement

also has jurisdiction in such cases,¹ but in other states the remedy in equity has been denied if there is a right of action at law.²

Assignee for Creditors. — Negotiable instruments which are transferred to assignees for the benefit of creditors, may be recovered on in equity.³

2. Depending on Amount Involved. — In actions on negotiable instruments, as in other cases, the amount involved must be within the jurisdiction of the court. If the amount is insufficient or excessive the action will be dismissed.⁴

among the parties interested, may maintain an action at law on it. *Carter v. Owens*, 41 Ala. 217.

An Assignee of a Non-negotiable Note is entitled to sue the maker at law in the name of the assignor. *Ogden v. Slade*, 1 Tex. 13.

Transfer by Widow Without Indorsement. — An action at law lies on a negotiable promissory note transferred to the holder by the widow of the payee without indorsement. *Nash v. Hogan*, 45 N. J. Eq. 108.

1. *Kimball v. Whitney*, 15 Ind. 280; *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516; *Ogden v. Slade*, 1 Tex. 13.

Owner of Equity. — B. being the holder by transfer by delivery, in the year 1841, of a note payable to the president, etc., of the Planters' Bank, not indorsed, after a judgment of ouster of its charter against the bank, filed a bill in equity against the makers, to compel the payment of the note. It was held on demurrer to the bill that by the transfer of the note to him B. acquired but an equity in the note which, upon the dissolution of the bank, he could only enforce in a court of equity. *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516.

Suit in Assignee's Own Name. — The assignee of a negotiable note may sue in equity in his own name. *Ogden v. Slade*, 1 Tex. 13.

2. *Townsend v. Carpenter*, 11 Ohio 21; *Brush v. Kinsley*, 14 Ohio 22; *Walters v. Farmers' Bank*, 76 Va. 12.

Remedy at Law. — "It has been decided in *Townsend v. Carpenter*, 11 Ohio 21, that the assignee of a note, not negotiable, having an equity only, may enforce payment in chancery; but, if negotiable, the holder having the legal interest must sue at law." *Brush v. Kinsley*, 14 Ohio 22.

The Virginia Code, 1873, chapter 141, § 19 (Code 1887, § 2862), providing that equity shall not have jurisdiction of suits on bonds, notes, etc., by the

assignee or holder thereof, was not intended to affect the principle that when a court of equity has once rightly obtained cognizance of the controversy and of the parties, its power is effectual for complete relief. *Walters v. Farmers' Bank*, 76 Va. 12.

3. *Biscoe v. Sneed*, 11 Ark. 104; *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373.

4. *Thomas v. Anderson*, 58 Cal. 99; *Thomas v. Miller*, Walk. (Miss.) 324; *Ausley v. Alderman*, Phil. L. (N. Car.) 215. See generally article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

Several Promises. — In *Thomas v. Anderson*, 58 Cal. 99, it was held that the superior court did not have jurisdiction of an action on an instrument by which several persons promised to pay respectively certain sums, each less than the amount necessary to give that court jurisdiction, though the total of such sums exceeded the jurisdictional amount.

Amount Reduced by Credits. — When the value of a note is reduced by indorsed credits to less than \$100, an action brought in a County or Superior Court on such note may be abated on plea of the defendant, under the North Carolina statute, which provides that "no action shall be originally commenced in the County or Superior Court for any balance of less value than one hundred dollars due on any bond, promissory note, or liquidated account signed as aforesaid." *Ausley v. Alderman*, Phil. L. (N. Car.) 215.

Including Interest. — In declaring on a note for fifty dollars in the Circuit Court the plaintiff must declare also for interest or the court will not have jurisdiction, when the court has jurisdiction only of demands exceeding fifty dollars. *Thomas v. Miller*, Walk. (Miss.) 324.

Justice of the Peace. — Actions on negotiable instruments cannot be main-

3. United States Courts — Assignee. — The Act of Congress defining the jurisdiction of the courts of the United States contains the following provision: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of an assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." ¹

tained before a justice of the peace when the amount involved exceeds the jurisdiction of the justice. *Meis v. Geyer*, 4 Mo. App. 404; *Kearns v. Heitman*, 104 N. Car. 332.

A Note Indorsed to Justice for Collection cannot be sued upon before such justice, since by such indorsement he became the plaintiff's agent. *West v. Wheeler*, 49 Mich. 505.

Duebill. — An instrument reading: "Due B. one hundred and fifty dollars. (Signed) A.," is a promissory note, and a justice of the peace has jurisdiction thereon. *Brady v. Chandler*, 31 Mo. 28.

Action on Contract or Note. — An action by the indorsee of a negotiable promissory note against the indorser is an action upon the contract which the law implies, and not an action upon the note; and in such an action before a justice of the peace, the justice has no jurisdiction where the amount is in excess of his jurisdiction in actions founded on contracts other than bonds or notes for the payment of money. *Meis v. Geyer*, 4 Mo. App. 404.

Splitting Demand. — Where money was collected by one of two joint owners of several notes, the other owner cannot bring separate actions for his half of each note collected so as to give a justice of the peace jurisdiction; the action, being for money had and received, must be for the aggregate amount so collected and due him. *Kearns v. Heitman*, 104 N. Car. 332. In this case it was said that an action might have been maintained for the half of each note as it was collected, but when all was paid the plaintiff became entitled to half of the gross sum paid, and, as that exceeded two hundred dollars, a justice of the peace had no jurisdiction.

1. Act of August 13, 1888; Rev. Stat. U. S., Supplement to 2d ed., vol. 1, p. 612; *Dromgoole v. Farmers', etc., Bank*, 2 How. (U. S.) 241; *Montalet v.*

Murray, 4 Cranch (U. S.) 46; *Mollan v. Torrance*, 9 Wheat. (U. S.) 537; *Coffee v. Planters' Bank*, 13 How. (U. S.) 183; *Keary v. Farmers', etc., Bank*, 16 Pet. (U. S.) 89; *Gibson v. Chew*, 16 Pet. (U. S.) 315; *Morgan v. Gay*, 19 Wall. (U. S.) 81; *Rogers v. Linn*, 2 McLean (U. S.) 126; *Welles v. Newberry*, 4 McLean (U. S.) 226; *Small v. King*, 5 McLean (U. S.) 147; *Shuford v. Cain*, 1 Abb. (U. S.) 302; *Campbell v. Jordan*, Hempst. (U. S.) 534. Compare *Gregg v. Weston*, 7 Biss. (U. S.) 360, decided under the statute of 1875.

Aliens. — When both parties are aliens, the courts of the United States have no jurisdiction, if it does not appear upon the record that a suit might have been maintained in the courts of the United States between the original parties to the note in suit. *Montalet v. Murray*, 4 Cranch (U. S.) 46.

Diverse Citizenship. — Where the indorsee of an inland bill of exchange sues the drawer or acceptor in a Circuit Court, it is not enough to allege that the plaintiff and defendant are citizens of different states. The payee must appear to be a citizen of a state other than that in which the defendant resides. *Morgan v. Gay*, 19 Wall. (U. S.) 81.

Action Against Maker and Payee. — In *Dromgoole v. Farmers' and Merchants' Bank*, 2 How. (U. S.) 241, the Circuit Court was held to have no jurisdiction of a suit brought by the indorsee of a promissory note against both maker and payee, where both resided in the same state, although the law of that state permitted such a joinder.

Against Remote Indorser. — To maintain an action in the Circuit Court against a remote indorser the plaintiff must show that the intermediate indorser, through whom he traces title, could have maintained one. *Mollan v. Torrance*, 9 Wheat. (U. S.) 537.

Action by Receiver. — It has been held that a receiver under a Michigan stat-

Test of Negotiability. — What is a negotiable instrument under this statute is determined according to the principles of the law merchant, and not with reference to state statutes.¹

A Negotiable Instrument Indorsed in Blank is held to be payable to bearer within the terms of the statute limiting the jurisdiction of the federal courts.²

Corporations. — By the express provision of this statute, an exception is made in the case of notes payable to bearer, executed by a corporation.³

Foreign Bills. — A bill drawn in one state and payable in another is a foreign bill within the provision of this statute, excepting foreign bills of exchange from its operation.⁴

ute providing for the voluntary dissolution of banking corporations, could not sue in the federal courts on negotiable instruments belonging to the bank unless the bank itself could have done so. *Bradford v. Jenks*, 2 McLean (U. S.) 130.

Non-negotiable Notes. — In *Shuford v. Cain*, 1 Abb. (U. S.) 302, it was held that an earlier statute containing much the same provisions and restrictions applied to non-negotiable notes.

Replevin. — An action of replevin to recover the possession of negotiable instruments may be maintained in a Circuit Court of the United States by the assignee of one who could not himself have sued in that court. *Deshler v. Dodge*, 16 How. (U. S.) 622.

1. **Test of Negotiability.** — "The point is whether the provision that the principal and interest are payable with exchange destroys the negotiable character of the note according to the principles of the law merchant. The question is not whether the note may be negotiable under the provisions of the state statute. The state legislature may declare that all instruments or contracts for the payment of money are negotiable, and shall possess the incidents pertaining to negotiable paper, but that would not change the test of negotiability fixed by the Act of Congress of 1875. That test is negotiability according to the principles of the law merchant, not according to the provisions of the state statute." *Windsor Sav. Bank v. McMahon*, 38 Fed. Rep. 284.

2. *Steel v. Rathbun*, 42 Fed. Rep. 390; *Bank of British North America v. Barling*, 46 Fed. Rep. 357.

Maker and First Holder Citizens of Same State. — A promissory note payable "to the order of —," which was made

and delivered for a valuable consideration, is, in legal effect, payable to bearer; and one who buys it from a lawful owner and holder, and afterwards fills the blank by writing his own name therein as payee, which he may lawfully do, is a "subsequent holder" within the meaning of the phrase as it is used in the Act of Congress defining the jurisdiction of the Circuit Courts of the United States, and therefore not entitled to sue in such court upon such a note, the original holder and the maker both being citizens of the same state. *Steel v. Rathbun*, 42 Fed. Rep. 390.

Under Former Statute. — Before the Acts of March 3, 1887, and August 13, 1888, it was held that notes payable to bearer might be sued on by a subsequent holder, without regard to the citizenship of the payee. *Bullard v. Bell*, 1 Mason (U. S.) 243; *Commonwealth Bank v. Wister*, 2 Pet. (U. S.) 318; *Thompson v. Perrine*, 106 U. S. 589; *Bonnafee v. Williams*, 3 How. (U. S.) 574; *Halsted v. Lyon*, 2 McLean (U. S.) 226; *Varner v. West*, 1 Woods (U. S.) 493.

3. See Rev. Stat. U. S., Supplement to 2d ed., vol. 1, p. 612.

Notes of Corporations Indorsed in Blank. — In *Bank of British North America v. Barling*, 46 Fed. Rep. 357, bills of exchange drawn by a corporation, payable to its own order and indorsed in blank, were held to be payable to bearer within the terms of the statute, but having been made by a corporation, the court had jurisdiction in an action by a subsequent holder.

4. **Citizenship of Payee Immaterial.** — A bill drawn in one state on a person living in another, and there payable, is to be deemed a foreign bill within the meaning of the act, and the indorsee

Presumptions as to Jurisdiction. — Presumptions will not be indulged which would defeat the jurisdiction of the federal courts in actions on negotiable instruments.¹

Between What Parties. — Under the statute limiting the jurisdiction of federal courts, the citizenship of the real parties to the instrument determines the jurisdiction.²

Legal Owner. — And so the citizenship of the legal, rather than of the equitable owner governs the jurisdiction.³

What Contracts. — The statute restricting jurisdiction applies only to the original contract between the parties to the negotiable paper.⁴

Indorsee Suing Indorser. — The statute governing jurisdiction of federal courts does not apply to an action by an indorsee against his indorser.⁵

is not precluded from suing the drawer in a federal court by the citizenship of the payee. *Buckner v. Finley*, 2 Pet. (U. S.) 586.

1. *M'Micken v. Webb*, 11 Pet. (U. S.) 25; *Marine, etc., Phosphate Min., etc., Co. v. Bradley*, 105 U. S. 175.

Legal or Equitable Owner. — Where it is possible that the assignee of a negotiable instrument, who sues thereon in a federal court, may not be its equitable, but only its legal owner, no presumption will be indulged in that the assignor was a citizen of the same state as the defendants, for the purpose of defeating the jurisdiction, the fact not clearly appearing. *Marine, etc., Phosphate Min., etc., Co. v. Bradley*, 105 U. S. 175.

2. **Accommodation Paper.** — In *Goldsmith v. Holmes*, 36 Fed. Rep. 484, Judge Deady decided that where a citizen of Oregon made a negotiable note payable to the order of another citizen of Oregon, who gave no consideration for it, but indorsed it for the maker's accommodation, and merely as a surety, and then delivered it to citizens of New York, who loaned money upon it to the maker, the lenders of the money were original parties to the contract, and entitled to sue upon it in a United States Circuit Court. This was approved in *Steel v. Rathbun*, 42 Fed. Rep. 391.

3. **Citizenship of Cestuis Que Trust.** — The capacity of the legal holder of a promissory note, payable to bearer, to sue thereon in a Circuit Court, is not affected by the citizenship of his *cestuis que trust*, for whose use the suit is brought. *Bonafee v. Williams*, 3 How. (U. S.) 574.

4. *Phillips v. Preston*, 5 How. (U. S.) 278; *Marine, etc., Phosphate*

Min., etc., Co. v. Bradley, 105 U. S. 175.

New Contract. — A corporation agreed by an instrument under its seal to pay a certain sum of money to A. at a specified rate of interest, and by an indorsement under its seal on the paper, after it matured, further agreed, in consideration of forbearance to a date named, to pay a higher rate of interest to bearer. It was held that the indorsement was a new contract upon a sufficient consideration, and negotiable, but that the lawful holder under it was not precluded from suing in the Circuit Court by the fact that A. was a citizen of the same state as the corporation. *Marine, etc., Phosphate Min., etc., Co. v. Bradley*, 105 U. S. 175.

Collateral Contract. — In an action on a collateral contract between accommodation indorsers to bear equally any loss resulting from the indorsement, it is no objection to the jurisdiction that the defendant was a citizen of the same state with the holder for value. *Phillips v. Preston*, 5 How. (U. S.) 278.

5. *Young v. Bryan*, 6 Wheat. (U. S.) 146; *Mollan v. Torrance*, 9 Wheat. (U. S.) 537; *Evans v. Gee*, 11 Pet. (U. S.) 83; *Coffee v. Planters' Bank*, 13 How. (U. S.) 183; *Gaylord v. Johnson*, 5 McLean (U. S.) 448; *Dennison v. Larned*, 6 McLean (U. S.) 496; *Campbell v. Jordan, Hempst.* (U. S.) 534.

Indorser and Makers Residents of Same State. — An indorsee of a promissory note, who resides in a different state, may sue in the Circuit Court his immediate indorser, residing in the state in which the suit is brought, although that indorser be a resident of the same state with the maker of the note. *Mollan v. Torrance*, 9 Wheat. (U. S.) 537.

III. SIMULTANEOUS AND SUCCESSIVE SUITS — Where several parties liable. — The holder of a negotiable instrument may, at common law, proceed at the same time in separate suits against each of the parties who may be liable, until the debt is satisfied.¹

Several Instruments Payable by Same Person. — A creditor holding several negotiable instruments, payable by the same person, may maintain separate actions upon each. This is frequently done in order to bring the claims within the jurisdiction of a court having cognizance of claims for a limited amount only.²

Actions for Interest. — Where a negotiable instrument is payable with interest annually or semi-annually, the holder may maintain an action for interest at the end of each interest period,³ and, by

Whether Maker Could Be Sued Immaterial. — The rule was established in *Young v. Bryan*, 6 Wheat. (U. S.) 146, that the Circuit Court has jurisdiction of a suit brought by the indorsee of a promissory note, who was a citizen of one state, against the indorser who was a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker or not.

On Common Counts. — In *Coffee v. Planters' Bank*, 13 How. (U. S.) 183, a recovery was allowed on the common counts against the plaintiff's immediate indorser in an action which would otherwise have been within the restrictions of the statute limiting jurisdiction of federal courts.

1. *Moore v. Rogers*, 19 Ill. 347; *Billingsley v. State Bank*, 3 Ind. 375; *Morrison v. Fishel*, 64 Ind. 177; *Gilmore v. Carr*, 2 Mass. 171; *Porter v. Ingraham*, 10 Mass. 88; *Hunter v. Hempstead*, 1 Mo. 67; *Tarin v. Morris*, 2 Dall. (Pa.) 115; *Lowenstein v. Knopf*, 4 Mo. App. 594.

Against Maker and Indorser. — The holder of a negotiable instrument may maintain several actions at the same time against the maker and indorser. *Morrison v. Fishel*, 64 Ind. 177; *Gilmore v. Carr*, 2 Mass. 171; *Porter v. Ingraham*, 10 Mass. 88; *Hunter v. Hempstead*, 1 Mo. 67.

Joint and Several Contracts. — It was held in *Moore v. Rogers*, 19 Ill. 347, that several actions might be maintained at the same time on a negotiable instrument in which the liability was joint and several.

Costs in Several Actions. — It was held in *Porter v. Ingraham*, 10 Mass. 90, that the holder of a negotiable instrument bringing several actions thereon

at the same time "proceeds at the risk of costs — not only of the loss of his own costs, but of paying costs, when he receives satisfaction in one suit before judgments are recovered in the other suits." To the same effect, see *Gilmore v. Carr*, 2 Mass. 171.

2. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542; *St. Mary's Bank v. Brooks*, 12 Ga. 531; *Buckner v. Thompson*, 11 Ill. 563; *Nickerson v. Rockwell*, 90 Ill. 460; *Boyle v. Grant*, 18 Pa. St. 162; *Planters', etc., Bank v. Cowing*, 2 Nott & M. (S. Car.) 438; *Ferguson v. Culton*, 8 Tex. 283; *Nathans v. Hope*, 77 N. Y. 420, holding that a recovery in one suit, and satisfaction of the judgment, is not a bar to the other actions.

As to Splitting Demands Generally, see article ACTIONS, vol. 1, p. 148 *et seq.*

Several Coupons. — Actions may be instituted on several coupons detached from railroad mortgage bonds where the amount of each is within the jurisdiction of the court. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.

Justices of the Peace. — Where a creditor has several notes against the same debtor, though they be all due and in the same right, each being within the jurisdiction of a justice of the peace, but in the aggregate exceeding that jurisdiction, a suit may be brought before a justice of the peace on each of them, or a suit may be brought upon them in the aggregate in the District Court. *Buckner v. Thompson*, 11 Ill. 563; *Nickerson v. Rockwell*, 90 Ill. 460; *Ferguson v. Culton*, 8 Tex. 283. See also *St. Mary's Bank v. Brooks*, 12 Ga. 531.

3. *Smith v. Champion*, 102 Ga. 92; *Kurz v. Suppiger*, 18 Ill. App. 630;

what seems to be the weight of authority, it is held that separate actions may be maintained for the principal of a negotiable instrument, and for the interest due thereon.¹

Statutory Provisions as to Separate Suits. — In some states there are statutes limiting the power of the holder of negotiable instruments to maintain several actions thereon.²

Consolidation. — A court in which several actions are brought on negotiable instruments, may order them consolidated where there are the same parties in each case.³ But a consolidation will not be ordered where one of the notes in suit has a different indorser

Walker v. Kimball, 22 Ill. 537; *Dulaney v. Payne*, 101 Ill. 325; *Wehrly v. Morfoot*, 103 Ill. 183.

Reason of Rule. — A promise to pay the principal at one time and the interest at another is to be construed as several distinct promises to constitute several causes of action, and being several in their origin, no subsequent act can make them one and entire. Accordingly successive suits may be brought to recover successive instalments of interest as they become due, and where a note provides that if interest is not paid, the principal sum shall immediately become due and payable, the omission to pay an instalment of interest does not make the principal and interest an entire demand. *Wehrly v. Morfoot*, 103 Ill. 183.

Action for Instalments. — Where a note purports to be payable on time, but was in truth given to secure the payment of money by instalments, the payee having brought an action on the note and taking a cognovit for the instalments due, cannot maintain a second action for default in the payment of subsequent instalments. *Siddall v. Rawcliffe*, 1 M. & Rob. 263.

1. *Dulaney v. Payne*, 101 Ill. 325; *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28; *Sparhawk v. Wills*, 6 Gray (Mass.) 163. *Contra*, *Howe v. Bradley*, 19 Me. 31.

Separate Action for Attorney's Fee. — Where a stipulation for an attorney's fee provides that it may be recovered either in an action on the note, or a separate action, a separate action may be maintained even by an assignee to recover such fee. *Dorsey v. Wolff*, 142 Ill. 589.

2. For cases construing such statutes, see *Vandewater v. McRae*, 27 Cal. 596; *Billingsley v. State Bank*, 3 Ind. 375; *Morrison v. Fishel*, 64 Ind. 177; *Sims*

monds v. Center, 6 Mass. 18; *Sims v. McNeil*, 10 Humph. (Tenn.) 500.

Debts Secured by Mortgage. — In *Vandewater v. McRae*, 27 Cal. 596, it was held that the California statute providing that there should be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, was not applicable in a case where a judgment had been obtained against the maker of a note, and the holder was suing the indorser.

Only One Action at Same Term. — The Indiana statute (Rev. Stat., p. 697) providing that no holder of a bill of exchange shall be permitted at any term of the Circuit Court to institute more than one suit upon such bill, prohibits the institution of separate suits at the same term upon such bill, but not at different terms of the same court. *Billingsley v. State Bank*, 3 Ind. 375; *Morrison v. Fishel*, 64 Ind. 177.

Resident and Nonresident Defendants. — The Tennessee Act of 1813, c. 67, which prohibits the prosecution of several actions against parties jointly and severally liable for the payment of money, does not prevent the holder of a note executed by several persons from prosecuting his action by attachment against nonresidents, and by summons against those who can be served personally with process, at the same time. *Sims v. McNeil*, 10 Humph. (Tenn.) 500.

3. *Rumsey v. Wynkoop*, 1 Yeates (Pa.) 5; *Boyle v. Grant*, 18 Pa. St. 162; *Planters', etc., Bank v. Cohen*, 2 Nott & M. (S. Car.) 440. See in general article CONSOLIDATION OF ACTIONS, vol. 4, p. 673.

Consolidation on Appeal. — It was held in *Boyle v. Grant*, 18 Pa. St. 162, that, while the payee of several promissory notes might maintain a suit before a justice of the peace on each of the

from the others,¹ where it does not appear that the defenses in each case are the same,² nor where the amount involved if the actions were consolidated would exceed the jurisdiction of the court.³

IV. FORM OF ACTION — 1. At Common Law — a. ASSUMPSIT. — The common-law action of assumpsit lies for the breach of a simple contract. It is therefore a proper form of action by which the liability of a maker, drawer, indorser, acceptor, surety, etc., of a bill, note, or check may be enforced by the party to whom such liability accrues.⁴

notes, on appeal from such justice the court might consolidate the suits.

1. *Planters', etc., Bank v. Cohen*, 2 Nott & M. (S. Car.) 440.

2. *Worley v. Glentworth*, 10 N. J. L. 241, in which case the notes were made at different dates, and matured at different times.

3. *Parrott v. Green*, 1 McCord L. (S. Car.) 531; *Planters', etc., Bank v. Cowing*, 2 Nott & M. (S. Car.) 438.

4. See in general article ASSUMPSIT, vol. 2, p. 987.

In the following cases assumpsit was recognized rather than strictly decided to be a proper form of action:

Alabama. — *Hightower v. Ivy*, 2 Port. (Ala.) 308; *Kirkpatrick v. Bethany*, 1 Ala. 201; *Murdock v. Caruthers*, 21 Ala. 785.

Connecticut. — *Eagle Bank v. Smith*, 5 Conn. 71.

Illinois. — *Giddings v. McCumber*, 51 Ill. App. 373.

Indiana. — *Bush v. Seaton*, 4 Ind. 522.

Kentucky. — *Anderson v. Anderson*, 4 Dana (Ky.) 352; *Breckenridge v. Shrieve*, 4 Dana (Ky.) 375.

Maryland. — *Hopkins v. Kent*, 17 Md. 113; *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Penn v. Flack*, 3 Gill & J. (Md.) 369.

Massachusetts. — *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Barker v. Parker*, 10 Gray (Mass.) 339; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Ramsdell v. Soule*, 12 Pick. (Mass.) 126; *Randall v. Rich*, 11 Mass. 494; *State Bank v. Hurd*, 12 Mass. 171; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316; *Wild v. Fisher*, 4 Pick. (Mass.) 421.

Michigan. — *Brown v. McHugh*, 35 Mich. 52; *Port Huron, etc., R. Co. v. Potter*, 55 Mich. 627.

Mississippi. — *Phipps v. Nye*, 34 Miss. 330.

Missouri. — *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321.

New Hampshire. — *Blodgett v. Jackson*, 40 N. H. 21; *Chamberlin v. Perkins*, 55 N. H. 237; *Edgerton v. Brackett*, 11 N. H. 218; *Howland v. Spencer*, 14 N. H. 580; *Johnson v. Crane*, 16 N. H. 68; *Martin v. Farnum*, 24 N. H. 194; *Tenney v. Sanborn*, 5 N. H. 557; *Rushworth v. Moore*, 36 N. H. 188; *Wilson v. George*, 10 N. H. 446.

New York. — *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; *Cottrell v. Conklin*, 4 Duer (N. Y.) 45; *Arnold v. Crane*, 8 Johns. (N. Y.) 79; *Butler v. Wright*, 20 Johns. (N. Y.) 367; *Cayuga County Bank v. Warden*, 6 N. Y. 19; *Wright v. Butler*, 6 Wend. (N. Y.) 284; *McClellan v. Anthony*, 1 Edm. Sel. Cas. (N. Y.) 284; *Burdick v. Green*, 15 Johns. (N. Y.) 247, 18 Johns. (N. Y.) 14; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5; *Hays v. Phelps*, 1 Sandf. (N. Y.) 64; *Pierce v. Crafts*, 12 Johns. (N. Y.) 90; *Butler v. Rawson*, 1 Den. (N. Y.) 105; *Throop v. Cheeseman*, 16 Johns. (N. Y.) 264; *Smith v. Smith*, 2 Johns. (N. Y.) 235; *Olcott v. Rathbone*, 5 Wend. (N. Y.) 490.

North Carolina. — *Smith v. Bryan*, 11 Ired. L. (N. Car.) 418.

Ohio. — *Mitchell v. McCabe*, 10 Ohio 405.

Oregon. — *Cogswell v. Hayden*, 5 Oregon 22.

Pennsylvania. — *Elkinton v. Fennimore*, 13 Pa. St. 173; *Dilworth v. Hirst*, 1 Phila. (Pa.) 206, 8 Leg. Int. (Pa.) 111; *Ledy v. Tammany*, 9 Watts (Pa.) 353; *Pleiss v. Maule*, 2 Miles (Pa.) 186.

South Carolina. — *Haviland v. Simons*, 4 Rich. L. (S. Car.) 338; *Matthewes v. Fogg*, 1 Rich. L. (S. Car.) 369.

Tennessee. — *Irby v. Brigham*, 9 Humph. (Tenn.) 750; *Bachus v. Richmond*, 5 Yerg. (Tenn.) 109; *Turpin v. Williams*, 1 Sneed (Tenn.) 397.

Utah. — *Miller v. Zeigler*, 3 Utah 17.

Form of Action. *NEGOTIABLE INSTRUMENTS.* At Common Law.

On What Instruments. — In the absence of statute assumpsit will not lie on a promissory note under seal. But in several states this common-law rule has been modified by statute, and now assumpsit will lie where formerly the action was debt or covenant.¹ Nor will assumpsit lie on a special agreement to guarantee a note.² It is available, however, on a note payable in bank notes,³ on a note containing a condition,⁴ on an instrument payable in articles and not in money,⁵ on a non-negotiable

Vermont. — *Austin v. Burlington*, 34 Vt. 506; *Chase v. Burnham*, 13 Vt. 447; *Brigham v. Hutchins*, 27 Vt. 569; *U. S. Bank v. Lyman*, 20 Vt. 666; *Malley v. Weinman*, 48 Vt. 180; *Johnson v. Catlin*, 27 Vt. 87; *Vaughn v. Rugg*, 52 Vt. 235; *Sanford v. Norton*, 14 Vt. 228.

Virginia. — *U. S. Bank v. Jackson*, 9 Leigh (Va.) 221; *Murray v. Carret*, 3 Call (Va.) 373; *Peasley v. Boatwright*, 2 Leigh (Va.) 195.

United States. — *Frazer v. Carpenter*, 2 McLean (U. S.) 236; *Campbell v. Jordan*, Hempst. (U. S.) 534; *Benjamin v. Tillman*, 2 McLean (U. S.) 213; *Moore v. Metropolis Bank*, 13 Pet. (U. S.) 302; *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Riddle v. Mandeville*, 1 Cranch (C. C.) 95.

England. — *Hodges v. Steward*, 1 Salk. 125; *Thompson v. Morgan*, 3 Campb. 101; *Master v. Miller*, 4 T. R. 339; *Bennett v. Farnell*, 1 Campb. 130; *Bentley v. Northouse*, 1 M. & M. 66, 22 E. C. L. 251; *Grant v. Vaughan*, 3 Burr. 1516; *Dimsdale v. Lanchester*, 4 Esp. N. P. 201; *Israel v. Douglas*, 1 H. Bl. 239; *Starke v. Cheeseman*, 1 Salk. 128; *Smith v. Kendall*, 6 T. R. 123; *Pownall v. Ferrand*, 6 B. & C. 439, 13 E. C. L. 230; *Tatlock v. Harris*, 3 T. R. 174; *Murray v. East India Co.*, 5 B. & Ald. 204, 7 E. C. L. 66; *Waynam v. Bend*, 1 Campb. 175; *Wharton v. Walker*, 4 B. & C. 163, 10 E. C. L. 302.

Declaring Specially. — It was held in *Butler v. Rawson*, 1 Den. (N. Y.) 105, that assumpsit would not lie on a promissory note where the word "surety" was added to the signature of one of the makers, on the ground that where the defendant's character as surety appears on the face of the instrument the plaintiff must declare specially.

As to What Will Support the Action of Assumpsit in such cases, see Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 65, title *Bills of Exchange and Promissory Notes*.

1. *Avery v. Latimer*, 1 West. L. J. (Ohio) 310; *January v. Goodman*, 1 Dall. (U. S.) 208, in which case it was held that assumpsit would not lie on an instrument said to be a promissory note, but concluding with the words "as witness my hand and seal," and actually sealed. To the same effect see *Pierce v. Lacy*, 23 Miss. 193; *Avery v. Latimer*, 1 West. L. J. (Ohio) 310. Compare *Campbell v. Jordan*, Hempst. (U. S.) 534. See in general article ASSUMPSIT, vol. 2, p. 989.

Indorsement of Sealed Note. — In *Gist v. Drakely*, 2 Gill (Md.) 330, it was held that assumpsit would lie on an indorsement in blank of the note, although the note was executed by the corporation under its seal. The action was held not to be upon the sealed instrument, but upon the contract contained in the indorsement.

Unsealed Writings Made Specialties. — In *Anderson v. Anderson*, 4 Dana (Ky.) 352, it was held that assumpsit would lie on a written acceptance of a bill of exchange, it being considered that the statute raising certain unsealed writings to the dignity of specialties did not apply to such an acceptance. 2. *Richardson v. Smith*, 8 Johns. (N. Y.) 439.

3. *Throop v. Cheeseman*, 16 Johns. (N. Y.) 264; *Deberry v. Darnell*, 5 Yerg. (Tenn.) 451.

4. *Payson v. Whitcomb*, 15 Pick. (Mass.) 212, where the condition was that the payee assign a certain mortgage to the maker of the note. But see *McClellan v. Anthony*, 1 Edm. Sel. Cas. (N. Y.) 284, where it was held that an order was not conditional although it contained a provision that the acceptor should deduct the sum stated in the order from the amount due to the acceptor from the drawer.

5. *Hassell v. Hoit*, 17 N. H. 39; *Chamberlain v. Perkins*, 55 N. H. 237; *Crandal v. Bradley*, 7 Wend. (N. Y.) 311; *Stever v. Lamoure*, Hill & D. Supp. (N. Y.) 352; *Taplin v. Packard*,

note ¹ for the recovery of money paid for a counterfeit bill ² or a forged note or indorsement, ³ or for one which is void for want of a stamp, ⁴ and where the holder of a note surrenders it upon a consideration which fails. ⁵

Account Stated. — In several cases it has been held that a recovery may be had on a negotiable instrument under a count in assumpsit on an account stated. ⁶

8 Barb. (N. Y.) 220, *disapproving* a dictum to the contrary in *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 646; *Elkinton v. Fennimore*, 13 Pa. St. 173. But see *Saxton v. Johnson*, 10 Johns. (N. Y.) 418.

Note Payable in Land. — In *Smith v. Smith*, 2 Johns. (N. Y.) 235, an action of assumpsit by the payee against the maker of a note was sustained, although the note was payable in land at a certain price per acre.

1. *Fitch v. Bogue*, 19 Conn. 291.

In *Port Huron, etc., R. Co. v. Potter*, 55 Mich. 627, a recovery on the common counts was permitted in an action on a railroad aid note conditioned on the completion of the railroad to a certain point.

2. *Watson v. Cresap*, 1 B. Mon. (Ky.) 196; *White v. Green*, 5 Jones L. (N. Car.) 47.

Payment in Counterfeit Bills. — In *Young v. Adams*, 6 Mass. 182, it was held that the payee of a note might recover against the maker in an action for money had and received on a note payable in foreign bills, although the maker had already paid the note in such bills, it being discovered that one of the bills paid was a counterfeit.

3. *White v. Green*, 5 Jones L. (N. Car.) 47; *Ancher v. Bank of England*, 2 Doug. 638, in which case there was a recovery, for money had and received, by the drawer of a bill of exchange whose agent had paid it to one holding under a forged indorsement, against such indorsee.

4. *Tyte v. Jones*, 1 East, 58 note *a*.

5. *Gray v. Gray*, 2 J. J. Marsh. (Ky.) 21.

Failure of Consideration. — The maker of a note cannot sustain assumpsit for money had and received against the payee, when the consideration for which the note is given fails. *Dean v. Mason*, 4 Conn. 428.

Against Discharged Bankrupt. — An action of assumpsit is the proper remedy to enforce a promise made by a discharged bankrupt to pay a note from which he was discharged by his

bankruptcy proceedings. *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44.

Instrument Held as Security. — In *Shelton v. Darling*, 2 Conn. 435, it was said "While a party holds an instrument as a security for his debt, he cannot resort to the action of *indebitatus assumpsit*, for money had and received; for the express written contract extinguishes the implied one."

A Note Not Due cannot be made the basis of an action of assumpsit against the maker. *Child v. Eureka Powder Works*, 44 N. H. 354.

Conversion of Note by Maker. — In *Tucker v. Jewett*, 32 Conn. 563, it was said that trover was the proper remedy where a promissory note was delivered by the payee to the maker to be held as a mere deposit, and was converted by the maker, but a recovery was allowed on a general count in assumpsit, "probably on the ground that the note might be left out of view and judgment might be given on the original cause of action. But it does not appear what the original cause of action was, that is, what the transaction was in consideration of which the note was given. It is by no means a uniform rule that general assumpsit will lie for the original consideration of a note. It may have been given in compromise of a tort, as for a libel or an assault and battery." See also *Arnold v. Crane*, 8 Johns. (N. Y.) 79.

6. *Johnson v. Johnson*, Minor (Ala.) 263; *Catlin v. Gilders*, 3 Ala. 536; *Hopper v. Eiland*, 21 Ala. 714; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Wagstaffe v. Boardman*, 9 D. & R. 248, 22 E. C. L. 388; *Burmester v. Hogarth*, 11 M. & W. 97.

Payee Against Maker. — The payee may recover against the maker of a promissory note under a common count on an account stated. *Catlin v. Gilders*, 3 Ala. 536.

Indorsee Against Indorser. — "Evidence of an existing debt is sufficient to support a count upon an account stated. The circumstance of the defendant in this instance not being

b. COVENANT. — A sealed instrument is, at common law, the basis of the action of covenant. But where the use of a seal has been abrogated, or where writings without a seal have been placed on the same footings as sealed instruments, it seems that a bill or note may be sued on in this form of action.¹

c. DEBT. — The distinguishing feature of the action of debt consists in the fact that it lies for the recovery of money or its equivalent in sums certain. It is therefore an appropriate remedy at common law to recover upon a bill or note.² Thus the action has been held to lie by the payee of a bill of exchange against the drawer,³ by an indorsee against the drawer,⁴ by the drawer against the acceptor,⁵ by the payee against the acceptor,⁶

an original party to the bill makes no difference, for his indorsement of the bill created a debt from him to the indorsee. Besides, his acknowledgment of an existing debt, and his promise to pay it, created a privity of contract between him and the plaintiff, independently of the bill, and was good evidence to support the count upon an account stated." *Wagstaffe v. Boardman*, 9 D. & R. 248, 22 E. C. L. 388. See also *Burmester v. Hogarth*, 11 M. & W. 97, in which case the bill was indorsed in blank by the defendant, who was the payee, and in which case it was said: "Although the indorsement of the bill, in an action by the indorsee against the indorser, may be *prima facie* evidence of an account stated, yet on the facts in proof in this case, that *prima facie* evidence was rebutted."

Conditional Note. — In *Hopper v. Eiland*, 21 Ala. 714, it was said that a conditional note when condition has been performed can be given in evidence on an account stated, but it was held that the paper involved in that case was not entitled to be received in that character.

1. See generally article COVENANT, vol. 5, p. 345.

Action of Covenant and Lex Fori. — In *U. S. Bank v. Donnally*, 8 Pet. (U. S.) 361, it was said: "No one will pretend that because an action of covenant will lie in Kentucky on an unsealed contract made in that state, therefore a like action will lie in another state where covenant can be brought only on a contract under seal."

2. See article DEBT, vol. 5, p. 899. Compare *Peasley v. Boatwright*, 2 Leigh (Va.) 195; *Welsh v. Craig*, 1 Stra. 680; *Lindo v. Gardner*, 1 Cranch (U. S.) 343; *Muldrow v. Caldwell*, 7 Mo. 563.

3. *Dunlap v. Buckingham*, 16 Ill.

109; *Brown v. Hall*, 2 A. K. Marsh. (Ky.) 600; *Camp v. Owego Bank*, 10 Watts (Pa.) 130; *Sharpe v. Fowlkes*, 7 Humph. (Tenn.) 512; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Bishop v. Young*, 2 B. & P. 78.; *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207. But see *Hard's Case*, 1 Salk. 23.

4. *Home v. Semple*, 3 McLean (U. S.) 150; *Stratton v. Hill*, 2 Chit. Rep. 126, 18 E. C. L. 274. *Contra*, when by an indorsee in blank, see *Lewin v. Edwards*, 9 M. & W. 720.

5. *Camp v. Owego Bank*, 10 Watts (Pa.) 130; *Regnault v. Hunter*, 4 W. Va. 257; *Priddy v. Hembrey*, 1 B. & C. 674, 8 E. C. L. 284; *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207.

Value Received. — In *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207, it was held that debt would lie by the drawer of a bill of exchange against the acceptor, although the instrument did not contain the words "value received," since "those words express only what the law must imply in each case from the nature of the instrument, and the relation of the parties apparent upon it."

6. *Illinois*. — *Dunlap v. Buckingham*, 16 Ill. 111.

Kentucky. — *Anderson v. Anderson*, 4 Dana (Ky.) 352.

Tennessee. — *Planters' Bank v. Galloway*, 11 Humph. (Tenn.) 342.

Virginia. — *Hollingsworth v. Milton*, 8 Leigh (Va.) 50, by statute.

West Virginia. — *Regnault v. Hunter*, 4 W. Va. 257, under a statute.

United States. — *Frazer v. Carpenter*, 2 McLean (U. S.) 237; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Home v. Semple*, 3 McLean (U. S.) 150.

England. — *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207.

Compare *Wilson v. Crowdhill*, 2

by an indorsee against the acceptor.¹ In case of a promissory note it has been held that the action of debt would lie by the payee named in such note against the maker,²

Munf. (Va.) 302; *Smith v. Segar*, 3 Hen. & M. (Va.) 394; *Anonymous*, Hardres 485.

Reason of Rule.—"It is true, that the consideration of the acceptor's promise proceeds, immediately, from the drawer, but his promise is made directly to the payee or other holder of the bill; the legal effect is, that the acceptor promises to pay the payee if he be the holder, or the indorsee if he be the holder. In no sense is the undertaking of the acceptor collateral to that of the drawer; on the contrary, the converse of this is true. He does not undertake to pay the debt of the drawer, but by his acceptance he makes the debt his own as a principal debtor, and the drawer is only liable in case of his failure to pay on demand, at the maturity of the bill. Now, upon principle, it is difficult to see any reason why the action of debt should not lie in such case; the acceptor being a principal debtor, liable upon an express and direct undertaking to pay a sum certain." *Planters' Bank v. Galloway*, 11 Humph. (Tenn.) 342.

For Value Received.—That an action of debt will lie by the payee of the bill of exchange against the acceptor, where it is expressed to be for value received, see *Frazer v. Carpenter*, 2 McLean (U. S.) 237; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385.

Where it was objected that debt would not lie on instruments which were not expressed to be for "value received" it was said in *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207, by Lord Denman: "The counsel, who contended that the actions were not maintainable for want of the words 'value received,' admitted that if those words had been inserted, the plaintiff * * * must have succeeded. But we are of the opinion that those words express only what the law must imply in each case, from the nature of the instrument and the relation of the parties apparent upon it; and that it therefore makes no difference, as to this question, whether the words be or be not inserted. We hold, therefore, that the action of debt is maintainable." See also *Dunlap v. Buckingham*, 16 Ill. 111.

1. *Raborg v. Peyton*, 2 Wheat. (U. S.) 385, where the bill is expressed to be for value received; *Regnault v. Hunter*, 4 W. Va. 257, which case was decided under section 12, chapter 144, of the code of Virginia, providing that "an action of debt may be maintained upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent;" *Vowell v. Alexander*, 1 Cranch (C. C.) 33, in which case it was held that debt would lie by an indorsee against the acceptor of an inland bill of exchange in Virginia. Compare *Powell v. Ansell*, 3 M. & G. 171, 42 E. C. L. 97; *Cloves v. Williams*, 3 Bing. N. Cas. 868, 32 E. C. L. 360.

2. *Arkansas*.—*Bentley v. Dickson*, 1 Ark. 165.

Illinois.—*Dunlap v. Buckingham*, 16 Ill. 111.

Kentucky.—*Brown v. Brown*, 10 B. Mon. (Ky.) 247; *Stephens v. Crostwait*, 3 Bibb (Ky.) 222; *Bradford v. Ross*, 3 Bibb (Ky.) 238 (the payee had taken up the note in this case).

Maine.—*De Proux v. Sargent*, 70 Me. 266.

Missouri.—*Warne v. Hill*, 7 Mo. 40, under a statute.

North Carolina.—*Gardner v. Clark*, 1 Murph. (N. Car.) 283.

Pennsylvania.—*Camp v. Owego Bank*, 10 Watts (Pa.) 130.

Tennessee.—*Bloomfield v. Hancock*, 1 Yerg. (Tenn.) 101; *Young v. Hawkins*, 4 Yerg. (Tenn.) 171; *Plummer v. Keaton*, 9 Yerg. (Tenn.) 27.

West Virginia.—*Keller v. McHuffman*, 15 W. Va. 64.

United States.—*Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Childress v. Emory*, 8 Wheat. (U. S.) 642, where the action was against the maker's executor. Compare *Lindo v. Gardner*, 1 Cranch (U. S.) 344.

England.—*Bishop v. Young*, 2 B. & P. 78; *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207; *Simpkins v. Potheary*, 14 Jur. 464.

Reason of Rule.—"As debt will lie where *indebitatus assumpsit* will, and as the statute of Anne puts notes on the same footing with bills of exchange, it

by an indorsee against the maker,¹ by an assignee against the

would seem clearly to follow, that an action of debt may be maintained by the payee of a promissory note against the drawer." *Gardner v. Clark*, 1 Murph. (N. Car.) 283.

Value Received. — In *Hatch v. Traves*, 11 Ad. & El. 702, 39 E. C. L. 207, it was held that the words "value received" were not necessary to entitle the payee of a promissory note to maintain debt against the maker. But see *Bishop v. Young*, 2 B. & P. 78.

Check. — In *Simpkins v. Potheary*, 14 Jur. 464, debt by the payee of a check against the maker was sustained.

Joint Action. — In *Keller v. McHuffman*, 15 W. Va. 64, an action of debt by the payee against the joint makers of a note was sustained, although the note was sealed by one of the makers. And in *Taylor v. Coolidge*, 17 Ark. 454, it was held that the payee and assignor of an instrument in writing, under seal, for the payment of money, might be sued jointly with the obligor, in an action of debt, by the assignee.

But in *Watson v. Hoge*, 7 Yerg. (Tenn.) 344, a joint action of debt against the maker and an indorser of a note was held improper.

Executors and Administrators. — By the ancient common law an administrator is not liable for debt on a promissory note given by his intestate. *Barry v. Robinson*, 1 B. & P. N. R. 293. In this case it was said by Mansfield, C. J.: "The distinction between the actions of debt and assumpsit as applicable to the case of executors, is not founded in good sense; but still that distinction has always been recognized in the law. Ill-founded as it is, we must nevertheless act upon it, while it continues to be law, for it is not in our power to alter the law."

In *Childress v. Emory*, 8 Wheat. (U. S.) 642, it was held that an action of debt would lie against executors upon a promissory note given by their testator, it being held that the common-law rule prohibiting such actions because a wager of law was not open to executors did not apply, wager of law having been abolished. See also *Leathers v. M'Glasson*, 3 T. B. Mon. (Ky.) 223. In *Brown v. Brown*, 10 B. Mon. (Ky.) 247, the administrator of the payee of a note was permitted to maintain debt against the maker.

1. *Alabama*. — *Barclay v. Moore*, 17

Ala. 634. And see *Carroll v. Meeks*, 3 Port. (Ala.) 226.

Maine. — *National Exch. Bank v. Abell*, 63 Me. 346; *De Proux v. Sargent*, 70 Me. 266.

Missouri. — *Nelson v. State Bank*, 7 Mo. 219, under a statute.

New York. — *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341.

Pennsylvania. — *Camp v. Owego Bank*, 10 Watts (Pa.) 130.

Tennessee. — *Anderson v. Crockett*, 6 Yerg. (Tenn.) 330; *Bank v. Cowan*, 11 Humph. (Tenn.) 126. *Contra*, *Olive v. Napier*, *Cooke* (Tenn.) 11.

United States. — *Raborg v. Peyton*, 2 Wheat. (U. S.) 385; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20; *Bullard v. Bell*, 1 Mason (U. S.) 243.

Reason of Rule. — "An action of debt lies for a sum certain, whether it has been rendered certain by a judgment, or by a special or simple contract between the parties. Hence debt may be maintained not only by the payee, but by the indorsee against the maker of a promissory note." *De Proux v. Sargent*, 70 Me. 266.

Bearer Against Maker. — The holder of a note payable to bearer may bring debt on it against the maker. *Carroll v. Meeks*, 3 Port. (Ala.) 226.

Against Stockholder. — In *Bullard v. Bell*, 1 Mason (U. S.) 243, the action was by the bearer of a bank note against a stockholder under a statute making the latter individually liable, and it was held that debt would lie.

In Alabama. — In *Barclay v. Moore*, 17 Ala. 634, it was held that an action of debt might be maintained by an indorsee of a note under a statute of that state providing that "the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit." *Clay's Digest*, 383, § 12.

In Iowa it was held in *Sater v. Hendershatt*, 1 Morr. (Iowa) 118, that a special indorsee of a sealed instrument should sue thereon in the name of the payee, because it was doubtful whether debt would lie on such an instrument.

In Pennsylvania, by the Act of March 21, 1806, the action of debt is expressly given in all cases of debt due by bond, note, etc., but it has been held that aside from this statute debt might be maintained by an indorsee against the maker of a note, on the ground that

maker,¹ by an indorsee against an indorser.²

On What Instruments. — Debt lies on coupons detached from railroad mortgage bonds,³ on a sealed note,⁴ and on an instrument payable in foreign money⁵ or in property.⁶ But debt will not

the maker, like the acceptor of a bill of exchange, is primarily liable, and that all reasons which may be assigned for sustaining the action against the acceptor apply with equal force to an action by the indorsee against the maker. *Camp v. Owego Bank*, 10 Watts (Pa.) 130.

1. *Taylor v. Walpole*, 1 Blackf. (Ind.) 378; *Lawrence v. Dougherty*, 5 Yerg. (Tenn.) 435; *Leathers v. M'Glasson*, 3 T. B. Mon. (Ky.) 223 (the action in this case was against the executor of the maker).

2. *Loose v. Loose*, 36 Pa. St. 538; *Planters' Bank v. Tappan*, 2 Humph. (Tenn.) 98; *Bayley v. Hazard*, 3 Yerg. (Tenn.) 487; *Camp v. Owego Bank*, 10 Watts (Pa.) 130 (in this case it was said that an action of debt might be maintained "by the first indorsee against the first indorser, who was also the drawer of a bill payable to his own order"); *Watkins v. Wake*, 7 M. & W. 488. Compare *McGuire v. Blanton*, 5 Humph. (Tenn.) 361; *Frierson v. Reeves*, 7 Humph. (Tenn.) 359; *State Bank v. Cowan*, 11 Humph. (Tenn.) 126, in which case it was held that debt would lie by an indorsee against the maker and indorser but not against the indorser alone.

Surety and Indorser. — It was held in *McGuire v. Blanton*, 5 Humph. (Tenn.) 361, that an action of debt might be maintained by a person who appeared on the face of the note as surety, to recover against the maker the amount which he had been forced to pay the holder, but that an indorser who had been forced to pay could not maintain the action.

Payable in Bank Notes. — Debt does not lie in *Tennessee* by the indorsee against the indorser of a note payable in North Carolina bank notes. *Gamble v. Hatton, Peck* (Tenn.) 130; *Deberry v. Darnell*, 5 Yerg. (Tenn.) 451.

Joint Action. — Under a statute giving a joint action against the maker or indorsers of inland bills of exchange, promissory notes, and writings obligatory, it has been held that a joint action of debt will lie against such persons whether debt will lie against an indorser sued alone or not. *Planters' Bank v. Tappan*, 2 Humph. (Tenn.) 98.

Intermediate Indorsements. — An indorsee may bring debt against the drawer, although there may be intermediate indorsements, since those indorsements may be stricken out. *Home v. Semple*, 3 McLean (U. S.) 150.

In Virginia. — In *Mandeville v. Riddle*, 1 Cranch (U. S.) 290, it was held that under the statutes of Virginia an action of debt would not lie by an indorsee against a remote indorser.

3. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.

4. *Pierce v. Lacy*, 23 Miss. 193, in which case it was held that debt, and not assumpsit, was the proper form of action.

5. *Gamble v. Hatton, Peck* (Tenn.) 130, in which case it was said: "If foreign money is to be paid, it may be sued for in debt, demanding so much currency as is the value of the foreign money, or in debt, in the *debet and detinet*, demanding the foreign money and leaving the jury to assess the value."

Compare *Wilburn v. Greer*, 6 Ark. 255, where it was held that debt would lie on a note payable in "Arkansas money," which was held to mean "current coin of the United States."

In Virginia, under section 4 of chapter 125 of Rev. Code, giving an action of debt upon any "note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money or a quantity of tobacco," it was held that debt would lie by the payee of an order not technically a bill of exchange. *Hollingsworth v. Milton*, 8 Leigh (Va.) 52, the court saying: "In the cases of *Smith v. Segar*, 3 Hen. & M. (Va.) 394, and *Wilson v. Crowdhill*, 2 Munf. (Va.) 302 (which however were acceptances on bills of exchange), the influence of this statute does not seem to have been considered. In the recent case of *Peasley v. Boatwright*, 2 Leigh (Va.) 195, the original statute, 4 Hen. Stat. at Large, pp. 273-5, from which the present act is substantially copied, came under examination; and it was decided by all the judges that debt would lie, under the act, on a promissory note not expressed to be for value received, and without laying any consideration."

6. *Henry v. Gamble, Minor* (Ala.) 15;

lie where the intervention of the jury is required to assess unliquidated damages.¹ And it seems that an action of debt cannot be maintained on a promissory note payable in instalments, until the last day of payment is past,² nor on a collateral undertaking to pay the note of another.³

d. TROVER.—Where a promissory note or a bill of exchange has been converted an action of trover may be maintained by the owner thereof.⁴ Trover lies also for the conversion of bank bills.⁵ It seems that an action of trover will lie by one co-owner of a negotiable instrument against another for its conversion.⁶

Dorsey v. Lawrence, Hard. (Ky.) 517; *Bloomfield v. Hancock*, 1 Yerg. (Tenn.) 101; *Young v. Hawkins*, 4 Yerg. (Tenn.) 171; *Lawrence v. Dougherty*, 5 Yerg. (Tenn.) 435; *Crawford v. Daigh*, 2 Va. Cas. 521.

1. *Mitchell v. Walker*, 4 Ark. 145, in which case it was held that debt would not lie upon a note executed alone for property or an agreement for unliquidated damages. See also *Deberry v. Darnell*, 5 Yerg. (Tenn.) 451, where it was held that debt would not lie on a note payable in North Carolina bank notes.

2. *Rudder v. Price*, 1 H. Bl. 547.

In *Brown v. Brown*, 10 B. Mon. (Ky.) 247, it was held that debt would lie on a note payable in instalments, when all of the instalments were due, though some of the instalments were of an amount less than was necessary to give the court jurisdiction.

3. *Tappan v. Campbell*, 9 Yerg. (Tenn.) 436.

But in *Brown v. Bussey*, 7 Humph. (Tenn.) 573, debt was maintained by an indorsee on a guaranty of payment by the payee of a note.

4. See, in general, article *TROVER*.

Connecticut.—*Tucker v. Jewett*, 32 Conn. 563.

Georgia.—*Wight v. Hester*, 24 Ga. 489.

Iowa.—*Conover v. Earl*, 26 Iowa 167.

Maine.—*Ewell v. Gillis*, 14 Me. 74.

Michigan.—*Hicks v. Lyle*, 46 Mich. 489.

New York.—*Chase v. Chase*, 1 Paige (N. Y.) 198; *Bissel v. Drake*, 19 Johns. (N. Y.) 66. But see *Easterly v. National Exch. Bank*, 3 Thomp. & C. (N. Y.) 366.

North Carolina.—*Robertson v. Dunn*, 87 N. Car. 191.

Tennessee.—*Seals v. Cummings*, 8 Humph. (Tenn.) 442.

Vermont.—*Spencer v. Dearth*, 43 Vt. 98.

England.—*Treuttel v. Barandon*, 8 Taunt. 100, 4 E. C. L. 33.

Paid Note.—An action of trover will lie to recover damages against the holder of a note for refusing to deliver it up to the makers when they have paid it. *Spencer v. Dearth*, 43 Vt. 98.

Chattel Notes.—It was held in *Hicks v. Lyle*, 46 Mich. 489, that an action of trover might be maintained for the conversion of a note made payable in cedar posts.

Maker and Bailee.—Where a defendant held as a deposit a note against himself in favor of the plaintiff, which he refused to deliver on demand, it was held that trover was the appropriate remedy, and that the value of the note could not be recovered by the plaintiff in general assumpsit. *Tucker v. Jewett*, 32 Conn. 563.

Deposit of Check.—In *Moore v. Craig*, (Brooklyn City Ct.) 4 N. Y. Supp. 339, it was held that trover would not lie in a case where the plaintiff had deposited with the defendant a check drawn in her favor, which the defendant had collected, but had failed to pay over the proceeds. The plaintiff's remedy, the court said, was an action to recover a deposit.

Trover or Assumpsit.—In *Robertson v. Dunn*, 87 N. Car. 191, it was held that either assumpsit or trover might be maintained by the owner of a note against a person who, having the note in his possession, had obtained judgment thereon without authority from such owner.

5. *Moody v. Keener*, 7 Port. (Ala.) 218; *Abrahams v. South-Western R. Bank*, 1 S. Car. 441.

6. *Boyle v. Levings*, 28 Ill. 314; *Conover v. Earl*, 26 Iowa 167.

Reason of Rule.—"It may be true that a note cannot be parceled out by

2. Statutory Actions. — The common-law forms of action are, of course, of no consequence in those jurisdictions where the distinction between forms of action has been abolished by codes of procedure or practice acts. In some states, also, statutes exist providing special methods, more or less summary, where commercial paper is sued upon. The pleadings and judgment in such proceedings are noticed in other parts of this article.¹

V. VENUE — *County of Defendant's Residence.* — It is generally required that actions on negotiable instruments be brought in the county of the defendant's residence, the same as other civil actions.²

Party Primarily Liable. — Under the statutes of some states actions on negotiable instruments may be brought in the county where

the holder, so as to render the maker liable to distinct actions by the different assignees. The principle here referred to has no application to this case. The owner of a note may sell distinct shares thereof to different persons, who thus become co-owners; and the interest thus acquired by one co-owner is such as to enable him to protect it by an action; and he may maintain trover if a co-owner be guilty of a conversion." *Conover v. Earl*, 26 Iowa 167.

Illinois Statute. — It was held in *Boyle v. Levings*, 28 Ill. 314, that an action of trover could be maintained for the conversion of a promissory note or bank bills received under it, although the plaintiff and defendant were jointly interested in such note, but it was said: "At common law this action could not be maintained, but under the second section of the 56th chapter, Rev. Stat., we think it can." This statute gave a right of action for the conversion against a co-owner in the same manner as if such co-ownership did not exist.

1. See *infra*, IX., *Declaration and Complaint*; and XIV. 7. *Judgment*.

Suits on Paper of Corporations. — See *infra*, XIV. 7. *Judgment*.

Suit Against Assignor. — It was held in *Thompson v. Shreve*, 24 Ark. 264, that the provision in the statute relating to the remedy by petition in debt, 'to the effect that, if the plaintiff is the owner of the instrument sued on, as assignee, the fact of the assignment must be stated in the petition, does not authorize a suit against the assignor, in the form prescribed by the statute, but is merely for the purpose of showing that the plaintiff is the legal owner of the instrument. This is manifest not only from the context of the statute,

but from the language employed in the particular section."

For Early Cases illustrating these special statutory proceedings, see *Fox v. Sayre*, 6 Dana (Ky.) 312; *Kinsman v. Castleman*, 1 T. B. Mon. (Ky.) 210; *Hartman v. Welz*, 1 B. Mon. (Ky.) 242; *Kalfus v. Watts*, Litt. Sel. Cas. (Ky.) 197; *London v. Kenney*, 1 Bibb (Ky.) 331; *Kincaid v. Higgins*, 1 Bibb (Ky.) 352; *Wright v. Coleman*, 4 Bibb (Ky.) 252; *Dallam v. Wilson*, 4 T. B. Mon. (Ky.) 108; *Duncan v. McAfee*, 3 Ill. 559; *Thompson v. High*, 13 Ga. 312; *Blevins v. Blevins*, 4 Ark. 441; *Mitchell v. Walker*, 4 Ark. 145.

2. *Newcome v. Dunham*, 27 Ind. 285; *Morrison v. Fishel*, 64 Ind. 177; *Brenner v. Egly*, 23 Kan. 123; *Lichty v. McMartin*, 11 Kan. 565. See, in general, article VENUE.

In Colorado, by the provisions of the Code of Civil Procedure 1883, § 28, actions on promissory notes may be tried in the county in which either plaintiff or defendant resides, and the provision that actions on notes may be tried in the county where payable does not prevent an action on such a note in the county of plaintiff's residence, though defendant resides and the note is made payable in another. *Thomas v. Colorado Nat. Bank*, 11 Colo. 511.

Foreign Corporation. — Under a statute providing that transitory actions may be brought in the county in which either party resides, and not elsewhere, but when neither party is an inhabitant, then in any county, an action on a promissory note payable to a foreign corporation, and conditioned to be void on failure of the corporation to raise a certain amount of money as required by a certain lease, is transitory and may be brought in any county. Edu-

the party primarily liable thereon resides.¹

In County of Indorser's Residence — When Maker Joined. — In some states an action on a promissory note against the maker and indorser may be brought in the county where the indorser resides, though the maker resides in another county.² The indorser, however, must be one who has transferred the note *bona fide*, and not merely for the purpose of having the action brought in the county of his residence.³

cational Soc., etc., *v. Varney*, 54 N. H. 376.

1. *Vinson v. Platt*, 21 Ga. 135; *Moore v. Knox*, 46 Miss. 602; *Hamilton v. Catchings*, 58 Miss. 92.

Bills of Exchange in Georgia. — "Bills of exchange are either included in the constitution or they are not. If they are, and the acceptor takes the place of the maker of the note, and the drawer the place of the indorser, then by the very terms of the constitution, suit must be brought in the county where the acceptor, the maker, resides. If they are not included in the amended constitution, still, in analogy to this provision, and all the other analogies of the law, the action should be located where the party primarily liable resides." *Vinson v. Platt*, 21 Ga. 135.

When One Maker Is Surety. — Under a statute providing that the suit on a promissory note shall be brought in the county where the party to the suit first liable shall reside, "that is to say, in the county of the residence of the maker or acceptor, within the statute, as judicially expounded, if there be two makers standing toward each other as principal and surety, such suit may well be brought in the county where either of them resides." *Moore v. Knox*, 46 Miss. 602.

Accommodation Acceptor. — Under a statute providing that an action on a bill of exchange should be brought in the county where the person primarily liable resides, it has been held that the county of the acceptor's residence was the proper place to bring such an action notwithstanding the fact that such acceptor was an accommodation party, and that this was known to the plaintiff when he took the bill. *Hamilton v. Catchings*, 58 Miss. 92.

2. *Indiana*. — *Norvell v. Hittle*, 23 Ind. 346; *Hall v. Suitt*, 39 Ind. 316; *Ewing v. Logan*, 40 Ind. 342; *Keiser v. Yandes*, 45 Ind. 174.

Iowa. — *Stout v. Noteman*, 30 Iowa 414.

Kansas. — *Brenner v. Egly*, 23 Kan. 123; *Rullman v. Hulse*, 32 Kan. 598.

Nebraska. — *Belcher v. Palmer*, 35 Neb. 449.

Texas. — *Williams v. City Nat. Bank*, (Tex. Civ. App. 1894) 27 S. W. Rep. 147. This case was decided under a statute providing that "indorsers * * * may be jointly sued with their principal obligors."

Contra. — *Morris v. McClain, Dudley* (Ga.) 172. This case, however, was under a statutory provision which gave the defendant a right to be sued in the county of his residence, except in actions against joint promisors. And compare *McGuire v. Wagoner*, 59 Ga. 591, as to suing an indorser with the maker where the maker resides.

Parties Immediately Liable. — In *Hall v. Suitt*, 39 Ind. 316, it was held that the indorsers as well as makers of a promissory note are immediately liable to the holder, and that therefore an action on such promissory note may be properly brought in the county in which such indorser resides.

3. *Brenner v. Egly*, 23 Kan. 123; *Rullman v. Hulse*, 32 Kan. 598; *Belcher v. Palmer*, 35 Neb. 449; *Pool v. Pickett*, 8 Tex. 122; *Henderson v. Kissam*, 8 Tex. 46; *Raymond v. Holmes*, 11 Tex. 54; *Christie v. Gunter*, 26 Tex. 700. But see *Norwell v. Hittle*, 23 Ind. 346.

Unreal or Imaginary Party. — "In no case can an action for money on a promissory note or other joint and several contract be brought outside of the county where the defendant resides or may be summoned, by merely uniting with him as a codefendant some unreal or imaginary party, against whom no judgment could be properly rendered." *Brenner v. Egly*, 23 Kan. 123.

Assignment to Pay Debt. — "It does not appear from the evidence that the note was assigned without consideration, and for the purpose of fraudulently giving jurisdiction of the case to the court in Wood county. It was

Where Performance Due. — In some states it is permissible to bring actions on negotiable instruments in the county where they are made payable, or where performance of the contract is otherwise due.¹

Waiving Objections to Venue. — The defendant in an action on a negotiable instrument, as in other cases, may waive his right to insist upon the action being brought in a particular county.²

assigned to enable the assignor to apply its proceeds in payment of a debt due from him to the assignee. This was a legitimate purpose, and it cannot be urged as an objection to the validity of the assignment that it enabled the holder of the note to sue in the county of his residence, or that the privilege it conferred thus to sue was a motive for making the assignment, since it was made *bona fide* for a sufficient consideration. It was the right of the assignor thus to dispose of and apply the note to the payment of his debt. If this was the motive and purpose of the assignment, and it was not merely fictitious and colorable, and for the purpose of conferring jurisdiction upon the court in the county of the assignor's residence, it could not be deemed a fraud upon the court of the county of the maker's residence, or an infraction of his right to be sued in that county." *Christie v. Gunter*, 26 Tex. 700.

1. *Thomas v. Colorado Nat. Bank*, 11 Colo. 511; *Troy Portable Grain Mill Co. v. Bowen*, 7 Iowa 465; *Sanbourn v. Smith*, 44 Iowa 152; *Lammers v. Floyd*, 11 Tex. Civ. App. 473; *Looney v. Le Geir*, 2 Tex. App. Civ. Cas., § 532.

Bill of Exchange. — In *Lammers v. Floyd*, 11 Tex. Civ. App. 473, it was held that an action on a bill of exchange which was expressly made "returnable in Galveston," was properly brought in the county of Galveston, though the drawer, who was the defendant, resided in another county.

Certificate of Deposit. — In *Sanbourn v. Smith*, 44 Iowa 152, it was held that a certificate of deposit payable "on return of this certificate," might properly be sued on at the place where the bank was located, and not where the banker might happen to reside. Under section 2581 of the Iowa Code, providing that "when by its terms a written contract is to be performed in any particular place, action for breach thereof may be brought in the county wherein such place is situated."

Guaranty. — It was held in *Looney v. Le Geir*, 2 Tex. App. Civ. Cas., § 532, that an action on a guaranty was properly brought against the guarantor in the county where the principal contract was to be performed.

Venue Not Changed by Fraudulent Guaranty. — It was held in *Troy Portable Grain Mill Co. v. Bowen*, 7 Iowa 465, that an action on a promissory note was properly brought under Iowa Code, § 1704, in the county where the note was made payable, and that where the parties, for the purpose of enabling the payee to bring his action in some other county, procured a guaranty of the note by another person without the consent of the maker, the venue would not be changed by such fraudulent act. But, in the absence of an objection by the maker, the action might properly have been brought against both the maker and guarantor in the county where the latter resided.

Where Property Located. — In *Scott v. Turner*, 15 La. Ann. 346, it was held that an action on a note secured by an act of hypothecation importing confession of judgment might be brought in the parish where the property was situated.

2. *Humphries v. McWhorter*, 25 Ga. 37; *Lamar v. Cottle*, 27 Ga. 263; *Demuth v. Cutler*, 50 Me. 298; *Watkins v. Plummer*, 93 Mich. 215; *Christian v. O'Neal*, 46 Miss. 670.

Acknowledging Service. — "We think that the acknowledgment of service by the defendants, alleged in the declaration to reside in Fulton, was sufficient to give the court of Cass county jurisdiction as to them. The entire object of requiring a second original and process to issue when an indorser is sued, and resides in a county different from that of the maker of a promissory note, where the suit must be brought, is to assure the court that the party has been served by the proper officer, and that the party himself has legal notice of the suit. This object is fully accomplished by the acknowledg-

VI. PARTIES PLAINTIFF — 1. Payee — a. ACTION BY PAYEE FOR HIS OWN USE. — It is, of course, the general rule that an action on a negotiable instrument may be maintained in the name of the payee of such instrument, when he is also the owner thereof.¹

When Not the Real Owner. — In most states the payee of a negotiable instrument may sue thereon in his own name, although he is not the real or beneficial owner of such instrument or of all of it.²

ment of service by the parties in this case. The defendant was at liberty to waive a constitutional as well as a legal right in a matter of this sort. He did waive it, and must be bound by it." *Humphries v. McWhorter*, 25 Ga. 37.

Pleading the General Issue has been held to be a waiver of an objection to the venue. When an action is brought in the wrong county, advantage of the defect should be taken by a plea in abatement. *Demuth v. Cutler*, 50 Me. 298.

Colorable Indorsement for Collection. — In *Watkins v. Plummer*, 93 Mich. 215, it was held that although the note in suit had been indorsed to a person residing in a county where the defendant had certain business interests, in order that an action might be maintained against him in that county, nevertheless he had submitted to the jurisdiction without being misled as to the real ownership of the note, and could not afterwards object to the venue.

1. *Hapgood v. Wellington*, 136 Mass. 217; *Perry v. Swasey*, 12 Cush. (Mass.) 36; *Bent v. Brainard*, 1 Mo. 283; *Walker v. Mauro*, 18 Mo. 564; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *McLaren v. Watson*, 26 Wend. (N. Y.) 425.

Order for Whole Debt. — An order drawn for the whole of a debt is an equitable assignment of it, and the party in whose favor the order is drawn may sue for the debt in his own name. *Walker v. Mauro*, 18 Mo. 564.

Conditional Order. — A note given by A to B for a certain sum which A owed C, on condition that B produces C's order for the sum, is a note on which B may maintain an action in his own name. *Bent v. Brainard*, 1 Mo. 283.

General Guarantee. — It was held in *McLaren v. Watson*, 26 Wend. (N. Y.) 425, that on a general guaranty of the payment of a note, without naming any person as payee, an action could be brought only in the name of the person in whose hands it first becomes available, unless the guaranty was

written on the note itself. See also *Watson v. McLaren*, 19 Wend. (N. Y.) 557.

Agreement to Take Up Note. — In *Van Eman v. Stanchfield*, 13 Minn. 75, it was held that the plaintiff, under an agreement between the maker and a third person that the maker should take up a certain note in the hands of the plaintiff, could recover only by showing that he was the owner of such note or that he had a special property in it. See also *Perry v. Swasey*, 12 Cush. (Mass.) 36.

Note Given as Collateral Security. — It was held in *Hapgood v. Wellington*, 136 Mass. 217, that the payee of a note might sue the maker thereon, though the note was given him to secure him against liability as an indorser on a note by the same maker, although the plaintiff had, at the time of suit, incurred no liability under such indorsement.

Name of Payee Left Blank. — An action may be maintained against the maker by the holder of a negotiable instrument in which the name of the payee is left blank. *Rich v. Starbuck*, 51 Ind. 87; *Boyd v. McCann*, 10 Md. 118.

Filling Up Blank. — In *Boyd v. Bockenkamp*, 3 W. N. C. (Pa.) 25, it was held that any holder might sue upon a note payable to blank or bearer, without filling up the blank; but in *Thompson v. Rathbun*, 18 Oregon 202, it was held that on a note payable to the order of —, an action could not be maintained unless it was filled up.

2. *California.* — *Price v. Dunlap*, 5 Cal. 483; *Sainsevain v. Luce*, (Cal. 1894) 35 Pac. Rep. 1033.

Indiana. — *Wells v. Sutton*, 85 Ind. 72; *Blacker v. Dunbar*, 108 Ind. 220; *Johnson v. Conklin*, 119 Ind. 110; *Offutt v. Rucker*, 2 Ind. App. 354; *Wheeler v. Barr*, 7 Ind. App. 387.

Kansas. — *Scantlin v. Allison*, 12 Kan. 85.

Kentucky. — *Brooking v. Clarke*, 2 Litt. (Ky.) 197.

Indorsement Unnecessary. — Where an instrument is payable to the order of the payee, such payee may maintain an action thereon without indorsing it.¹

Mistake in Payee's Name. — Where an instrument is made payable to a person by a wrong name, such person may sue thereon in his right name.²

Louisiana. — *Gilman v. Horseley*, 5 Martin N. S. (La.) 661.

Maine. — *Whitcomb v. Smart*, 38 Me. 264. But see *Bean v. Dolliff*, 67 Me. 228, where it was held that one to whom a note was made payable to secure a lien could not sue thereon after his lien was discharged.

Massachusetts. — *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 230.

Minnesota. — *Vanstrum v. Liljengren*, 37 Minn. 191; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37; *Minnesota Thresher Mfg. Co. v. Heipler*, 49 Minn. 395; *Cooper v. Hayward*, 67 Minn. 92, (Minn. 1898) 74 N. W. Rep. 152. But see *Van Eman v. Stanchfield*, 13 Minn. 75.

Missouri. — *Barry County v. McGlothlin*, 19 Mo. 307; *Nicolay v. Fritschle*, 40 Mo. 67.

New York. — *Fish v. Jacobsohn*, 5 Bosw. (N. Y.) 514, 2 Abb. App. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599.

Ohio. — *Numlin v. Westlake*, 2 Ohio 24.

Pennsylvania. — *Thompson v. Clark*, 56 Pa. St. 33.

Tennessee. — *Barbee v. Williams*, 4 Heisk. (Tenn.) 522; *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Rutherford v. Mitchell*, 1 Mart. & Y. (Tenn.) 261; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Texas. — *Allen v. Pannell*, 51 Tex. 165; *Jones v. Nowland*, Dall. (Tex.) 451; *McKinney v. Peters*, Dall. (Tex.) 545; *Wheeler v. Roberts*, 2 Tex. App. Civ. Cas., § 128; *Anderson v. Shaw*, 2 Tex. Unrep. Cas. 285.

Vermont. — *Sanford v. Huxley*, 18 Vt. 170; *Johnson v. Catlin*, 27 Vt. 87.

But see *Sullivan v. Hellams*, 6 S. Car. 184, holding otherwise under a statute requiring the action to be by the real party in interest.

As to the General Rule Requiring the Real Party in Interest to Sue, see article PARTIES.

Action Forbidden by Real Owner. — The payee of a note cannot maintain an action in his own name against the express wishes of the beneficial owner.

Comstock v. Hoag, 5 Wend. (N. Y.) 599.

Payment to the Real Owner of an instrument will defeat an action by the payee thereon in his own name. *Price v. Dunlap*, 5 Cal. 483.

Payee for Collection Only. — One to whom a bill of exchange is made payable for the purpose of collecting its amount from the acceptor may sue the acceptor thereon in his own name, although no consideration passed from him to the drawer. *Vanstrum v. Liljengren*, 37 Minn. 191; *Minnesota Thresher Mfg. Co. v. Heipler*, 49 Minn. 395.

Payee Part Owner Only. — The payee of an instrument may sue thereon, notwithstanding he is only a part owner of such instrument. *Scantlin v. Allison*, 12 Kan. 85; *Brooking v. Clarke*, 2 Litt. (Ky.) 197; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37; *Fish v. Jacobsohn*, 2 Abb. App. Dec. (N. Y.) 132, 1 Keyes (N. Y.) 539; *Sanford v. Huxley*, 18 Vt. 170.

1. *Durgin v. Bartol*, 64 Me. 473; *Huling v. Hugg*, 1 W. & S. (Pa.) 418. And see *Davis v. Baker*, 71 Ga. 33.

2. *Alabama.* — *Taylor v. Strickland*, 37 Ala. 642.

Georgia. — *Smith v. Hanie*, 74 Ga. 324.

Illinois. — *Chenot v. Lefevre*, 8 Ill. 637.

Massachusetts. — *Medway Cotton Manufactory v. Adams*, 10 Mass. 360.

Missouri. — *Neil v. Dillon*, 3 Mo. 59.

Pennsylvania. — *Latshaw v. Hiltelbeitel*, 2 Penny. (Pa.) 263.

And see *Bair v. People's Bank*, 27 Neb. 577.

Payee a Partnership. — In *Smith v. Hanie*, 74 Ga. 324, an individual was permitted to sue on a note payable to the order of himself and company, it being alleged that the individual did business in such partnership name without in fact having any partner.

"Senior." — Where there are two persons by the same name, being father and son, on a note payable to such person without the addition of any further description, the father may sue in his

Necessity of Possession. — The payee of a negotiable instrument may sue thereon in his own name notwithstanding the instrument is in the possession of a third person at the time the suit is brought,¹ unless such third person holds the instrument under a claim of right.²

b. ACTION IN NAME OF PAYEE FOR ANOTHER'S USE — (1) In General. — The general rule is that the holder or owner of a negotiable instrument, although it has not been expressly indorsed to him by the payee, may sue thereon in the payee's name,³ but an action on a note for the use of another than the payee should

own name, adding the word "senior." *Neil v. Dillon*, 3 Mo. 59. See also article NAMES, *ante*, p. 270.

Altered Instrument. — In *Latshaw v. Hildebeitel*, 2 Penny. (Pa.) 263, it was held that where an instrument named C. as the payee, and the name of the payee of the instrument was altered by the maker of the note, after signing, without the knowledge of the surety, to R. the real lender of the money, C. might maintain an action on such note to the use of R.

1. *Vastine v. Wilding*, 45 Mo. 89; *Selden v. Pringle*, 17 Barb. (N. Y.) 458.

2. *Crandall v. Schroepfel*, 1 Hun (N. Y.) 557; *Read v. Marine Bank*, 59 Hun (N. Y.) 578, 136 N. Y. 454.

3. *Alabama*. — *Herndon v. Taylor*, 6 Ala. 461.

Arkansas. — *Heartman v. Franks*, 36 Ark. 501.

Florida. — *Hooker v. Gallagher*, 6 Fla. 351.

Maine. — *Harriman v. Hill*, 14 Me. 127; *Brown v. Nourse*, 55 Me. 230.

Massachusetts. — *Mosher v. Allen*, 16 Mass. 451.

Mississippi. — *Haynes v. Ezell*, 25 Miss. 242.

Pennsylvania. — *Lyon v. Chalker*, 2 Watts (Pa.) 15; *Post v. Kinzua Hemlock R. Co.*, 171 Pa. St. 615, 37 W. N. C. (Pa.) 305.

South Carolina. — *Carroll v. Still*, 13 S. Car. 430; *Morris v. Peay*, 1 Hill L. (S. Car.) 35.

Tennessee. — *Wright v. McLemore*, 10 Yerg. (Tenn.) 235.

England. — *Pease v. Hirst*, 10 B. & C. 122, 21 E. C. L. 38.

As to Suits Generally by Assignee in Name of Assignor see article EQUITABLE ASSIGNMENTS, vol. 7, p. 733 *et seq.*

Action Against Indorser. — In *Haynes v. Ezell*, 25 Miss. 242, it was held that if a note payable to order be trans-

ferred by delivery without indorsement, by the payee, and then indorsed regularly by the transferee, the last indorsee could not sue a prior indorser in the name of the payee, although he might sue the maker in the payee's name.

Contingent Note. — In a suit upon a promissory note in these words: "There will be due to the A. Co. or order, two hundred and fifty dollars for rental of rolling stock, under contract of lease and conditional sale of even date herewith, payable at the office of the A. Co.," it was held that the note embraced a contingency that rendered it non-negotiable, and that suit should have been brought in the name of the payee for the use of the holder. *Post v. Kinzua Hemlock R. Co.*, 171 Pa. St. 615.

Discontinuing Action. — A payee who has transferred his interest in a note, and is merely the nominal plaintiff in an action thereon, will not be allowed fraudulently to discontinue the action and defeat the right of the real plaintiff. *Morris v. Peay*, 1 Hill L. (S. Car.) 35.

Change in Form. — It was held in *Pease v. Hirst*, 10 B. & C. 122, 21 E. C. L. 38, that a note payable to the partners composing a banking house might properly be sued on in the names of such payees, although there had subsequently been a change in the persons composing the firm, and the note had been transferred to the new firm without indorsement.

Where a Sealed Note payable to A as administrator has been transferred to B, an action on the note may be maintained in the name of A as administrator, suing for the benefit of B. *Carroll v. Still*, 13 S. Car. 430.

Consent of Payee to Suit in His Name. — See upon this subject article EQUITABLE ASSIGNMENTS, vol. 7, pp. 737, 738.

not be brought in the name of the payee after his death, but in that of his personal representative.¹

(2) *For What Holders* — (a) *Discount by Another Person than the Payee.* — When an instrument is made payable to a particular person, but is discounted by another person without passing through the payee's hands at all, an action may nevertheless be maintained in the payee's name on such instrument.²

(b) *Person Taking Up Instrument.* — An action may be maintained in the name of the payee, when the person taking up the instrument is the drawer of a bill of exchange³ or a surety,⁴ but not when he is a joint maker with the defendant,⁵ or an indorser.⁶

(c) *Indorsee.* — In most states, at least in the absence of statutory provisions requiring actions to be brought in the name of the real party in interest, or equivalent provisions, the indorsee of a negotiable instrument may sue thereon in the name of the payee.⁷

1. *Orr v. Thompson*, 9 Ill. 451. See also cases cited in article EQUITABLE ASSIGNMENTS, vol. 7, p. 737.

2. *Alabama.* — *Bird v. Wooley*, 23 Ala. 717.

Georgia. — *Hayne v. Perry*, 25 Ga. 400.

Maine. — *Lime Rock Bank v. Macomber*, 29 Me. 564; *Skowhegan Bank v. Baker*, 36 Me. 154; *Granite Bank v. Ellis*, 43 Me. 367.

Massachusetts. — *Adams Bank v. Jones*, 16 Pick. (Mass.) 574.

Mississippi. — *Trible v. Grenada Bank*, 2 Smed. & M. (Miss.) 523; *Graves v. Mississippi, etc., R. Co.*, 6 How. (Miss.) 548.

New Hampshire. — *Farnsworth v. Sweet*, 5 N. H. 267; *Elliot v. Abbot*, 12 N. H. 549; *Newbury Bank v. Rand*, 38 N. H. 166.

New York. — *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567; *Utica Bank v. Ganson*, 10 Wend. (N. Y.) 315.

Ohio. — *Clinton Bank v. Ayres*, 16 Ohio 283.

Vermont. — *Montpelier Bank v. Joyner*, 33 Vt. 481; *Middlebury Bank v. Bingham*, 33 Vt. 621; *Newbury Bank v. Richards*, 35 Vt. 281; *Farmers', etc., Bank v. Humphrey*, 36 Vt. 554; *Burlington Bank v. Beach*, 1 Aik. (Vt.) 62.

West Virginia. — *Spencer Bank v. Simmons*, 43 W. Va. 79.

3. *Davis v. M'Connell*, 3 McLean (U. S.) 391.

4. *Rockingham Bank v. Claggett*, 29 N. H. 292; *Low v. Blodgett*, 21 N. H. 121.

5. *Hendrickson v. Hutchinson*, 29 N. J. L. 180.

6. *Jordan v. Thornton*, 7 Ark. 224. But see *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88; *Bradford v. Bucknam*, 12 Me. 15.

7. *Georgia.* — *Tumlin v. Quarles*, 26 Ga. 395.

Iowa. — *Sater v. Hendershott*, 1 Morr. (Iowa) 118. *Contra*, *Allen v. Newberry*, 8 Iowa 65.

Maine. — *Lewis v. Hodgdon*, 17 Me. 267.

Massachusetts. — *Mosher v. Allen*, 16 Mass. 451; *Hodges v. Holland*, 19 Pick. (Mass.) 43.

Mississippi. — *Montague v. King*, 37 Miss. 441. *Contra*, *Lake v. Hastings*, 24 Miss. 490.

Tennessee. — *Burk v. State Bank*, 3 Head (Tenn.) 686; *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Vermont. — *Austin v. Birchard*, 31 Vt. 589.

United States. — *York Bank v. Asbury*, 1 Biss. (U. S.) 230.

Compare *Hunt v. Stewart*, 7 Ala. 525; *Wilson v. Ryan*, 7 J. J. Marsh. (Ky.) 350; *Moore v. Maxwell*, 2 Martin N. S. (La.) 249; *Guilfont v. Ascension Parish*, 28 La. Ann. 413; *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Helfer v. Alden*, 3 Minn. 332; *Bright v. Hand*, 16 N. J. L. 273; *Jones v. Martins*, 13 Pa. St. 614; *Spence v. Robinson*, 35 W. Va. 313.

Debt on Sealed Instrument. — In *Sater v. Hendershott*, 1 Morr. (Iowa) 118, an indorsee was permitted to sue in debt in the name of the payee on a sealed instrument, because under the statutes in force at that time it was doubtful whether the indorsee could maintain

This has been held even where the indorsement was in blank.¹

(d) **Bearer.** — A note payable in specific articles should be sued upon by the payee, though in terms it is made payable to payee or bearer.²

(e) **Assignee.** — The assignee of a negotiable instrument may maintain an action thereon in the name of the payee.³

debt on a negotiable instrument in his own name.

Forged Indorsement. — A person to whom a note made by a partnership has been delivered by one member of the firm, the name of the payee being forged, has been permitted to sue in the name of the payee. *York Bank v. Asbury*, 1 Biss. (U. S.) 230.

A Witnessed Note may be sued upon by the indorsee, with the payee's consent, in the name of the payee, in order to secure the benefit of a special statute of limitations. *Hodges v. Holland*, 19 Pick. (Mass.) 43.

1. *Temple v. Hays*, 1 Morr. (Iowa) 9; *Gray v. Wood*, 2 Har. & J. (Md.) 328; *Foss v. Nutting*, 14 Gray (Mass.) 484; *Reynolds v. Richards*, 14 Pa. St. 205. See also *infra*, VI. 5. d. *On What Instruments.*

A Note Payable in Work is not negotiable, and suit upon it must be in the name of the payee, although it has been transferred by an indorsement in blank. *Reynolds v. Richards*, 14 Pa. St. 205.

2. *Sanford v. Huxley*, 18 Vt. 170.

3. *Alabama.* — *Johnson v. English*, 1 Stew. (Ala.) 170; *Planters', etc., Bank v. Willis*, 5 Ala. 770. But see *Bullock v. Ogburn*, 13 Ala. 346.

Connecticut. — *Freeman v. Perry*, 22 Conn. 617; *Hunt v. Pierpont*, 27 Conn. 305.

Georgia. — *Haug v. Riley*, 101 Ga. 372.

Iowa. — *Yunker v. Martin*, 18 Iowa 143.

Maine. — *Hatch v. Spearin*, 11 Me. 354; *Ballard v. Greenbush*, 24 Me. 336.

Massachusetts. — *Tucker v. Tucker*, 119 Mass. 79; *Troeder v. Hyams*, 153 Mass. 536; *Drury v. Vannevar*, 5 Cush. (Mass.) 442; *Stone v. Hubbard*, 7 Cush. (Mass.) 595; *Rockwood v. Brown*, 1 Gray (Mass.) 261, apparently controlling *Mosher v. Allen*, 16 Mass. 451, to the contrary.

Michigan. — *Atkinson v. Weidner*, 79 Mich. 575.

Mississippi. — *Taylor v. Reese*, 44 Miss. 89.

New Jersey. — *Matlack v. Hendrickson*, 13 N. J. L. 263.

Pennsylvania. — *Jones v. Martins*, 13 Pa. St. 614.

Tennessee. — *Vincent v. Groom*, 1 Verg. (Tenn.) 430; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352; *Wolfe v. Tyler*, 1 Heisk. (Tenn.) 313.

West Virginia. — *Clarke v. Hogeman*, 13 W. Va. 718.

But see *Kyle v. Thompson*, 3 Ill. 432; *Langham v. Lebarge*, 6 Mo. 355; *Wheeler v. Roberts*, 2 Tex. App. Civ. Cas., § 128; *Anderson v. Shaw*, 2 Tex. Unrep. Cas. 285.

On a Note Transferred by an Assignee in Insolvency. without indorsement, an action may be maintained by such transferee in the name of the payee. *Stone v. Hubbard*, 7 Cush. (Mass.) 595.

A Special Promise to the Assignee by the maker of a note, to pay the note to him, does not merge the original promise on a note, and prevent the assignee from suing in the name of the payee. *Hatch v. Spearin*, 11 Me. 354.

Assignee Authorized to Sue by Statute.

— The statutes authorizing an assignee to sue in his own name do not take away, it seems, his right to sue in the name of the payee. *Johnson v. English*, 1 Stew. (Ala.) 170; *Clarke v. Hogeman*, 13 W. Va. 718.

Title Through Payee. — It was held in *Ballard v. Greenbush*, 24 Me. 336, that an assignee could not sue in the name of the payee on non-negotiable paper, unless he had acquired his title through the payee.

Judgment Creditors of the payee of a note, in whom the title is vested by a blank indorsement and delivery, and by his agreement to apply its proceeds, when collected, upon the judgment, have the right to allow him to bring suit in his own name on the note. *Atkinson v. Weidner*, 79 Mich. 575.

A Non-negotiable Note must, it was held in *Matlack v. Hendrickson*, 13 N. J. L. 263, be sued on in the name of the payee, and not of the assignee.

Assignment with Guaranty. — It seems that an action may be maintained in

(f) **Holder by Delivery Only.** — A person to whom a negotiable instrument has been transferred by delivery merely, may maintain an action thereon in the name of the payee of such instrument.¹

2. Indorsee — a. IN GENERAL. — The general rule, subject to certain exceptions which will be mentioned hereafter, is that the indorsee of a negotiable instrument² may maintain an action thereon in his own name.³

the name of the payee for the benefit of the holder of a negotiable note which has been transferred with a guaranty. *Jones v. Martins*, 13 Pa. St. 614.

1. Alabama. — *Williams v. Jones*, 79 Ala. 119.

Georgia. — *Benson v. Abbott*, 95 Ga. 69.

Indiana. — *Lewis v. Hathman*, 7 Ind. 585.

Massachusetts. — *Jones v. Witter*, 13 Mass. 304.

New York. — *Savage v. Bevier*, 12 How. Pr. (N. Y. C. Pl.) 166.

South Carolina. — *Myers v. James*, 2 Bailey L. (S. Car.) 547; *Marvin v. M'Rae*, Rice L. (S. Car.) 171.

Tennessee. — *Burton v. Dees*, 4 Yerg. (Tenn.) 4; *Cardwell v. Tennison*, 10 Humph. (Tenn.) 446.

Striking Out Assignments. — It was held in *Cardwell v. Tennison*, 10 Humph. (Tenn.) 446, that the holder of a note by delivery merely, might strike out assignments on it to other persons, and recover in the name of the payee. But where there was a failure to do this it was held that the action could not be maintained, since it did not appear that the plaintiff was the legal owner of the note.

Former Action by Payee Dismissed. — It was held in *Burton v. Dees*, 4 Yerg. (Tenn.) 4, that it was no defense to an action in the name of the payee, by a person to whom a negotiable instrument had been transferred by delivery, that a prior suit by the payee of such instrument had been dismissed on the ground that the payee had not such an interest as would entitle him to maintain the action.

Payments to the Payee, after notice by the transferee to the maker not to make such payments, do not prevent an action by such transferee against the maker in the name of the payee. *Jones v. Witter*, 13 Mass. 304.

2. It was held in Maryland Fertilizing, etc., Co. v. Newman, 60 Md. 584, that an indorsee might sue in his own name on an instrument promising to

pay a certain sum of money and to pay all costs and charges of collection, with interest, though such instrument was not a negotiable promissory note.

In *Muir v. Jenkins*, 2 Cranch (C. C.) 18, it was held that on a note "negotiable at the bank of discount and deposit," but not drawn payable to order, the indorsee might sue in his own name, on the ground that it was the intention of the parties to make a negotiable instrument. And see *infra*, VI. 5. d. *On What Instruments*.

3. Alabama. — *Kirksey v. Bates*, 1 Ala. 303; *Tipton v. Nance*, 4 Ala. 194; *Smoot v. Morehouse*, 8 Ala. 370; *Pond v. Lockwood*, 3 Ala. 669; *Birch v. Tillotson*, 16 Ala. 387; *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476; *Phillips v. Sellers*, 42 Ala. 658; *Moses v. Clark*, 46 Ala. 229; *Flexner v. Dickerson*, 65 Ala. 72; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505; *Lea v. Branch Bank*, 8 Port. (Ala.) 119; *Smyth v. Strader*, 9 Port. (Ala.) 446; *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259.

Arkansas. — *Pike v. Galloway*, 17 Ark. 90; *Turner v. Stroud*, 37 Ark. 556.

California. — *McPherson v. Weston*, 64 Cal. 275; *Woodsum v. Cole*, 69 Cal. 142; *Scribner v. Hanke*, 116 Cal. 613.

Connecticut. — *Nevins v. Townsend*, 6 Conn. 5; *French v. Jarvis*, 29 Conn. 347; *Bowne v. Olcott*, 2 Root (Conn.) 353; *Goff v. Billinghamurst*, 2 Root (Conn.) 527.

Delaware. — *Hartwell v. McBeth*, 1 Harr. (Del.) 363; *Freeman v. Sutton*, 3 Houst. (Del.) 264.

Georgia. — *Leitner v. Miller*, 49 Ga. 486; *Wilson v. Tolson*, 79 Ga. 137.

Indiana. — *Shafer v. Bronenberg*, 42 Ind. 89; *Mendenhall v. Baylies*, 47 Ind. 575; *Morrison v. Fishel*, 64 Ind. 177; *Pixley v. Van Nostern*, 100 Ind. 34; *Deuel v. Newlin*, 131 Ind. 40; *Payne v. Albany City Nat. Bank*, 3 Ind. App. 214.

Illinois. — *Burnap v. Cook*, 32 Ill. 168; *Henderson v. Davisson*, 57 Ill. App. 17; *Lohman v. Cass County Bank*, 87 Ill. 616.

Iowa. — *Allen v. Newberry*, 8 Iowa

Indorsement After Maturity. — The fact that a negotiable instrument is transferred after maturity does not prevent the indorsee suing

65; *Sheldon v. Middleton*, 10 Iowa 17; *Fannon v. Robinson*, 10 Iowa 272; *McCarty v. Clark*, 10 Iowa 588; *Abell Note Brokerage, etc., Co. v. Hurd*, 85 Iowa 559; *Sater v. Hendershott*, 1 Morr. (Iowa) 118.

Kansas. — *Linney v. Thompson*, 3 Kan. App. 718.

Kentucky. — *Harpending v. Daniel*, 80 Ky. 449; *Wilson v. Ryan*, 7 J. J. Marsh. (Ky.) 350; *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790, (Ky. 1892) 18 S. W. Rep. 234.

Louisiana. — *West v. Wilson*, 4 La. 219; *Lapice v. Clifton*, 17 La. 152; *McKown v. Mathes*, 19 La. 542.

Maine. — *Augusta v. Leadbetter*, 16 Me. 45; *Southard v. Wilson*, 29 Me. 56; *Cooper v. Curtis*, 30 Me. 488; *Franklin Bank v. Lawrence*, 32 Me. 586; *Davis v. Briggs*, 39 Me. 304; *Chase v. Hathorn*, 61 Me. 505; *Hapgood v. Watson*, 65 Me. 510; *Noyes v. Gilman*, 65 Me. 589; *Woodman v. Boothby*, 66 Me. 389; *Hersey v. Elliot*, 67 Me. 526; *Ticonic Nat. Bank v. Bagley*, 68 Me. 249; *Russell v. Folsom*, 72 Me. 436; *Dorr v. Davis*, 76 Me. 301. *Contra*, *Bates v. Butler*, 46 Me. 387 (this case was decided under a statute).

Maryland. — *Maryland Fertilizing, etc., Co. v. Newman*, 60 Md. 584; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Noland v. Ringgold*, 3 Har. & J. (Md.) 216; *Heighe v. Farmers' Bank*, 5 Har. & J. (Md.) 68.

Massachusetts. — *Wilson v. Holmes*, 5 Mass. 543; *Emerson v. Cutts*, 12 Mass. 77; *Nevins v. DeGrand*, 15 Mass. 436; *Bowman v. Wood*, 15 Mass. 534; *Mosher v. Allen*, 16 Mass. 451; *Guild v. Eager*, 17 Mass. 615; *Exchange Bank v. Rice*, 107 Mass. 41; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Rand v. Hubbard*, 4 Met. (Mass.) 260; *Brigham v. Marean*, 7 Pick. (Mass.) 40; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 230; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Estabrook v. Smith*, 6 Gray (Mass.) 570; *Hubbard v. Mosely*, 11 Gray (Mass.) 170; *Craig v. Twomey*, 14 Gray (Mass.) 486; *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

Michigan. — *Green v. Burrows*, 47 Mich. 70; *Russell v. Klink*, 53 Mich. 161; *Moore v. Hall*, 48 Mich. 143;

Phelps v. Church, 65 Mich. 231; *Wintermute v. Torrent*, 83 Mich. 555; *Stevens v. Hannan*, 86 Mich. 305; *Watkins v. Plummer*, 93 Mich. 215.

Minnesota. — *White v. Phelps*, 14 Minn. 27; *Elmquist v. Markoe*, 45 Minn. 305. But see *Rock County Nat. Bank v. Hollister*, 21 Minn. 385.

Mississippi. — *Lake v. Hastings*, 24 Miss. 490; *Montague v. King*, 37 Miss. 441; *Sims v. Wilkins*, 5 Smed. & M. (Miss.) 234; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43; *Haynes v. Ezell*, 25 Miss. 242; *Planters' Bank v. Chewning*, 5 How. (Miss.) 413.

Missouri. — *Irvin v. Maury*, 1 Mo. 194; *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Knaus v. Givens*, 110 Mo. 58; *Cummings v. Kohn*, 12 Mo. App. 585.

Nebraska. — *Roberts v. Snow*, 27 Neb. 425.

New Hampshire. — *Moody v. Leavitt*, 2 N. H. 171; *Thompson v. Wilson*, 2 N. H. 291; *Edgerton v. Brackett*, 11 N. H. 218; *Elliot v. Abbot*, 12 N. H. 549; *Southwick v. Ely*, 15 N. H. 541; *Burnham v. Whittier*, 5 N. H. 334; *Woodbury v. Woodbury*, 47 N. H. 11.

New York. — *Leavitt v. Putnam*, 3 N. Y. 494; *Commercial Bank v. Union Bank*, 11 N. Y. 203, 19 Barb. (N. Y.) 391; *Cummings v. Morris*, 25 N. Y. 625, *affirming* 3 Bosw. (N. Y.) 560; *Battle v. Coit*, 26 N. Y. 404, 19 Barb. (N. Y.) 68; *Dean v. Hewit*, 5 Wend. (N. Y.) 257; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Waggoner v. Colvin*, 11 Wend. (N. Y.) 27; *DeLafield v. Kinney*, 24 Wend. (N. Y.) 345; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284; *Eaton v. Alger*, 57 Barb. (N. Y.) 179; *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.) 139, 2 Cai. Cas. (N. Y.) 321; *Denniston v. Bacon*, 10 Johns. (N. Y.) 198; *Havens v. Huntington*, 1 Cow. (N. Y.) 387; *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *James v. Chalmers*, 5 Sandf. (N. Y.) 52; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132, 45 N. Y. Super. Ct. 383; *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63; *Matthews v. Moran*, 19 Misc. Rep. (N. Y. Supreme Ct.) 24; *White v. Williams*, 1 Paige (N. Y.) 502; *Concord Granite Co. v. French*, 3 Civ. Pro. Rep. (N. Y. C. Pl.) 445, 65 How. Pr. (N. Y.) 317, *affirming* 3 Civ. Pro. Rep. (N. Y.) 56; *Kirby v. Cogswell*, 1

thereon in his own name. In such case the holder takes the legal title and can maintain suit in the same manner as if he had received the instrument before it was due.¹

- Cai. (N. Y.) 505; *Lodge v. Phelps*, 2 Cai. Cas. (N. Y.) 321.
- North Carolina*. — *Kahnweiler v. Anderson*, 78 N. Car. 133.
- Ohio*. — *Osborn v. McClelland*, 43 Ohio St. 284; *Wayne v. Minor*, 3 Cinc. Wkly. L. Bul. 365, 7 Am. L. Rec. 9.
- Oregon*. — *Roberts v. Parrish*, 17 Oregon 583.
- Pennsylvania*. — *Kyner v. Shower*, 13 Pa. St. 444; *Jones v. Martins*, 13 Pa. St. 614; *Lawrance v. Fussell*, 77 Pa. St. 460; *Rand v. Dovey*, 83 Pa. St. 280; *Oberle v. Schmidt*, 86 Pa. St. 221; *Ashton v. Reeves*, 3 Phila. (Pa.) 339, 16 Leg. Int. (Pa.) 37; *Bank v. Butler*, 4 Kulp (Pa.) 99; *Porter v. Gunnison*, 2 Grant's Cas. (Pa.) 297; *Hanway v. McCullough*, 26 Pa. L. J. 79; *City Bank v. Traders' Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213; *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102; *McCormick v. Trotter*, 10 S. & R. (Pa.) 94; *Barriere v. Nairac*, 2 Dall. (Pa.) 249.
- Rhode Island*. — *Bank of America v. Senior*, 11 R. I. 376; *Cross v. Brown*, 19 R. I. 220.
- Tennessee*. — *Herron v. Bullitt*, 3 Sneed (Tenn.) 497; *Burk v. State Bank*, 3 Head (Tenn.) 686.
- Texas*. — *Andrews v. Hoxie*, 5 Tex. 171; *De Cordova v. Atchison*, 13 Tex. 372; *Barnett v. Logue*, 29 Tex. 282; *Frank v. Kaigler*, 36 Tex. 305; *Abercrombie v. Stillman*, 77 Tex. 589; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648; *Jackson v. Fawlkcs*, (Tex. 1892) 20 S. W. Rep. 136.
- Vermont*. — *Jarvis v. Barker*, 3 Vt. 445; *Cahoon v. Moore*, 11 Vt. 604; *Norton v. Downer*, 15 Vt. 569; *Tarbell v. Sturtevant*, 26 Vt. 513.
- Virginia*. — *Hoe v. Wilson*, 5 Call (Va.) 61.
- West Virginia*. — *Spence v. Robinson*, 35 W. Va. 313.
- Wisconsin*. — *Manegold v. Dulau*, 30 Wis. 541; *Merrill v. Guthrie*, 1 Pin. (Wis.) 435.
- Wyoming*. — *Stamper v. Gay*, 3 Wyoming 322.
- United States*. — *Pease v. Dwight*, 6 How. (U. S.) 190; *Riddle v. Mandeville*, 1 Cranch (C. C.) 95; *Mandeville v. Riddle*, 1 Cranch (U. S.) 290; *Muir v. Jenkins*, 2 Cranch (C. C.) 18; *Deale v. Krofft*, 4 Cranch (C. C.) 448; *York Bank v. Asbury*, 1 Biss. (U. S.) 230; *Irwin v. Bailey*, 8 Biss. (U. S.) 523; *Thatcher v. Winslow*, 5 Mason (U. S.) 58; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20; *Smith v. Clapp*, 15 Pet. (U. S.) 125; *Shuford v. Cain*, 1 Abb. (U. S.) 302.
- England*. — *Brown v. Davies*, 3 T. R. 80; *Hubbard v. Jackson*, 4 Bing. 390, 15 E. C. L. 12; *Louviere v. Laubray*, 10 Mod. 36; *Hawkins v. Gardner*, 12 Mod. 213; *Coleman v. Biedman*, 7 C. B. 871, 62 E. C. L. 871; *Callow v. Lawrence*, 3 M. & S. 95; *Deuters v. Townsend*, 5 B. & S. 616, 117 E. C. L. 616; *Johnson v. Kennion*, 2 Wils. 262; *Hawkins v. Cardee*, 1 Salk. 65; *Gibson v. Minet*, 1 H. Bl. 569; *Williams v. James*, 15 Q. B. 505, 69 E. C. L. 505; *Milne v. Graham*, 1 B. & C. 192, 8 E. C. L. 82; *M'Lean v. Clydesdale Banking Co.*, L. R. 9 App. 95; *Watkins v. Maule*, 2 Jac. & W. 237.
- Striking Out** the drawer's name does not affect the right of an indorsee to recover against the acceptor. *Ashton v. Reeves*, 3 Phila. (Pa.) 339, 16 Leg. Int. (Pa.) 37. *Compare Deale v. Krofft*, 4 Cranch (C. C.) 448.
- Statutory Authority to Indorsee to Sue**. — In *Irvin v. Maurry*, 1 Mo. 194, it was held that the indorsee of a promissory note might sue thereon, notwithstanding the statute providing that all bills and promissory notes should be assignable, and giving the assignee power to sue in his own name, it being held that the statute did not take away the effect of an indorsement.
- A National Bank** might sue as indorsee on a promissory note, without regard to whether its purchase was *ultra vires*. *National Pemberton Bank v. Porter*, 125 Mass. 333.
- A Town** might sue as indorsee on a note purchased to meet an expected claim by the payee against the town. *Augusta v. Leadbetter*, 16 Me. 45.
1. *Alabama*. — *Kirksey v. Bates*, 1 Ala. 303.
- Connecticut*. — *Nevins v. Townsend*, 6 Conn. 5; *French v. Jarvis*, 29 Conn. 347.
- Iowa*. — *Fannon v. Robinson*, 10 Iowa 272.
- Massachusetts*. — *Emerson v. Cutts*, 12 Mass. 77; *Guild v. Eager*, 17 Mass. 615.
- Mississippi*. — *Moore v. Ayres*, 5 Smed. & M. (Miss.) 310.

Special Indorsee. — Where a negotiable instrument is transferred by a special indorsement an action may be maintained thereon only by such special indorsee.¹

b. INTEREST OF INDORSEE — Beneficial Ownership. — In most states, at least in the absence of special statutory provisions, the indorsee of a negotiable instrument may sue in his own name, although he may not be the person entitled to the money due thereon.²

New York. — *Havens v. Huntington*, 1 Cow. (N. Y.) 387; *Dean v. Hewit*, 5 Wend. (N. Y.) 257; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284; *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63.

Pennsylvania. — *Kyner v. Shower*, 13 Pa. St. 444.

England. — *Brown v. Davies*, 3 T. R. 80; *Hubbard v. Jackson*, 4 Bing. 390, 15 E. C. L. 12; *Callow v. Lawrence*, 3 M. & S. 95; *Deuters v. Townsend*, 5 B. & S. 616, 117 E. C. L. 616.

Contra. — *Prest v. Vanarsdalen*, 11 N. J. L. 194.

Indorsement Pending Suit. — In *Fannon v. Robinson*, 10 Iowa 272, and in *Deuters v. Townsend*, 5 B. & S. 616, 117 E. C. L. 616, it was held that an action might be maintained by the indorsee of a negotiable instrument, which was transferred to him while suit was pending thereon.

Indorsement Before Suit. — In *Clark v. Peabody*, 22 Me. 500, it was held that no action could be maintained by the indorsee of a note unless it was indorsed by the payee before the commencement of the suit.

1. *Delaware.* — *Hartwell v. McBeth*, 1 Harr. (Del.) 363.

Iowa. — *Morris v. Hendershott*, 1 Morr. (Iowa) 118.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.

Mississippi. — *Lake v. Hastings*, 24 Miss. 490.

Pennsylvania. — *Bank v. Butler*, 4 Kulp (Pa.) 99; *Jones v. Martins*, 13 Pa. St. 614; *Lawrance v. Fussell*, 77 Pa. St. 460.

West Virginia. — *Spence v. Robinson*, 35 W. Va. 313.

2. *Alabama.* — *Pond v. Lockwood*, 8 Ala. 669. But see *Tipton v. Nance*, 4 Ala. 194.

California. — *McPherson v. Weston*, 64 Cal. 275; *Scribner v. Hanke*, 116 Cal. 613. But see *Woodsum v. Cole*, 69 Cal. 142.

Georgia. — *Wilson v. Tolson*, 79 Ga. 137; *Haug v. Riley*, 101 Ga. 372.

Illinois. — *Henderson v. Davisson*, 57 Ill. App. 17; *Lohman v. Cass County Bank*, 87 Ill. 616.

Indiana. — *Shafer v. Bronenberg*, 42 Ind. 89. But see *Mendenhall v. Baylies*, 47 Ind. 575; *Pixley v. Van Nostern*, 100 Ind. 34. *Contra*, *Deuel v. Newlin*, 131 Ind. 40.

Iowa. — *Abell Note Brokerage, etc., Co. v. Hurd*, 85 Iowa 559.

Kansas. — *Linney v. Thompson*, 3 Kan. App. 718.

Kentucky. — *Harpending v. Daniel*, 80 Ky. 449.

Louisiana. — *West v. Wilson*, 4 La. 219; *Lapice v. Clifton*, 17 La. 152; *McKown v. Mathes*, 19 La. 542.

Maine. — *Southard v. Wilson*, 29 Me. 56; *Cooper v. Curtis*, 30 Me. 488; *Franklin Bank v. Lawrence*, 32 Me. 586; *Ticonic Nat. Bank v. Bagley*, 68 Me. 249. *Contra* by statute, *Bates v. Butler*, 46 Me. 387.

Massachusetts. — *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Brigham v. Marean*, 7 Pick. (Mass.) 40; *Wilson v. Holmes*, 5 Mass. 543.

Michigan. — *Moore v. Hall*, 48 Mich. 143; *Wintermute v. Torrent*, 83 Mich. 555; *Watkins v. Plummer*, 93 Mich. 215.

Minnesota. — *Elmquist v. Markoe*, 45 Minn. 305. But see *Rock County Nat. Bank v. Hollister*, 21 Minn. 385.

Missouri. — *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Cummings v. Kohn*, 12 Mo. App. 585.

Nebraska. — *Roberts v. Snow*, 27 Neb. 425.

New Hampshire. — *Edgerton v. Brackett*, 11 N. H. 218; *Southwick v. Ely*, 15 N. H. 541.

New York. — *Commercial Bank v. Union Bank*, 11 N. Y. 203, 19 Barb. (N. Y.) 391; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132, 45 N. Y. Super. Ct. 383; *James v. Chalmers*, 5 Sandf. (N. Y.) 52; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599; *Waggoner v. Colvin*, 11 Wend. (N. Y.) 27; *Concord Granite Co. v. French*, 3 Civ. Pro. Rep. (N. Y. C. Pl.) 445, 65 How. Pr. (N. Y.) 317, *affirming*

Indorsee for Collection. — A person to whom a negotiable instrument has been transferred by indorsement, for the purpose of collection only, may nevertheless sue thereon in his own name. Even under the codes a plaintiff is the real party in interest if he has a valid transfer as against the assignor and holds the legal title to the demand.¹

Indorsement for Collateral Security. — An indorsee to whom a negotiable instrument is transferred for collateral security may sue thereon in his own name.²

c. PARTICULAR FORMS OF INDORSEMENT. — It has been held

- 3 Civ. Pro. Rep. (N. Y.) 56. But see *Eaton v. Alger*, 57 Barb. (N. Y.) 179.
- Ohio*. — *Wayne v. Minor*, 3 Cinc. Wkly. L. Bul. 365, 7 Am. L. Rec. 9. But see *Osborn v. McClelland*, 43 Ohio St. 284.
- Oregon*. — *Roberts v. Parrish*, 17 Oregon 583.
- Pennsylvania*. — *Hanway v. McCullough*, 26 Pa. L. J. 79; *City Bank v. Traders' Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213. But see *Oberle v. Schmidt*, 86 Pa. St. 221.
- Rhode Island*. — *Bank of America v. Senior*, 11 R. I. 376; *Cross v. Brown*, 19 R. I. 220.
- Tennessee*. — *Herron v. Bullitt*, 3 Sneed (Tenn.) 497.
- Texas*. — *Andrews v. Hoxie*, 5 Tex. 171; *De Cordova v. Atchison*, 13 Tex. 372; *Barnett v. Logue*, 29 Tex. 282.
- Wyoming*. — *Stamper v. Gay*, 3 Wyoming 322.
- United States*. — *Irwin v. Bailey*, 8 Biss. (U. S.) 523. But see *Thatcher v. Winslow*, 5 Mason (U. S.) 58.
- England*. — *Coleman v. Biedman*, 7 C. B. 871, 62 E. C. L. 871; *Johnson v. Kennion*, 2 Wils. 262; *Williams v. James*, 15 Q. B. 505, 69 E. C. L. 505.
- Compare Heighe v. Farmers' Bank*, 5 Har. & J. (Md.) 68.
1. *Alabama*. — *Bancroft v. Paine*, 15 Ala. 834.
- California*. — *McPherson v. Weston*, 64 Cal. 275.
- Georgia*. — *Wilson v. Tolson*, 79 Ga. 137; *Haug v. Riley*, 101 Ga. 372.
- Iowa*. — *Abell Note Brokerage, etc., Co. v. Hurd*, 85 Iowa 559.
- Louisiana*. — *West v. Wilson*, 4 La. 219; *Lapice v. Clifton*, 17 La. 152; *McKown v. Mathes*, 19 La. 542.
- Michigan*. — *Wintermute v. Torrent*, 83 Mich. 555; *Watkins v. Plummer*, 93 Mich. 215.
- Missouri*. — *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Cummings v. Kohn*, 12 Mo. App. 585.
- Nebraska*. — *Roberts v. Snow*, 27 Neb. 425.
- New Hampshire*. — *Edgerton v. Brackett*, 11 N. H. 218.
- New York*. — *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Commercial Bank v. Union Bank*, 19 Barb. (N. Y.) 391; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132, 45 N. Y. Super. Ct. 383. *Contra*, *Iselin v. Rowlands*, 30 Hun (N. Y.) 488.
- Ohio*. — *Wayne v. Minor*, 3 Cinc. Wkly. L. Bul. 365, 7 Am. L. Rec. 9.
- Oregon*. — *Roberts v. Parrish*, 17 Oregon 583.
- Pennsylvania*. — *Hanway v. McCullough*, 26 Pa. L. J. 79; *City Bank v. Traders' Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213.
- Rhode Island*. — *Cross v. Brown*, 19 R. I. 220.
- Texas*. — *Andrews v. Hoxie*, 5 Tex. 171.
- United States*. — *Irwin v. Bailey*, 8 Biss. (U. S.) 523.
- Contra*. — *Deuel v. Newlin*, 131 Ind. 40; *Bates v. Butler*, 46 Me. 387.
- And see *Rock County Nat. Bank v. Hollister*, 21 Minn. 385; *Watson v. New England Bank*, 4 Met. (Mass.) 343, where it was held that an action would not lie in the name of a bank to which a bill had been indorsed for collection, after the bank had returned it to the owner.
2. *Arkansas*. — *Turner v. Stroud*, 37 Ark. 556.
- Iowa*. — *Sheldon v. Middleton*, 10 Iowa 17; *McCarty v. Clark*, 10 Iowa 588.
- Kentucky*. — *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790, (Ky. 1892) 18 S. W. Rep. 234.
- Massachusetts*. — *Bowman v. Wood*, 15 Mass. 534.
- Minnesota*. — *White v. Phelps*, 14 Minn. 27.
- Texas*. — *Jackson v. Fawkes*, (Tex. 1892) 20 S. W. Rep. 136.

that an indorsee may sue in his own name on a note indorsed without words of negotiability,¹ or indorsed "for collection,"² or indorsed with a guaranty of payment or of collection,³ or indorsed conditionally,⁴ or indorsed with a restriction,⁵ or indorsed by a corporation under its seal,⁶ or under an indorsement made by the indorsee at the request of the indorser,⁷ or under an indorsement which had been erased and afterwards restored,⁸ or on a note transferred by a separate order to pay.⁹ But it has been held that an indorsee cannot sue in his own name on an indorsement "for account" of the indorser,¹⁰ or on a forged indorsement,¹¹ or an indorsement of part only of the contents of an instrument.¹² Where there is a break in the chain of indorsements under which an indorsee claims, he cannot sue on such instrument in his own name,¹³ nor can an indorsee strike out a special indorsement, and write another indorsement over the name of the indorser, making the instrument payable to himself.¹⁴

d. ON WHAT INSTRUMENTS. — An indorsee has been held

Vermont. — Chase v. Burnham, 13 Vt. 447; Tarbell v. Sturtevant, 26 Vt. 513.

1. Leavitt v. Putnam, 3 N. Y. 494.

2. Wilson v. Tolson, 79 Ga. 137; Payne v. Albany City Nat. Bank, 3 Ind. App. 214. See as to an indorsee suing in his own name where he is merely agent for collection, *ante*, p. 389.

3. Green v. Burrows, 47 Mich. 70; Russell v. Klink, 53 Mich. 161; Phelps v. Church, 65 Mich. 231.

Non-negotiable Guaranty. — Where the party to whose order a note is payable indorses a guarantee thereon, such indorsement need not be negotiable to enable the assignee to sue the maker. Phelps v. Church, 65 Mich. 231.

4. Cummings v. Morris, 25 N. Y. 625, 3 Bosw. (N. Y.) 560. These were cases where the indorsement was for a consideration that was not to be paid until the note should be collected.

5. Sims v. Wilkins, 5 Smed. & M. (Miss.) 234. In this case the indorsement was in these words: "Sir, will you be so good as to pay the within note to Mr. W. W. Wilkins, and, if you cannot pay it, settle it with him as he may wish you to do, for me."

6. Rand v. Dovey, 83 Pa. St. 280. In this case, however, the indorsement by the corporation was irregular, the corporation not being a party to the instrument, and the indorsee did not need to trace his title through such indorsement.

As to indorsement by the treasurer

of a corporation, see Chase v. Hathorn, 61 Me. 505; Russell v. Folsom, 72 Me. 436.

7. Woodbury v. Woodbury, 47 N. H. 11.

8. Nevins v. De Grand, 15 Mass. 436.

9. Noyes v. Gilman, 65 Me. 589. In this case, however, it was held that while an order to pay the amount due on a note, and a letter saying that the order was good, operated as a transfer of the note, so as to enable the transferee to sue, nevertheless the order and acceptance were not a separate negotiable instrument on which the indorsee could maintain an action in his own name.

10. Lawrance v. Fussell, 77 Pa. St. 460. See, however, as to an indorsee for collection suing in his own name, *ante*, p. 389.

11. York Bank v. Asbury, 1 Biss. (U. S.) 230.

12. Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Frank v. Kaigler, 36 Tex. 305; Hawkins v. Gardner, 12 Mod. 213; Hawkins v. Cardee, 1 Salk. 65.

Residue Extinguished or Satisfied. — It seems an indorsee may sue on an indorsement of part of the amount of a negotiable instrument, when it appears that the residue thereof has been extinguished or satisfied. Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Hawkins v. Cardee, 1 Salk. 65.

13. Haynes v. Ezell, 25 Miss. 242. But see Condon v. Pearce, 43 Md. 83.

14. Burnap v. Cook, 32 Ill. 168. But see Porter v. Cushman, 19 Ill. 572.

entitled to sue in his own name on a banker's draft or check,¹ on an instrument payable to the order of the maker² or to a fictitious person,³ on a foreign note,⁴ even though the indorsee could not sue in his own name in the state where the instrument was made,⁵ or on one payable in specific articles,⁶ and on a note payable to a guardian for his ward,⁷ or one payable to executors.⁸ Before the statutes of 3 and 4 Anne, c. 9, promissory notes were not negotiable, so that the indorsee could sue in his own name,⁹ and sealed notes are not within the terms of that statute.¹⁰ An indorsee cannot sue in his own name on a promise to accept a bill,¹¹ nor on an instrument not payable to order,¹² or on an instrument payable on condition.¹³ An indorsee cannot sue in his own name

1. *M'Lean v. Clydesdale Banking Co.*, L. R. 9 App. 95, it being held that such an instrument was negotiable both in England and Scotland. *Compare* *Delafield v. Kinney*, 24 Wend. (N. Y.) 345, where it was left undecided whether certificates of deposit issued by associations formed under the general banking laws of New York were such negotiable instruments as would enable an indorsee to bring an action in his own name.

2. *Lea v. Branch Bank*, 8 Port. (Ala.) 119, *overruling* *Ramsey v. Johnson*, Minor (Ala.) 419.

3. *Gibson v. Minet*, 1 H. Bl. 569.

4. *Milne v. Graham*, 1 B. & C. 192, 8 E. C. L. 82: In this case an action was maintained in England by the indorsee of a promissory note made in Scotland and negotiated in England.

5. *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.) 139, 2 Cai. Cas. (N. Y.) 321.

In *Connecticut* it was held that an indorsee may sue in his own name on a note given in another state, where such an instrument is negotiable, although he would not be able to do so on a note made and negotiated in Connecticut. *Goff v. Billinghamurst*, 2 Root (Conn.) 527. And see *Bowne v. Olcott*, 2 Root (Conn.) 353, in which case the court said: "By the laws of this state, such notes as the note in suit are not made negotiable; of consequence no such action will lie in favor of an indorsee upon a note executed in this state. But this is no objection to an indorsee, coming from another state, vested with such right, and maintaining an action in this state."

6. *Phillips v. Sellers*, 42 Ala. 658; *Flexner v. Dickerson*, 65 Ala. 72. These were agreements to deliver a certain amount of cotton. *Contra*, *Fahnestock v. Schoyer*, 9 Watts (Pa.)

102; *McCormick v. Trotter*, 10 S. & R. (Pa.) 94.

Note Payable in Bank Notes.—In *McCormick v. Trotter*, 10 S. & R. (Pa.) 94, it was held that the indorsee could not sue in his own name on a note promising to pay five hundred dollars in notes of the chartered banks of Pennsylvania.

7. *Dorr v. Davis*, 76 Me. 301.

8. *Moses v. Clark*, 46 Ala. 229.

9. *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Clerke v. Martin*, 2 Ld. Raym. 757; *Burton v. Souter*, 2 Ld. Raym. 774; *Williams v. Cutting*, 2 Ld. Raym. 825.

10. *McIntosh v. Stubb*, Dec. Col. Dec. (S. Car.) 1829, where it was held that a transferee of such a note should sue as assignee and not as indorsee.

11. *Exchange Bank v. Rice*, 107 Mass. 41; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648. *Contra*, *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

12. *Noland v. Ringgold*, 3 Har. & J. (Md.) 216; *Barriere v. Nairac*, 2 Dall. (Pa.) 249.

Payable to Order or to Bearer.—In *Noland v. Ringgold*, 3 Har. & J. (Md.) 216, it was held that an indorsee could not sue in his own name on a promissory note, unless the same was payable "to order" or "to bearer."

13. *Hubbard v. Mosely*, 11 Gray (Mass.) 170; *Denniston v. Bacon*, 10 Johns. (N. Y.) 198. *Compare* *Moody v. Leavitt*, 2 N. H. 171; *Pike v. Gallo-way*, 17 Ark. 90.

Indorsee with Notice.—In *Denniston v. Bacon*, 10 Johns. (N. Y.) 198, the indorsee had notice of the condition on which a note was given, namely, that it should be offered for discount on certain terms, and it was held that he could not sue thereon contrary to such conditions.

Condition Not Performed by Maker.—In *Moody v. Leavitt*, 2 N. H. 171, an

on the original consideration for which an instrument is given.¹

c. BY INDORSEMENT FROM WHAT PERSONS. — An indorsee may sue in his own name on a negotiable instrument which he takes by indorsement from a domestic² or foreign administrator,³ from a bankrupt after his bankruptcy,⁴ or from an auctioneer.⁵ Where a note is payable to one of the makers, an indorsee of the payee may sue thereon in his own name,⁶ and where a negotiable instrument is given by a firm to one of its members, or *vice versa*, an indorsee of such instrument may maintain an action thereon.⁷ On an instrument payable to a firm and indorsed to one of the partners, such indorsee is entitled to sue,⁸ and it is

indorsee was permitted to maintain an action in his own name on a note to which a condition had been annexed, the maker having failed to perform such condition, and the person with whom it was deposited in escrow having separated the agreement containing the condition from the note, and transferred it to the indorsee.

Ambiguous Words. — In *Pike v. Galloway*, 17 Ark. 90, a note was made payable "to the order of G. S. B., to Messrs. B. & B." It was held that the words "to Messrs. B. & B.," even if they imported a condition, were to be disregarded, and that an action might be maintained by an indorsee of such note in his own name.

1. *Battle v. Coit*, 26 N. Y. 404, 19 Barb. (N. Y.) 68. And see *White v. Williams*, 1 Paige (N. Y.) 502, where it was held that the indorsee of a note did not thereby acquire a right to foreclose a lien for which the note was security.

2. *Parsons v. Parsons*, 5 Cow. (N. Y.) 476; *Cahoon v. Moore*, 11 Vt. 604; *Watkins v. Maule*, 2 Jac. & W. 237.

3. *Rand v. Hubbard*, 4 Met. (Mass.) 260; *Abercrombie v. Stillman*, 77 Tex. 589. But see *Thompson v. Wilson*, 2 N. H. 291.

4. *Smoot v. Morehouse*, 8 Ala. 370; *Birch v. Tillotson*, 16 Ala. 387; *Hersey v. Elliott*, 67 Me. 526.

An Action by a Receiver in His Own Name was held properly instituted on a note payable to such receiver and indorsed by him to himself. *Davis v. Peck*, 54 Barb. (N. Y.) 425.

Transfer Before, and Indorsement After, Bankruptcy. — In *Smoot v. Morehouse*, 8 Ala. 370, and *Hersey v. Elliot*, 67 Me. 526, it was held that where a person had transferred a negotiable instrument, without indorsement, and had subsequently become bankrupt, if he

indorsed the instrument after the bankruptcy the indorsee might sue thereon in his own name.

Transfer to Bankrupt After Discharge. — In *Birch v. Tillotson*, 16 Ala. 387, a bankrupt, after his discharge, became the *bona fide* holder of a note payable to himself, which had been returned in the schedule and sold by the assignee, and it was held that thereby the bankrupt was remitted to his original title, and might transfer the note by indorsement, so as to vest in the indorsee a right of action in his own name.

5. *Matthews v. Moran*, 19 Misc. Rep. (N. Y. Supreme Ct.) 24. In this case a check was given to an auctioneer by a buyer, and the auctioneer indorsed it to the seller, who, it was held, could sue thereon in his own name.

6. *Pitcher v. Barrows*, 17 Pick. (Mass.) 361.

7. *Knaus v. Givens*, 110 Mo. 58.

8. *Alabama*. — *Smyth v. Strader*, 9 Port. (Ala.) 446; *Hazlehurst v. Pope*, 2 Stew. & P. (Ala.) 259.

California. — *McPherson v. Weston*, 64 Cal. 275.

Connecticut. — *Nevins v. Townsend*, 6 Conn. 5.

Maine. — *Davis v. Briggs*, 39 Me. 304; *Hapgood v. Watson*, 65 Me. 510; *Woodman v. Boothby*, 66 Me. 389.

Massachusetts. — In *Estabrook v. Smith*, 6 Gray (Mass.) 570, it was held that an indorsement by one partner in his individual name, to his copartner, of a promissory note payable to the firm, would not entitle such indorser to sue in his own name.

Mississippi. — *Planters' Bank v. Chewning*, 5 How. (Miss.) 413.

New Hampshire. — *Burnham v. Whittier*, 5 N. H. 334.

New York. — *Smith v. Lusher*, 5 Cow. (N. Y.) 688; *Kirby v. Cogswell*, 1

held that an indorsee of a note payable to a firm by an indorsement by less than all the partners, may sue thereon.¹ A person who has taken up a negotiable instrument may transfer it by indorsement, so as to enable his indorsee to sue in his own name.²

3. Bearer — *a.* IN GENERAL. — The general rule is that any holder or owner may sue upon a negotiable instrument payable to bearer. Thus, if a note is signed by a maker, leaving a blank for the name of the payee, the holder, by virtue of the implied authority, can fill the blank with his own name. This is conceded on all sides.³

Cal. (N. Y.) 505; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284.

Vermont. — *Norton v. Downer*, 15 Vt. 569.

Wisconsin. — *Manegold v. Dulau*, 30 Wis. 541; *Merrill v. Guthrie*, 1 Pin. (Wis.) 435.

Indorsement by Partner to Himself. — A partner of a firm to which a negotiable instrument is made payable may indorse such instrument in the firm name to himself, and sue thereon in his own name as indorsee. *Burnham v. Whittier*, 5 N. H. 334; *Kirby v. Cogswell*, 1 Cal. (N. Y.) 505.

1. *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476; *Pease v. Dwight*, 6 How. (U. S.) 190.

2. *Kirksey v. Bates*, 1 Ala. 303; *Havens v. Huntington*, 1 Cow. (N. Y.) 387; *Guild v. Eager*, 17 Mass. 615; *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390, 15 E. C. L. 12. *Compare Prest v. Vanarsdalen*, 11 N. J. L. 194.

3. *Alabama.* — *Carroll v. Meeks*, 3 Port. (Ala.) 226; *Prewitt v. Chapman*, 6 Ala. 89.

Arkansas. — *Buckner v. Real Estate Bank*, 5 Ark. 536; *Buckner v. Greenwood*, 6 Ark. 200.

California. — *McCann v. Lewis*, 9 Cal. 246.

District of Columbia. — *In re Wagner, MacArthur & M.* (D. C.) 395.

Florida. — *Gregory v. McNealy*, 12 Fla. 578.

Georgia. — *Houser v. Houser*, 43 Ga. 415; *Leitner v. Miller*, 49 Ga. 486; *Greer v. Woolfolk*, 60 Ga. 623; *Collier v. Barnes*, 64 Ga. 484; *Nisbet v. Lawson*, 1 Ga. 275.

Illinois. — *McHenry v. Ridgely*, 3 Ill. 309.

Iowa. — *Creighton v. Gordon*, 1 Morr. (Iowa) 41; *Hotchkiss v. Thonipson*, 1 Morr. (Iowa) 156; *Allensworth v. Moore*, 3 Greene (Iowa) 273; *Riggs v. Price*, 3 Greene (Iowa) 334; *Lane v.*

Krekle, 22 Iowa 399; *McCormick v. Grundy County*, 24 Iowa 382.

Kentucky. — *Bonham v. Laird*, 4 B. Mon. (Ky.) 404.

Louisiana. — *Gaines v. Morris*, 6 Rob. (La.) 4.

Maine. — *Gage v. Johnson*, 20 Me. 437; *Sibley v. Robinson*, 23 Me. 70; *Baker v. Stinchfield*, 57 Me. 363.

Maryland. — *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Ellicott v. U. S. Insurance Co.*, 8 Gill & J. (Md.) 166; *Dunham v. Clogg*, 30 Md. 284; *Elliott v. Chesnut*, 30 Md. 562.

Massachusetts. — *Wheeler v. Johnson*, 97 Mass. 39; *Holcomb v. Beach*, 112 Mass. 450; *Paine v. Furnas*, 117 Mass. 290; *Pettee v. Prout*, 3 Gray (Mass.) 502; *Rider v. Taintor*, 4 Allen (Mass.) 356; *Sigourney v. Severy*, 4 Cush. (Mass.) 176; *Towne v. Wason*, 128 Mass. 517.

Michigan. — *Brigham v. Gurney*, 1 Mich. 349; *Hovey v. Sebring*, 24 Mich. 232; *Waldron v. Harring*, 28 Mich. 493; *Knapp v. Lee*, 42 Mich. 41; *Bitzer v. Wagar*, 83 Mich. 223.

Mississippi. — *Fox v. Hilliard*, 35 Miss. 160; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43; *Dease v. Reed*, 24 Miss. 239.

Nebraska. — *McWilliams v. Bridges*, 7 Neb. 419.

New Hampshire. — *Foster v. Shattuck*, 2 N. H. 446; *Elliot v. Abbot*, 12 N. H. 549; *Hunt v. Aldrich*, 27 N. H. 31.

New York. — *Comstock v. Hoag*, 5 Wend. (N. Y.) 600; *Ketchell v. Burns*, 24 Wend. (N. Y.) 456; *Townsend v. Billinge*, 1 Hilt. (N. Y.) 353; *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Central Bank v. Lang*, 1 Bosw. (N. Y.) 202; *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Throop v. Cheeseman*, 16 Johns. (N. Y.) 264; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Crandall v. Schroepel*, 1 Hun (N. Y.) 557; *Miller v. Gaston*, 2 Hill (N. Y.) 188; *Plets v. Johnson*, 3 Hill (N. Y.) 112; *Eaton v.*

Transfer Without Indorsement. — By the common law, the holder of a note payable to a certain person or bearer may sue thereon in his own name, although he holds such instrument by delivery merely, without indorsement or assignment.¹ In some states,

Alger, 47 N. Y. 345; Patchen v. Wilson, 4 Hill (N. Y.) 57; Ogilby v. Wallace, 2 Hall (N. Y.) 553. But see Depuy v. Swart, 3 Wend. (N. Y.) 135.

Ohio. — Byington v. Geddings, 2 Ohio 227.

Oregon. — *In re* Pendleton Hardware Co., 24 Oregon 330.

Pennsylvania. — Boyd v. Bockenkamp, 3 W. N. C. (Pa.) 25; Rankin v. Woodworth, 2 Watts (Pa.) 134; Elkin-ton v. Fennimore, 13 Pa. St. 173; Philadelphia, etc., R. Co. v. Smith, 105 Pa. St. 195; Winton v. Collings, 4 Kulp (Pa.) 491.

South Carolina. — Jackson v. Heath, 1 Bailey L. (S. Car.) 355; Fort v. Brunson, 2 Spears L. (S. Car.) 658; Brooks v. Floyd, 2 McCord L. (S. Car.) 364; Ware v. Key, 2 McCord L. (S. Car.) 373; O'Brien v. Sauls, 2 Rich. L. (S. Car.) 332; Kirkpatrick v. Taylor, 10 Rich. L. (S. Car.) 393; Richardson v. Gower, 10 Rich. L. (S. Car.) 109.

Tennessee. — Neely v. Morris, 2 Head. (Tenn.) 595; Smyth v. Carden, 1 Swan (Tenn.) 28; Wells v. Schoonover, 9 Heisk. (Tenn.) 805.

Texas. — Smith v. Clopton, 4 Tex. 109; Hopkins v. Seymour, 10 Tex. 202; Butler v. Robertson, 11 Tex. 142; Rider v. Duval, 28 Tex. 622; Barnett v. Logue, 29 Tex. 282; Jackson v. Elliott, 49 Tex. 62.

Vermont. — Baxter v. Buck, 10 Vt. 548; Sanford v. Huxley, 18 Vt. 170; Austin v. Birchard, 31 Vt. 589; Hyde v. Lawrence, 49 Vt. 361; Fletcher v. Fletcher, 29 Vt. 98.

West Virginia. — Smith v. Lawson, 18 W. Va. 212; Spencer Bank v. Simmons, 43 W. Va. 79.

Wisconsin. — Sanford v. McCreedy, 28 Wis. 103.

United States. — Bradford v. Jenks, 2 McLean (U. S.) 130; Halsted v. Lyon, 2 McLean (U. S.) 226; Bullard v. Bell, 1 Mason (U. S.) 243; Varner v. West, 1 Woods (U. S.) 493; Perrine v. Thompson, 17 Blatchf. (U. S.) 18; Bonnafee v. Williams, 3 How. (U. S.) 574; Smith v. Clapp, 15 Pet. (U. S.) 125.

England. — Collis v. Emmett, 1 H. Bl. 313; Gibson v. Minet, 1 H. Bl. 569; Vere v. Lewis, 3 T. R. 182; Ancona v. Marks, 7 H. & N. 686; Keene v. Beard, 8 C. B. N. S. 372, 98 E. C. L. 372,

6 Jur. N. S. 1248, 29 L. J. C. P. 287, 8 W. R. 469, 2 L. T. N. S. 240.

Before the Statute of Anne, an action could not be maintained by the holder of a note payable to bearer in his own name. Nicholson v. Sedgwick, 1 Ld. Raym. 180.

It seems that the cases of Grant v. Vaughan, 3 Burr. 1516, and Pierce v. Crafts, 12 Johns. (N. Y.) 90, holding that a bearer might maintain such an action before the statute of Anne, are not good law.

Instrument Not Negotiable Where Transferred. — In Woods v. Ridley, 11 Humph. (Tenn.) 194, it was held that the holder of a note payable to bearer might maintain an action thereon, although in the state where such note was transferred to him he could not have done so. The court in that case said: "It has been held in England that, where a promissory note was made in England, payable to bearer, and was transferred in France, by whose law it was not negotiable, the French holder might maintain an action thereon in England, upon the provisions of the statute of Anne."

Payee Corporation Extinct. — It has been held that the holder of a note payable to a corporation or bearer might sue thereon in his own name, although the corporation which was the payee had become extinct before the note was transferred to the plaintiff. Hyde v. Lawrence, 49 Vt. 361.

Payee Dead. — In Butler v. Robertson, 11 Tex. 142, it was held that an action might be maintained on a note payable to bearer by the holder thereof, in his own name, although it was shown that the note had been in the possession of the payee at the time of his death.

1. Creighton v. Gordon, 1 Morr. (Iowa) 41; Whiteford v. Burckmyer, 1 Gill (Md.) 127; Elliott v. Chesnut, 30 Md. 562; Bitzer v. Wagar, 83 Mich. 223; Smyth v. Carden, 1 Swan (Tenn.) 28.

Subsequent Statute Changing Rule. — In Creighton v. Gordon, 1 Morr. (Iowa) 41, it was held that one who held a note payable to bearer by delivery without indorsement might sue thereon in his own name, notwithstanding a statute passed before suit

however, a contrary rule now obtains by statute, a written assignment or indorsement being necessary to pass the legal title.¹

Transfer After Maturity. — It seems that the holder of an instrument payable to bearer may sue thereon in his own name, though he has taken such instrument by transfer after the date of its maturity.²

Title Necessary at Time of Suit. — An action cannot be maintained on an instrument payable to bearer by one who does not have title thereto at the time the suit is brought, as where the instrument has not been delivered to him at that time.³

b. INTEREST OF BEARER — Beneficial Ownership Immaterial. — The general rule is that an action can be maintained by the holder of a note or bill of exchange payable to bearer, whether the beneficial interest in such instrument is in such holder or not.⁴ It

brought, requiring an indorsement in such cases.

1. *White v. Joy*, 4 Ala. 571; *Sawyer v. Patterson*, 11 Ala. 523; *Cobb v. Bryant*, 86 Ala. 316; *Roosa v. Crist*, 17 Ill. 450; *Rabberman v. Muehlhausen*, 3 Ill. App. 326; *M'Nitt v. Hatch*, 4 Blackf. (Ind.) 531; *Creighton v. Gordon*, 1 Morr. (Iowa) 41.

In *Alabama*, if the note is not commercial paper the beneficial owner may sue on it in his own name whether he has the legal title or not. *Cobb v. Bryant*, 86 Ala. 316.

Note Payable to Bearer Only. — In *Sawyer v. Patterson*, 11 Ala. 523, it was held that a statute prohibiting an assignment of promissory notes by delivery merely, so as to permit the assignee to maintain an action thereon as the owner, could not be extended by construction to an indorsement directing the contents to be paid to the bearer, without indicating him by name.

2. *McCann v. Lewis*, 9 Cal. 246; *Rankin v. Woodworth*, 2 Watts (Pa.) 134; *Smith v. Lawson*, 18 W. Va. 212.

3. *Buckner v. Real Estate Bank*, 5 Ark. 536; *Hovey v. Sebring*, 24 Mich. 232; *Kirkpatrick v. Taylor*, 10 Rich. L. (S. Car.) 393; *Richardson v. Gower*, 10 Rich. L. (S. Car.) 109.

Possession Not in Plaintiff. — In *Crandall v. Schroepfel*, 1 Hun (N. Y.) 557, it was held that the plaintiff in that case could not maintain an action in his own name as holder of a note payable to himself or bearer, since he did not have possession of the note. But in *Gregory v. McNealy*, 12 Fla. 578, it was said to be immaterial whether the plaintiff had possession of the note in

suit at the time of commencing the action, as possession in an agent or trustee would be sufficient.

4. *Georgia*. — *Nisbet v. Lawson*, 1 Ga. 275; *Houser v. Houser*, 43 Ga. 415; *Greer v. Woolfolk*, 60 Ga. 623.

Illinois. — *McHenry v. Ridgely*, 3 Ill. 309.

Iowa. — *Allensworth v. Moore*, 3 Greene (Iowa) 273.

Maine. — *Sibley v. Robinson*, 23 Me. 70; *Baker v. Stinchfield*, 57 Me. 363.

Massachusetts. — *Wheeler v. Johnson*, 97 Mass. 39; *Pettee v. Prout*, 3 Gray (Mass.) 502; *Towne v. Watson*, 128 Mass. 517.

Michigan. — *Brigham v. Gurney*, 1 Mich. 349; *Hovey v. Sebring*, 24 Mich. 232.

Mississippi. — *Fox v. Hilliard*, 35 Miss. 160; *Dease v. Reed*, 24 Miss. 239.

Nebraska. — *McWilliams v. Bridges*, 7 Neb. 419.

New York. — *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Crandall v. Schroepfel*, 1 Hun (N. Y.) 557; *Ogilby v. Wallace*, 2 Hall (N. Y.) 553; *Comstock v. Hoag*, 5 Wend. (N. Y.) 600.

South Carolina. — *Jackson v. Heath*, 1 Bailey L. (S. Car.) 355; *O'Brien v. Sauls*, 2 Rich. L. (S. Car.) 332.

Tennessee. — *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

Texas. — *Butler v. Robertson*, 11 Tex. 142; *Barnett v. Logue*, 29 Tex. 282; *Jackson v. Elliott*, 49 Tex. 62.

Vermont. — *Austin v. Birchard*, 31 Vt. 589; *Hyde v. Lawrence*, 49 Vt. 361; *Fletcher v. Fletcher*, 29 Vt. 98.

United States. — *Halsted v. Lyon*, 2 McLean (U. S.) 226; *Perrine v. Thompson*, 17 Blatchf. (U. S.) 18.

may, in such cases, however, be shown that the holder has no real right to maintain the action,¹ as where his possession is *mala fide*.²

Personal Representative. — An executor or administrator into whose hands comes a negotiable instrument payable to bearer may sue thereon, and it is not necessary for him to designate himself as such executor or administrator.³

c. ON WHAT INSTRUMENTS. — The bearer has been permitted to sue in his own name on a negotiable note or bill of exchange,⁴ on a check,⁵ on a guaranty indorsed on a note,⁶ on a county

Compare Bryant v. Owen, 1 Port. (Ala.) 201.

Letting in Defenses. — It may be shown that the plaintiff in an action on an instrument payable to bearer is not the beneficial owner thereof, when such a showing is necessary to let in some defense which the defendant is entitled to set up. Nisbet v. Lawson, 1 Ga. 275; Greer v. Woolfolk, 60 Ga. 623.

Part Owner. — In Allensworth v. Moore, 3 Greene (Iowa) 273, it was held that an action might be maintained by the holder on a note payable to bearer, although he had given a receipt to another person, by which he agreed to pay part of the face of the note when the note became due. And see Halsted v. Lyon, 2 McLean (U. S.) 226, where an action by the holder of a note payable to bearer was maintained by a part owner with the consent of the other persons interested in the note.

Assignee in Bankruptcy. — In Jackson v. Elliott, 49 Tex. 62, it was held that it did not avail the defendant when sued by the holder of a note payable to bearer that the assignee in bankruptcy of another person was entitled to the notes in suit, where such assignee was not a party.

A Holder for Collection of a note payable to bearer may maintain an action thereon in his own name. Brigham v. Gurney, 1 Mich. 349; McWilliams v. Bridges, 7 Neb. 419.

1. McHenry v. Ridgely, 3 Ill. 309; Towne v. Wason, 128 Mass. 517; Dease v. Reed, 24 Miss. 239; Crandall v. Schroepel, 1 Hun (N. Y.) 557; Ogilby v. Wallace, 2 Hall (N. Y.) 553; Comstock v. Hoag, 5 Wend. (N. Y.) 600; Fletcher v. Fletcher, 29 Vt. 98; Wells v. Schoonover, 9 Heisk. (Tenn.) 805.

2. McHenry v. Ridgely, 3 Ill. 309; Towne v. Wason, 128 Mass. 517; Ogilby v. Wallace, 2 Hall (N. Y.) 553; Wells v. Schoonover, 9 Heisk. (Tenn.) 805.

3. Maine. — Gage v. Johnson, 20 Me. 437.

Massachusetts. — Holcomb v. Beach, 112 Mass. 450.

Michigan. — Knapp v. Lee, 42 Mich. 41.

New York. — Patchen v. Wilson, 4 Hill (N. Y.) 57.

South Carolina. — Brooks v. Floyd, 2 McCord L. (S. Car.) 364. But see Richardson v. Gower, 10 Rich. L. (S. Car.) 109, where it was held that agents of the distributees of an intestate could not sue on a note payable to bearer, no letters of administration having been taken out, and it was held to be immaterial whether there were debts or not.

Texas. — Rider v. Duval, 28 Tex. 622.

Vermont. — Baxter v. Buck, 10 Vt. 548.

Wisconsin. — Sanford v. McCreedy, 28 Wis. 103.

A Foreign Executor or Administrator may, it seems, sue on a note payable to bearer, whether he could sue as administrator or not. Knapp v. Lee, 42 Mich. 41; Robinson v. Crandall, 9 Wend. (N. Y.) 425. *Contra*, Chapman v. Fish, 6 Hill (N. Y.) 554.

Instrument Delivered After Death of Intestate. — In Baxter v. Buck, 10 Vt. 548, it was held that an administrator might sue on a note payable to bearer, although such note was not delivered until after the death of the intestate.

4. **By the Law Merchant** the holder of a note or bill payable to bearer can sue in his own name, but the holder of a bond cannot do so. Buckner v. Greenwood, 6 Ark. 200.

A Witnessed Promissory Note payable to bearer may be sued upon by the holder in his own name. Sigourney v. Severy, 4 Cush. (Mass.) 176.

5. Townsend v. Billinge, 1 Hilt. (N. Y.) 353; Keene v. Beard, 8 C. B. N. S. 372, 98 E. C. L. 372, 6 Jur. N. S. 1248; Ancona v. Marks, 7 H. & N. 686.

6. Waldron v. Harring, 28 Mich. 493; Ketchell v. Burns, 24 Wend. (N. Y.) 456; Miller v. Gaston, 2 Hill (N. Y.) 188.

warrant,¹ on a coupon,² and on a policy of insurance.³ So it has been held that an action will lie by the holder of a note payable to an assignee in bankruptcy or bearer,⁴ or one payable to the order of the payee or bearer,⁵ and on a note to the payee or bearer, when the name of the payee has not been filled in.⁶ A note to bearer payable in property may be sued upon by the holder in his own name.⁷ The same has been held of an instrument payable in bank bills.⁸ On the other hand, it has been held that the bearer could not sue in his own name upon a sealed note,⁹ on an imperfect bill,¹⁰ or on a non-negotiable note.¹¹

d. INSTRUMENTS TREATED AS PAYABLE TO BEARER. — In a number of cases it has been held that the holder of an instrument payable to a fictitious person might sue thereon as on a note payable to bearer,¹² and the same has been held of an instrument payable to the order of the maker,¹³ of one where the name of the payee is blank,¹⁴ and of one indorsed in blank.¹⁵

1. McCormick v. Grundy County, 24 Iowa 382.

2. Philadelphia, etc., R. Co. v. Smith, 105 Pa. St. 195; Perrine v. Thompson, 17 Blatchf. (U. S.) 18.

Overdue Interest Coupons. — In Philadelphia, etc., R. Co. v. Smith, 105 Pa. St. 195, it was held that an action on overdue interest coupons payable to bearer, whether attached to the bonds or not, might be maintained by the holder.

3. Ellicott v. U. S. Insurance Co., 8 Gill & J. (Md.) 166.

4. Collier v. Barnes, 64 Ga. 484.

5. Bitzer v. Wagar, 83 Mich. 223.

6. Boyd v. Bockenkamp, 3 W. N. C. (Pa.) 25. And see Winton v. Collings, 4 Kulp (Pa.) 491.

7. Iowa. — Riggs v. Price, 3 Greene (Iowa) 334.

New York. — Combs v. Bateman, 10 Barb. (N. Y.) 573.

Ohio. — Byington v. Geddings, 2 Ohio 227.

Pennsylvania. — Elkinton v. Fennimore, 13 Pa. St. 173.

Texas. — Hopkins v. Seymour, 10 Tex. 202.

Contra. — Sanford v. Huxley, 18 Vt. 170.

Payable in Work. — In Lyon v. Chalker, 2 Watts (Pa.) 15, it was held that a note payable in cabinet work was not negotiable, and hence could not be transferred so as to be sued upon by the bearer.

8. Throop v. Cheeseman, 16 Johns. (N. Y.) 264.

9. Sayre v. Lucas, 2 Stew. (Ala.) 259.

This case, however, was decided while a statute was in existence authorizing assignment by indorsement only.

10. Prewitt v. Chapman, 6 Ala. 86, which was an action on an instrument having no payee.

11. Whitwell v. Winslow, 134 Mass. 343.

Negotiability Destroyed. — In Moore v. Viele, 4 Wend. (N. Y.) 420, it was held that an action could not be maintained by the assignee of a note payable to bearer, directly on the note, where the negotiability of the note had been destroyed by an insolvent discharge granted to the maker.

"Due the Bearer Hereof." — In Cock v. Fellows, 1 Johns. (N. Y.) 143, it was held that an instrument in these words, "Due the bearer hereof, 3/ 18s. 10d., which I promise to pay to A or order, on demand," was not a note payable to bearer, and that the plaintiff to sue thereon must show title by indorsement.

12. Prewitt v. Chapman, 6 Ala. 89; Foster v. Shattuck, 2 N. H. 446; Elliot v. Abbot, 12 N. H. 549; Hunt v. Aldrich, 27 N. H. 31; Central Bank v. Lang, 1 Bosw. (N. Y.) 202; Plets v. Johnson, 3 Hill (N. Y.) 112; *In re* Pendleton Hardware Co., 24 Oregon 330; Collis v. Ematt, 1 H. Bl. 313; Gibson v. Minet, 1 H. Bl. 569; Vere v. Lewis, 3 T. R. 182.

13. Plets v. Johnson, 3 Hill (N. Y.) 112; Central Bank v. Lang, 1 Bosw. (N. Y.) 202.

14. Dunham v. Clogg, 30 Md. 284.

15. Gaines v. Morris, 6 Rob. (La.) 4.

4. Holder by Blank Indorsement — a. IN GENERAL — Suit in His Own Name. — Subject to certain exceptions, which will be mentioned hereafter, the general rule is that the holder of a negotiable instrument by a blank indorsement thereon¹ may sue in his own name on such instrument.² And where an instrument has been

1. What Is a Blank Indorsement. — It has been held that an indorsement "for account of" the payee, the indorser, was an indorsement in blank such as would permit the holder to sue in his own name, *Marine Bank v. Vail*, 6 Bosw. (N. Y.) 421; and that an indorsement in blank, by a person to whom a note has been assigned, may have the same effect, *Stevens v. Hannan*, 86 Mich. 305. But an indorsement in blank cannot be created by striking out a special indorsement. *U. S. Bank v. Moore*, 3 Cranch (C. C.) 330.

One Note Folded Within Another. — In *Columbus First Nat. Bank v. Leonard*, 91 Ga. 805, where, at the time a promissory note was indorsed in blank, another between the same parties was folded within it, the court held that the indorsement of the former did not operate as more than an equitable assignment of the latter, and consequently the holder could not sue on the latter without specially pleading the requisite facts.

2. Alabama. — *Riggs v. Andrews*, 8 Ala. 628; *Sawyer v. Patterson*, 11 Ala. 523; *Bancroft v. Paine*, 15 Ala. 834; *Agee v. Medlock*, 25 Ala. 281; *Henley v. Bush*, 33 Ala. 636; *Flexner v. Dickerson*, 65 Ala. 72; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505; *Berney v. Steiner*, 108 Ala. 111; *Kennon v. McRea*, 7 Port. (Ala.) 175.

Arkansas. — *Sterling v. Bender*, 7 Ark. 201; *Edwards v. Scull*, 11 Ark. 325; *Worthington v. Curd*, 15 Ark. 491; *Owen v. Arrington*, 17 Ark. 530.

Connecticut. — *Castle v. Candee*, 16 Conn. 234; *Clark v. Sigourney*, 17 Conn. 511; *Curtis v. Bemis*, 26 Conn. 1. **Delaware.** — *Hartwell v. McBeth*, 1 Harr. (Del.) 363.

District of Columbia. — *In re Wagner, MacArthur & M.* (D. C.) 395; *Keyser v. Shepherd*, 2 Mackey (D. C.) 66.

Florida. — *McCallum v. Driggs*, 35 Fla. 277.

Georgia. — *Habersham v. Lehman*, 63 Ga. 380; *Columbus First Nat. Bank v. Leonard*, 91 Ga. 805; *Nisbet v. Lawson*, 1 Ga. 275.

Illinois. — *Gillham v. State Bank*, 3 Ill. 246; *McHenry v. Ridgely*, 3 Ill.

309; *Jackson v. Haskell*, 3 Ill. 565; *Wilder v. De Wolf*, 24 Ill. 190; *Lafin v. Sherman*, 28 Ill. 391; *Harpham v. Haynes*, 30 Ill. 404; *Burnap v. Cook*, 32 Ill. 168; *Palmer v. Gardiner*, 77 Ill. 143; *Palmer v. Nassau Bank*, 78 Ill. 380; *Hutchinson v. Crane*, 100 Ill. 269; *Giddings v. McCumber*, 51 Ill. App. 373; *Fairbanks v. Campbell*, 53 Ill. App. 216; *Kuehne v. Goit*, 54 Ill. App. 596.

Indiana. — *Bowers v. Headen*, 4 Ind. 318; *Ferry v. Jones*, 10 Ind. 226; *Moore v. Pendleton*, 16 Ind. 481; *Rich v. Starbuck*, 51 Ind. 87; *Bowers v. Trevor*, 5 Blackf. (Ind.) 24; *Clark v. Walker*, 6 Blackf. (Ind.) 82.

Iowa. — *Temple v. Hays*, 1 Morr. (Iowa) 9; *Hickok v. Laubssier*, 1 Morr. (Iowa) 115.

Kentucky. — *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180; *Bradford v. Ross*, 3 Bibb (Ky.) 238; *Cope v. Daniel*, 9 Dana (Ky.) 416; *Long v. Cynthiana Bank*, 1 Litt. (Ky.) 291; *Barret v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97.

Louisiana. — *Griffon v. Jacobs*, 2 La. 192; *State Bank v. Roberts*, 4 La. 530; *Allard v. Ganushau*, 4 Martin (La.) 662; *Huie v. Bailey*, 16 La. 213; *Allain v. Whitaker*, 5 Martin N. S. (La.) 511; *Sprigg v. Cuny*, 7 Martin N. S. (La.) 253; *Banks v. Eastin*, 3 Martin N. S. (La.) 291; *Gaines v. Morris*, 6 Rob. (La.) 4; *Bacon v. Smith*, 2 La. Ann. 441; *Conrey v. Harrison*, 4 La. Ann. 349; *Kelly v. Ledoux*, 11 La. Ann. 689; *Ricard v. Harrison*, 19 La. Ann. 181; *Dorr v. Jouet*, 20 La. Ann. 27; *Klein v. Buckner*, 30 La. Ann. 680; *Scionneaux v. Waguespack*, 32 La. Ann. 283.

Maine. — *Fisher v. Bradford*, 7 Me. 28; *Barrett v. Barrett*, 8 Me. 353; *McDonald v. Bailey*, 14 Me. 101; *Willis v. Cresey*, 17 Me. 9; *Eaton v. McKown*, 34 Me. 510; *Golder v. Foss*, 43 Me. 364; *Yemuth v. Cutler*, 50 Me. 298; *Metcalf v. Yeaton*, 51 Me. 198; *Baker v. Stinchfield*, 57 Me. 363; *Marr v. Plummer*, 3 Me. 73.

Maryland. — *Kunkel v. Spooner*, 9 Md. 462; *Boyd v. McCann*, 10 Md. 118; *Long v. Crawford*, 18 Md. 220; *Dunham v. Clogg*, 30 Md. 284; *Elliott v.*

indorsed in blank, the holder may sue thereon in his own name, notwithstanding subsequent indorsements appearing on the instru-

Chesnut, 30 Md. 562; Canfield *v.* McIlwaine, 32 Md. 99; Lucas *v.* Byrne, 35 Md. 485; Condon *v.* Pearce, 43 Md. 83; Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 389; Chesley *v.* Taylor, 3 Gill (Md.) 251; Burckmyer *v.* Whiteford, 6 Gill (Md.) 1; Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216; Ringold *v.* Tyson, 3 Har. & J. (Md.) 172; Hudson *v.* Goodwin, 5 Har. & J. (Md.) 115; Day *v.* Lyon, 6 Har. & J. (Md.) 140; Kiersted *v.* Rogers, 6 Har. & J. (Md.) 282; Cumberland Bank *v.* M'Kinley, 6 Har. & J. (Md.) 527.

Massachusetts. — Taylor *v.* Binney, 7 Mass. 479; Little *v.* O'Brien, 9 Mass. 423; Lindsay *v.* Chase, 104 Mass. 253; Towne *v.* Wason, 128 Mass. 517; Manufacturers' Nat. Bank *v.* Thompson, 129 Mass. 438; Whitten *v.* Hayden, 9 Allen (Mass.) 408; Fairfield *v.* Adams, 16 Pick. (Mass.) 381; Beekman *v.* Wilson, 9 Met. (Mass.) 434; Way *v.* Richardson, 3 Gray (Mass.) 412.

Michigan. — Brigham *v.* Gurney, 1 Mich. 349; Boyd *v.* Corbitt, 37 Mich. 52; Green *v.* Burrows, 47 Mich. 70; Coy *v.* Stiner, 53 Mich. 42; Whitworth *v.* Pelton, 81 Mich. 98; Stevens *v.* Hannan, 86 Mich. 305.

Mississippi. — Chewning *v.* Gatewood, 5 How. (Miss.) 552.

Missouri. — Bennett *v.* Pound, 28 Mo. 598; Lachance *v.* Loeblein, 15 Mo. App. 460.

New Jersey. — Riker *v.* Corley, 3 N. J. L. 469.

New York. — Bedell *v.* Carll, 33 N. Y. 581; Clark *v.* Titcomb, 42 Barb. (N. Y.) 122; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Nelson *v.* Wellington, 5 Bosw. (N. Y.) 178; Marine Bank *v.* Vail, 6 Bosw. (N. Y.) 421; Barlow *v.* Myers, 24 Hun (N. Y.) 286; Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; Freeman *v.* Falconer, 44 N. Y. Super. Ct. 132; Ogilby *v.* Wallace, 2 Hall (N. Y.) 553; Hays *v.* Southgate, 10 Hun (N. Y.) 513; Lovell *v.* Evertson, 11 Johns. (N. Y.) 52; Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259; Parker *v.* Totten, 10 How. Pr. (N. Y. Supreme Ct.) 233.

Ohio. — Osborn *v.* McClelland, 43 Ohio St. 284; McCoy *v.* Hornbrook, 1 Cinc. Wkly. L. Bul. 170. *Contra*, Clawson *v.* Cone, 2 Handy (Ohio) 67.

Oregon. — Thompson *v.* Rathbun, 18 Oregon 202.

Pennsylvania. — Brown *v.* Clark, 14 Pa. St. 469; Mitchell *v.* Fuller, 15 Pa. St. 268; Lawrance *v.* Fussell, 77 Pa. St. 460; Logan *v.* Cassell, 88 Pa. St. 288; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355; Winton *v.* Collings, 4 Kulp (Pa.) 491; Boyd *v.* Bockenkamp, 3 W. N. C. (Pa.) 25; Sterling *v.* Marietta, etc., Trading Co., 11 S. & R. (Pa.) 179; Pearce *v.* Austin, 4 Whart. (Pa.) 489; Rosenberger *v.* Harrow Co., 2 Montg. Co. Rep. (Pa.) 37; Leidy *v.* Tammany, 9 Watts (Pa.) 353.

Rhode Island. — Mumford *v.* Weaver, 18 R. I. 801.

South Carolina. — Ahrens *v.* State Bank, 3 S. Car. 401.

Tennessee. — King *v.* Fleece, 7 Helsk. (Tenn.) 273; Wells *v.* Schoonover, 9 Helsk. (Tenn.) 805; Brady *v.* White, 4 Baxt. (Tenn.) 382; Gardner *v.* State Bank, 1 Swan (Tenn.) 420.

Texas. — Ogden *v.* Slade, 1 Tex. 13; Hansborough *v.* Towns, 1 Tex. 58; Lyon *v.* Kempinski, 1 Tex. App. Civ. Cas., § 80.

Virginia. — Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326; Hooe *v.* Wilson, 5 Call (Va.) 61.

West Virginia. — Smith *v.* Lawson, 18 W. Va. 212; Spencer Bank *v.* Simmons, 43 W. Va. 79.

United States. — Orr *v.* Lacy, 4 McLean (U. S.) 243; Dennison *v.* Larned, 6 McLean (U. S.) 496; U. S. *v.* Barker, 1 Paine (U. S.) 156; Evans *v.* Gee, 11 Pet. (U. S.) 80; U. S. Bank *v.* Moore, 3 Cranch (C. C.) 330; Cassel *v.* Dows, 1 Blatchf. (U. S.) 335.

England. — Law *v.* Parnell, 6 Jur. N. S. 172; Machell *v.* Kinnear, 1 Stark. 499, 2 E. C. L. 191; Catherwood *v.* Chabaud, 1 B. & C. 150, 8 E. C. L. 65; Law *v.* Parnell, 7 C. B. N. S. 282, 97 E. C. L. 282, 6 Jur. N. S. 172, 29 L. J. C. P. 17, 8 W. R. 6, 1 L. T. N. S. 32; Adams *v.* Oakes, 6 C. & P. 70, 25 E. C. L. 286; Attwood *v.* Rattenbury, 6 Moo. 579, 17 E. C. L. 61. *Contra*, Emmett *v.* Tottenham, 8 Exch. 884, where the nominal plaintiff had neither interest in nor possession of the bill sued on.

Surety Against Co-maker. — In Miller *v.* Zeigler, 3 Utah 17, it was held that a surety, to whom a note had been transferred by blank indorsement, could not maintain an action thereon as indorsee against the joint maker of the note.

ment, for these may be stricken out, if necessary to make title.¹ At common law the holder of a non-negotiable instrument under blank indorsement cannot sue the maker in his own name.² But this rule has been changed by statute in some of the United States.³ And at common law the holder of a non-negotiable instrument thus indorsed may sue the indorser in his own name.⁴

A Partner May Sue in His Own Name on a note payable to a firm, of which he is a member, and by such firm indorsed in blank. *Dorr v. Jouet*, 20 La. Ann. 27.

Change in Firm.—Where a bill is indorsed in blank to a firm, and after the indorsement one member of the firm dies, the surviving members continuing in business may sue on such bill under the blank indorsement. *Attwood v. Rattenbury*, 6 Moo. 579, 17 E. C. L. 61.

Statute Prohibiting Assignments by Delivery.—It was held in *Sawyer v. Patterson*, 11 Ala. 523, that the Act of 1837, prohibiting the assignment of promissory notes by delivery merely so as to permit the assignee to sue thereon as bearer, should not be extended by construction to blank indorsements.

Holder by Transfer from Pledgor.—The holder of an instrument indorsed in blank may sue the maker although at the time when the action is brought the instrument is in the hands of a pledgee of the plaintiff's transferrer, the lien of the pledgee being discharged before judgment and the instrument delivered to the plaintiff. *Fisher v. Bradford*, 7 Me. 28.

A Receiver or Assignee for the Benefit of Creditors of a holder by blank indorsement may sue in his own name without further description. *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13.

An Executor or Administrator may sue in his own name on a note indorsed in blank by his decedent. *Barlow v. Myers*, 24 Hun (N. Y.) 286; *Barrett v. Barrett*, 8 Me. 353; *Catherwood v. Chabaud*, 1 B. & C. 150, 8 E. C. L. 65, in which last case the action was by an administrator *de bonis non*. See also article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 711.

A Person Taking Up an Instrument indorsed in blank may sue thereon in his own name. *Palmer v. Gardiner*, 77 Ill. 143; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216; *Eaton v. McKown*, 34 Me. 510; *Lawrance v. Fussell*, 77 Pa. St. 460; *Brady v. White*, 4 Baxt. (Tenn.) 382.

Delivery Necessary.—To enable a holder to maintain an action in his own name on an instrument indorsed in blank, his title must be perfected by delivery. *Clark v. Sigourney*, 17 Conn. 511; *Machell v. Kinnear*, 1 Stark. 499, 2 E. C. L. 191.

Indorsed Before Death, Delivered Afterward.—In *Clark v. Sigourney*, 17 Conn. 511, it was held that an action could not be maintained in the name of the holder of an instrument which had been indorsed in blank by the payee before his death, and delivered after his death by his executors.

1. *Kennon v. McRea*, 7 Port. (Ala.) 175; *Habersham v. Lehman*, 63 Ga. 380; *Giddings v. McCumber*, 51 Ill. App. 373; *Long v. Cynthiana Bank*, 1 Litt. (Ky.) 291; *Huie v. Bailey*, 16 La. 213; *Gaines v. Morris*, 6 Rob. (La.) 4; *Watervliet Bank v. White*, 1 Den. (N. Y.) 608; *Mitchell v. Fuller*, 15 Pa. St. 268; *Rosenberger v. Harrow Co.*, 2 Montg. Co. Rep. (Pa.) 37; *Cassel v. Dows*, 1 Blatchf. (U. S.) 335; *U. S. v. Barker*, 1 Paine (U. S.) 156.

2. *Columbus First Nat. Bank v. Leonard*, 91 Ga. 805. See also *Ogden v. Slade*, 1 Tex. 13.

3. *Columbus First Nat. Bank v. Leonard*, 91 Ga. 807, quoting the *Georgia Code*, §§ 2775, 2776, which changed the common-law rule, and citing *Goodman v. Fleming*, 57 Ga. 350, as an authority in point, upon an examination of the record of the case, the latter being imperfectly reported; *Flexner v. Dickerson*, 65 Ala. 72, citing the *Alabama Code* of 1876, § 2099 (Code of 1852, § 1530); *Worthington v. Curd*, 15 Ark. 491, referring to the *Arkansas* statute; *Temple v. Hays*, 1 Morr. (Iowa) 9, a case of the blank indorsement of a sealed note. See also *Green v. Burrows*, 47 Mich. 70.

In *Texas* it was held that under the blended system of law and equity in that state the assignee of a non-negotiable instrument may sue the maker in his own name. *Ogden v. Slade*, 1 Tex. 13.

4. *Leidy v. Tammany*, 9 Watts (Pa.) 353; *Codwise v. Gleason*, 3 Day (Conn.) 12.

Suit in Name of Any Person Consenting. — The holder and owner of an instrument indorsed in blank may maintain an action thereon in the name of any person consenting to such action.¹

Effect of Mala Fide. — An action cannot be maintained in the name of the holder where his possession of the instrument is made *mala fide*.²

b. INTEREST OF HOLDER — Beneficial Interest of Ownership. — By the weight of authority, at least in the absence of statutes requiring the plaintiff to have the beneficial ownership of an instrument sued on, an action may be maintained by the holder of an instrument indorsed in blank, although he may not be the beneficial owner.³

1. *Burnap v. Cook*, 32 Ill. 168; *Kuehne v. Golt*, 54 Ill. App. 596; *Golder v. Foss*, 43 Me. 364; *Demuth v. Cutler*, 50 Me. 298; *Baker v. Stinchfield*, 57 Me. 363; *Marr v. Plummer*, 3 Me. 73; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *Brown v. Clark*, 14 Pa. St. 469. See also *Agee v. Medlock*, 25 Ala. 281; *Harpham v. Haynes*, 30 Ill. 404.

2. *Florida*. — *McCallum v. Driggs*, 35 Fla. 277.

Illinois. — *McHenry v. Ridgely*, 3 Ill. 309.

Louisiana. — *Banks v. Eastin*, 3 Martin N. S. (La.) 291.

Maine. — *Golder v. Foss*, 43 Me. 364.

Maryland. — *Kunkel v. Spooner*, 9 Md. 462; *Lucas v. Byrne*, 35 Md. 485; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.

Massachusetts. — *Little v. Obrien*, 9 Mass. 423; *Towne v. Wason*, 128 Mass. 517.

New York. — *Bedell v. Carll*, 33 N. Y. 581; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132; *Ogilby v. Wallace*, 2 Hall (N. Y.) 553.

Pennsylvania. — *Pearce v. Austin*, 4 Whart. (Pa.) 489.

Tennessee. — *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

A Person Who Has Stolen a Note indorsed in blank cannot, of course, maintain an action thereon in his own name. *Towne v. Wason*, 128 Mass. 517.

3. *Alabama*. — *Bancroft v. Paine*, 15 Ala. 834; *Agee v. Medlock*, 25 Ala. 281; *Henley v. Bush*, 33 Ala. 636.

Florida. — *McCallum v. Driggs*, 35 Fla. 277.

Georgia. — *Nisbet v. Lawson*, 1 Ga. 275.

Illinois. — *McHenry v. Ridgely*, 3 Ill. 309.

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309; *Harpham v. Haynes*, 30 Ill. 404; *Kuehne v. Golt*, 54 Ill. App. 596. But see *Moore v. Maple*, 25 Ill. 341, where it was held that equitable ownership at the time the suit was brought was necessary.

Louisiana. — *Bacon v. Smith*, 2 La. Ann. 441; *Conrey v. Harrison*, 4 La. Ann. 349; *State Bank v. Roberts*, 4 La. 530; *Banks v. Eastin*, 3 Martin N. S. (La.) 291; *Kelly v. Ledoux*, 11 La. Ann. 689; *Ricard v. Harrison*, 19 La. Ann. 181; *Klein v. Buckner*, 30 La. Ann. 680; *Scionneaux v. Wagnespach*, 32 La. Ann. 283.

Maine. — *Golder v. Foss*, 43 Me. 364; *Baker v. Stinchfield*, 57 Me. 363; *Marr v. Plummer*, 3 Me. 73.

Massachusetts. — *Manufacturers' Nat. Bank v. Thompson*, 120 Mass. 438; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *Fairfield v. Adams*, 16 Pick. (Mass.) 381; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Way v. Richardson*, 3 Gray (Mass.) 412.

Michigan. — *Brigham v. Gurney*, 1 Mich. 348; *Boyd v. Corbitt*, 37 Mich. 52; *Coy v. Stiner*, 53 Mich. 42.

New York. — *Parker v. Totten*, 10 How. Pr. (N. Y. Supreme Ct.) 233; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52; *Hays v. Southgate*, 10 Hun (N. Y.) 512; *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Ogilby v. Wallace*, 2 Hall (N. Y.) 553. But see *contra* by statute, *Bell v. Tilden*, 16 Hun (N. Y.) 346.

Ohio. — *Osborn v. McClelland*, 43 Ohio St. 284; *McCoy v. Hornbrook*, 1 Cinc. Wkly. L. Bul. 170. *Contra*, *Clawson v. Cone*, 2 Handy (Ohio) 67.

Pennsylvania. — *Brown v. Clark*, 14 Pa. St. 469; *Logan v. Cassell*, 88 Pa. St. 288. *Contra*, *Hoker v. Jamison*, 2 W. & S. (Pa.) 438, but in this case it was held that such a proceeding would not bar a subsequent suit by the real owner.

subject, however, to any defenses which the defendant may be entitled to set up against the real owner.¹

Holder for Collection or as Collateral. — Thus one to whom an instrument has been transferred by blank indorsement, for the purpose of collection,² or as collateral security,³ may sue thereon in his own name.

c. FILLING BLANK — Necessity of Filling Blank. — In many cases it is held that the holder of a note indorsed in blank may sue and recover thereon in his own name, without filling up the blank indorsement to himself.⁴ On the other hand, in some states

Rhode Island. — *Mumford v. Weaver*, 18 R. I. 801.

West Virginia. — *Smith v. Lawson*, 18 W. Va. 212.

England. — *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286. But see *contra*, *Emmett v. Tottenham*, 8 Exch. 884, where the nominal plaintiff had neither interest in nor possession of the bill sued on.

Contra. — *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Rock County Nat. Bank v. Hollister*, 21 Minn. 385.

Transfer Pending Suit. — In *Keyser v. Shepherd*, 2 Mackey (D. C.) 66, it was held that one to whom a note, indorsed in blank, was transferred pending suit thereon, might continue the action in his own name. But in *Curtis v. Bemis*, 26 Conn. 1, it was held that the action could not be continued in such a case in the name of the transferrer, although he had agreed that the suit might proceed in his name for the benefit of the transferee.

Action by Firm Instead of Partner. — Where a note is indorsed in blank by the payee to a member of a firm to indemnify him as security for the payee, the maker, in a suit by the firm to enforce payment, cannot be heard to object that the suit was brought in the name of the firm and not of the partner. *Hutchinson v. Crane*, 100 Ill. 269.

1. *Nisbet v. Lawson*, 1 Ga. 275; *Klein v. Buckner*, 30 La. Ann. 680; *Scionneaux v. Waguespack*, 32 La. Ann. 283; *Logan v. Cassell*, 88 Pa. St. 288.

2. *Bancroft v. Paine*, 15 Ala. 834; *Conrey v. Harrison*, 4 La. Ann. 349; *Kelly v. Ledoux*, 11 La. Ann. 689; *Ricard v. Harrison*, 19 La. Ann. 181; *Klein v. Buckner*, 30 La. Ann. 680; *Little v. O'Brien*, 9 Mass. 423; *Brigham v. Gurney*, 1 Mich. 349; *Boyd v. Corbitt*, 37 Mich. 52; *Coy v. Stiner*, 53

Mich. 42; *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286. *Contra*, by statute, *Bell v. Tilden*, 16 Hun (N. Y.) 346.

3. *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

"For Account of." — It was held in *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178, and in *Smith v. Hall*, 5 Bosw. (N. Y.) 319, that on a note indorsed in blank "for account of" the payee, the pledgee might maintain an action in his own name.

Transferee of Pledgee. — If the payee of a promissory note indorses it in blank, and delivers it before maturity, as collateral security, to a creditor, who transfers it, overdue, to a third person, the latter, while the debt for which it was pledged as security remains unpaid, may maintain an action on the note against the maker. *Lindsay v. Chase*, 104 Mass. 253.

Pledge Satisfied. — In *New England Trust Co. v. New York Belting, etc., Co.*, 166 Mass. 42, it was held that a person to whom notes indorsed in blank had been pledged could not sue thereon in his own name, after he had realized from other securities in his hands the amount of the debt which the notes were pledged to secure.

4. *Connecticut.* — *Castle v. Candee*, 16 Conn. 234.

Illinois. — *Gillham v. State Bank*, 3 Ill. 246; *Palmer v. Nassau Bank*, 78 Ill. 380; *Fairbanks v. Campbell*, 53 Ill. App. 216; *Kuehne v. Goit*, 54 Ill. App. 596. But see *Wilder v. De Wolf*, 24 Ill. 190.

Indiana. — *Ferry v. Jones*, 10 Ind. 226; *Moore v. Pendleton*, 16 Ind. 481; *Clark v. Walker*, 6 Blackf. (Ind.) 82.

Louisiana. — *Griffon v. Jacobs*, 2 La. 192; *Sprigg v. Cuny*, 7 Martin N. S. (La.) 253.

Maine. — *McDonald v. Bailey*, 14 Me. 101.

it is at least intimated that it is necessary to fill up the blank in such an instrument, so as to make it payable to the plaintiff.¹

Time of Filling Blank. — When it is held necessary to fill a blank, it may be done either before the trial or at the trial,² before the instrument is offered in evidence,³ or before verdict⁴ or judgment.⁵

Mississippi. — *Chewning v. Gatewood*, 5 How. (Miss.) 552.

Missouri. — *Bennett v. Pound*, 28 Mo. 598.

Pennsylvania. — *Boyd v. Bocken-kamp*, 3 W. N. C. (Pa.) 25.

Tennessee. — *Brady v. White*, 4 Baxt. (Tenn.) 382; *Garden v. State Bank*, 1 Swan (Tenn.) 420.

Special Contract. — Blank indorsements need not ordinarily be filled up, in suits against the indorser, either on or before the trial, whether the paper is negotiable or non-negotiable, or the indorser is a party to it or a stranger; but if the plaintiff means to prove a specific contract, different from that *prima facie* implied by a blank indorsement, such special contract should be filled up. *Castle v. Candee*, 16 Conn. 234.

Waiver of Objection. — In *Gardner v. State Bank*, 1 Swan (Tenn.) 420, it was held that it was not necessary to fill in the blank in an action on an instrument indorsed in blank, unless a special exception for failure to do so was made at the trial.

Described as Filled Up. — In *Riggs v. Andrews*, 8 Ala. 628, it was held to be unnecessary to fill up a blank indorsement, even when the description in the declaration was that of a note indorsed to the plaintiffs.

1. *Alabama.* — *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505; *Kennon v. McRea*, 7 Port. (Ala.) 175. *Contra*, *Riggs v. Andrews*, 8 Ala. 628.

Arkansas. — *Edwards v. Scull*, 11 Ark. 325.

Kentucky. — *Bradford v. Ross*, 3 Bibb (Ky.) 238; *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180; *Barret v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97.

Maine. — *Metcalf v. Yeaton*, 51 Me. 198.

Maryland. — *Lucas v. Byrne*, 35 Md. 485; *Canfield v. McIlwaine*, 32 Md. 99; *Chesley v. Taylor*, 3 Gill (Md.) 251; *Ringgold v. Tyson*, 3 Har. & J. (Md.) 172; *Hudson v. Goodwin*, 5 Har. & J. (Md.) 115; *Day v. Lyon*, 6

Har. & J. (Md.) 140; *Kiersted v. Rogers*, 6 Har. & J. (Md.) 282; *Cumberland Bank v. M'Kinley*, 6 Har. & J. (Md.) 527; *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 389. But see *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216.

Massachusetts. — *Taylor v. Binney*, 7 Mass. 479; *Whitten v. Hayden*, 9 Allen (Mass.) 408.

New Jersey. — *Riker v. Corley*, 3 N. J. L. 469.

New York. — *Watervliet Bank v. White*, 1 Den. (N. Y.) 608.

Oregon. — *Thompson v. Rathbun*, 18 Oregon 202.

Virginia. — *Hooe v. Wilson*, 5 Call (Va.) 61; *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326.

United States. — *Evans v. Gee*, 11 Pet. (U. S.) 80.

Plaintiff's Title Denied. — In *Barrett v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97, and in *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180, it was held that the indorsement of an instrument payable in blank must be filled up, so as to show title in the plaintiff, when such title was denied by the defendant.

2. *Kennon v. McRea*, 7 Port. (Ala.) 175; *Chesley v. Taylor*, 3 Gill (Md.) 251; *Kiersted v. Rogers*, 6 Har. & J. (Md.) 282; *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 389; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *Riker v. Corley*, 3 N. J. L. 469; *Hooe v. Wilson*, 5 Call. (Va.) 61; *Evans v. Gee*, 11 Pet. (U. S.) 80. See also *Ferry v. Jones*, 10 Ind. 226; *Moore v. Pendleton*, 16 Ind. 481.

After Death of Indorser. — The authority to fill the blank is irrevocable, and the holder may fill it though the indorser has died since the assignment. *Cope v. Daniel*, 9 Dana (Ky.) 416.

3. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505; *Edwards v. Scull*, 11 Ark. 325; *Day v. Lyon*, 6 Har. & J. (Md.) 140.

4. *Hudson v. Goodwin*, 5 Har. & J. (Md.) 115.

5. *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326.

5. *Assignée* — a. IN GENERAL. — By force of statutes providing for assignment of choses in action or requiring suits to be brought by the real party in interest, it is now the general rule that the assignee of a negotiable instrument or other instrument for the payment of money may maintain an action thereon in his own name.¹

1. See generally article EQUIVALENT ASSIGNMENTS, vol. 7, p. 748 *et seq.*

Alabama. — *Plaintiffs*, etc., *Bank v. Willis*, 5 Ala. 770; *Sawyer v. Bradford*, 6 Ala. 572; *Batclay v. Moore*, 17 Ala. 634; *Murdock v. Caruthers*, 21 Ala. 785; *Savage v. Walshe*, 26 Ala. 619; *Morris v. Poillon*, 56 Ala. 403; *Flexner v. Dickerson*, 65 Ala. 72; *Johnston v. English*, 1 Stew. (Ala.) 170.

Arkansas. — *Purdy v. Brown*, 4 Ark. 335; *Roberts v. Jacks*, 31 Ark. 597; *Jacks v. Nelson*, 34 Ark. 531; *Ivey v. Drake*, 36 Ark. 228; *Caldwell v. Meshew*, 44 Ark. 564; *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 542. But see *Ruddell v. Walker*, 7 Ark. 457; *Biscoe v. Steed*, 11 Ark. 104.

California. — *Herman v. Hecht*, 116 Cal. 553.

Colorado. — *Götter v. Stockdale*, 5 Colb. App. 489; *Walsh v. Allen*, 6 Colo. App. 303; *Bassett v. Inman*, 7 Colo. 270.

Georgia. — *Adams v. Robinson*, 69 Ga. 627. *Compare Hartford F. Ins. Co. v. Amos*, 98 Ga. 533.

Illinois. — *Miller v. Bledsoe*, 2 Ill. 530; *Hance v. Miller*, 21 Ill. 636; *Lockridge v. Nuckolls*, 25 Ill. 178; *Newman v. Ravenscroft*, 67 Ill. 496; *McPherson Nat. Bank v. Velde*, 49 Ill. App. 21; *Forster v. New Albany Securit Nat. Bank*, 61 Ill. App. 272. *Compare Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Turner v. Peotia, etc., R. Co.*, 95 Ill. 134.

Indiana. — *Lamson v. Falls*, 6 Ind. 309; *Rowe v. Haines*, 15 Ind. 445. *Compare Swift v. Ellsworth*, 10 Ind. 205; *Smith v. Felton*, 85 Ind. 223; *Bostwick v. Bryant*, 113 Ind. 448.

Iowa. — *Merchants', etc., Bank v. Hewitt*, 3 Iowa 93; *Allison v. Barrett*, 16 Iowa 278; *Yonker v. Martin*, 18 Iowa 143; *Swan v. Yapple*, 35 Iowa 248; *Greer v. Marble*, 37 Iowa 95; *Watnock v. Richardson*, 50 Iowa 450; *Campbell v. Brown*, 64 Iowa 425; *Harlan v. Sigler*, 1 Morr. (Iowa) 39; *Creighton v. Gordon*, 1 Morr. (Iowa) 41. *Compare Andrews v. Brown*, 1 Iowa 154; *Cochran v. Glover*, 1 Morr. (Iowa) 151.

Kansas. — *Schnier v. Fay*, 12 Kan.

184; *Reynolds v. Qualey*, 18 Kan. 361; *Beeson v. Shively*, 28 Kan. 574.

Kentucky. — *Brooking v. Clarke*, 2 Litt. (Ky.) 197; *Instone v. Williamson*, 2 Bibb (Ky.) 83; *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84.

Louisiana. — *Jones v. Elliott*, 4 La. Anth. 303.

Maine. — *Hatch v. Spearin*, 11 Me. 354; *Willis v. Ctesey*, 17 Me. 9; *Smith v. Berty*, 18 Me. 122; *Jackson v. York, etc., R. Co.*, 48 Me. 147; *Farnutt v. Virgin*, 52 Me. 576; *McDonald v. Laughlin*, 74 Me. 480.

Maryland. — *Stith v. Young*, 26 Md. 233; *Hampson v. Owens*, 55 Md. 583.

Massachusetts. — *Jones v. Witter*, 13 Mass. 304; *Platts v. Holmes*, 10 Cush. (Mass.) 92; *Attiherst Academy v. Cowls*, 6 Pick. (Mass.) 427; *Grover v. Grover*, 24 Pick. (Mass.) 261.

Michigan. — *Redmond v. Stansbury*, 24 Mich. 445; *Watertown F. Ins. Co. v. Grover, etc., Sewing Mach. Co.*, 41 Mich. 131; *Peltier v. Babillion*, 45 Mich. 384; *Hicks v. Lyle*, 46 Mich. 488; *Spinning v. Sullivan*, 48 Mich. 5; *Davis v. Merrill*, 51 Mich. 480; *Stevens v. Hahnah*, 86 Mich. 305.

Mississippi. — *Lamkin v. Nye*, 43 Miss. 241; *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563.

Missouri. — *Smith v. Oldham*, 5 Mo. 483; *Webb v. Morgan*, 14 Mo. 428; *Hill v. McPherson*, 15 Mo. 204; *Long v. Constant*, 19 Mo. 320; *Canefox v. Anderson*, 22 Mo. 347; *Thornton v. Crowther*, 24 Mo. 164; *McClain v. Weidemyer*, 25 Mo. 364; *Willard v. Moies*, 30 Mo. 142; *Brady v. Chandler*, 31 Mo. 28; *Weinwick v. Bender*, 43 Mo. 80; *Smith v. Gregory*, 75 Mo. 121; *Young v. Chew*, 6 Mo. App. 387; *Khaus v. Givens*, 110 Mo. 58; *Saulsbury v. Corwin*, 40 Mo. App. 373. *Cohra, McCarty v. Hall*, 13 Mo. 480.

New Hampshire. — *Currier v. Hodgdon*, 3 N. H. 82; *Howland v. Spenter*, 14 N. H. 580. But see *Betry v. Gillis*, 17 N. H. 9.

New York. — *Dürglin v. Ireland*, 14 N. Y. 322; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Allen v. Brown*, 44 N. Y. 228; *Delahunt v. Aetna Ins. Co.*, 97 N.

Time of Assignment. — The fact that an instrument is assigned after its maturity does not affect the assignee's right to sue thereon,¹ and it has often been held that the assignment of a note while

Y. 537; *Hays v. Southgate*, 10 Hun (N. Y.) 511; *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344; *Callahan v. Crow*, 91 Hun (N. Y.) 346; *Cummins v. Barkalow*, 4 Keyes (N. Y.) 514, 1 Abb. App. Dec. (N. Y.) 479; *Carpenter v. Cummings*, 18 Misc. Rep. (N. Y. City Ct.) 587, 76 N. Y. St. Rep. 239; *Butterfield v. Macomber*, 22 How. Pr. (N. Y. Supreme Ct.) 150; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273; *Chase v. Chase*, 1 Paige (N. Y.) 198; *Ryle v. Brown*, 50 N. Y. Super. Ct. 174; *U. S. v. White*, 2 Hill (N. Y.) 59; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *Allgoever v. Edmunds*, 66 Barb. (N. Y.) 579; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Dawson v. Coles*, 16 Johns. (N. Y.) 51; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463. Compare *Savage v. Bevier*, 12 How. Pr. (N. Y. C. Pl.) 166; *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547; *Lamoureux v. Hewit*, 5 Wend. (N. Y.) 307; *Jessel v. Williamshburgh Ins. Co.*, 3 Hill (N. Y.) 88.

North Carolina. — *Wilcoxson v. Logan*, 91 N. Car. 449; *Kiff v. Weaver*, 94 N. Car. 274; *Martin v. Hayes*, Busb. L. (N. Car.) 423; *Knight v. Wilmington*, etc., R. Co., 1 Jones L. (N. Car.) 357; *Grist v. Backhouse*, 4 Dev. & B. L. (N. Car.) 362. See *Abrams v. Cureton*, 74 N. Car. 523.

Pennsylvania. — *De Barry v. Withers*, 44 Pa. St. 356. Compare *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102.

South Carolina. — *Thompson v. Malone*, 13 Rich. L. (S. Car.) 252; *Ware v. Key*, 2 McCord L. (S. Car.) 373; *Ferrall v. Paine*, 2 Strobb. L. (S. Car.) 293.

Tennessee. — *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29; *Wright v. McLe-more*, 10 Yerg. (Tenn.) 235; *Dickerson v. Wheeler*, 1 Humph. (Tenn.) 51; *Moore v. Weir*, 3 Sneed (Tenn.) 46.

Texas. — *Ogden v. Slade*, 1 Tex. 13; *Smith v. Clopton*, 4 Tex. 109; *Knight v. Holloman*, 6 Tex. 153.

Washington. — *Riddell v. Pritchard*, 12 Wash. 601; *McDaniel v. Pressler*, 3 Wash. 636; *Seattle Nat. Bank v. Emmons*, 16 Wash. 585.

West Virginia. — *Clarke v. Hogen-man*, 13 W. Va. 718.

United States. — *Harper v. Butler*, 2

Pet. (U. S.) 239; *Smith v. Clapp*, 15 Pet. (U. S.) 125; *Leavitt v. Cowles*, 2 McLean (U. S.) 491; *Swann v. Schol-field*, 2 Cranch (C. C.) 140; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373; *Weston v. Penniman*, 1 Mason (U. S.) 306; *Glenn v. Scott*, 28 Fed. Rep. 804. Compare *Hopkirk v. Page*, 2 Brock. (U. S.) 20; *Bradley v. Trammel*, Hempst. (U. S.) 164. See also *Lawrence v. U. S.*, 8 Ct. of Cl. 252.

England. — *Johnson v. Peck*, 3 Stark. 66, 14 E. C. L. 165.

Assignee or Assignor. — The assignee of a note that is payable to bearer may elect to sue in the name of the assignor, or in his own name. *Ware v. Key*, 2 McCord L. (S. Car.) 373.

Assignee or Indorsee. — In *Stevens v. Hannan*, 86 Mich. 305, a note was transferred by writing on the back of it the following: "For value received, I hereby assign all interest in this note to W." It was held that if the effect of this assignment was to make it thereafter non-negotiable, the assignee could sue in his own name, under How. Stat. Mich., § 7344, but that if such transfer did not make the note non-negotiable, the transferee was an indorsee and consequently could sue in his own name.

Exclusive Right of Action in Assignee. — In *Roberts v. Jacks*, 31 Ark. 597, and in *Purdy v. Brown*, 4 Ark. 535, it was held that the assignee of a note had the exclusive right of action thereon.

Assignment Invalid. — In *Lockridge v. Nuckolls*, 25 Ill. 178, it was held that the plaintiff could not maintain an action on the note in that case as assignee, because the assignment under which he claimed was invalid.

Remote Assignee. — It was held in *Dunlop v. Harris*, 5 Call (Va.) 16, that the last assignee of a promissory note could not maintain an action against a remote indorser, for want of privity between them; and in *M'Carty v. Rhea*, 1 Blackf. (Ind.) 55, that an action on a note not governed by the law merchant would not lie by an assignee against a remote assignor; but in *Dorsey v. Hadlock*, 7 Blackf. (Ind.) 113, it was held that such an action would lie in equity though not at law.

1. *Walsh v. Allen*, 6 Colo. App. 303.

suit was pending thereon would not abate the suit, but that the action might be continued in the name of the assignee.¹

b. INTEREST OF ASSIGNEE — Beneficial Ownership. — By the weight of authority, in the absence of statutes providing otherwise, an assignee of an instrument may sue in his own name, without regard to whether he is also the beneficial owner.²

Assignee for Collection. — One to whom a negotiable instrument is assigned for the purpose of collection may sue thereon in his own name.³

c. UNDER WHAT ASSIGNMENTS. — An assignee in bankruptcy or insolvency may sue in his own name on instruments payable to the assignor.⁴ It seems that a valuable consideration for an

1. *Ivey v. Drake*, 36 Ark. 228; *Reynolds v. Quaely*, 18 Kan. 361; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488. See *Ruddell v. Walker*, 7 Ark. 457, where it was held that the issuance of a writ of summons, and not the filing of a cause of action with the justice, constitutes the institution of a suit, and therefore that a suit might be maintained in the name of the assignee, if the note was assigned after the filing and before the issuance of the writ.

2. *Colorado.* — *Gomer v. Stockdale*, 5 Colo. App. 489; *Bassett v. Inman*, 7 Colo. 270.

Illinois. — *Forster v. New Albany Second Nat. Bank*, 61 Ill. App. 272.

Kentucky. — *Brooking v. Clarke*, 2 Litt. (Ky.) 197.

Missouri. — *Webb v. Morgan*, 14 Mo. 428; *Saulsbury v. Corwin*, 40 Mo. App. 373.

New York. — *Allen v. Brown*, 44 N. Y. 228; *Carpenter v. Cummings*, 18 Misc. Rep. (N. Y. City Ct.) 587, 76 N. Y. St. Rep. 239; *Cummins v. Barkalow*, 4 Keyes (N. Y.) 514, 1 Abb. App. Dec. (N. Y.) 479; *Hays v. Southgate*, 10 Hun (N. Y.) 511.

Texas. — *Knight v. Holloman*, 6 Tex. 153.

Washington. — *McDaniel v. Pressler*, 3 Wash. 636; *Riddell v. Pritchard*, 12 Wash. 601.

Contra — Indiana. — *Swift v. Ellsworth*, 10 Ind. 205; *Smith v. Felton*, 85 Ind. 223; *Bostwick v. Bryant*, 113 Ind. 448.

Minnesota. — *Van Eman v. Stanchfield*, 13 Minn. 75.

New Hampshire. — *Berry v. Gillis*, 17 N. H. 9.

North Carolina. — *Abrams v. Cureton*, 74 N. Car. 523.

Part Owner. — It seems that the as-

signee of a note who is the beneficial owner of part of it can maintain an action thereon in his own name. *Carpenter v. Cummings*, 18 Misc. Rep. (N. Y. City Ct.) 587.

But that an action by a part owner must be for the whole amount due, see *Brooking v. Clarke*, 2 Litt. (Ky.) 197.

3. *Colorado.* — *Gomer v. Stockdale*, 5 Colo. App. 489.

Illinois. — *Forster v. New Albany Second Nat. Bank*, 61 Ill. App. 272.

Missouri. — *Webb v. Morgan*, 14 Mo. 428; *Saulsbury v. Corwin*, 40 Mo. App. 373.

Washington. — *McDaniel v. Pressler*, 3 Wash. 636; *Riddell v. Pritchard*, 12 Wash. 601.

Contra. — *Bostwick v. Bryant*, 113 Ind. 448; *Abrams v. Cureton*, 74 N. Car. 523. See also *Wolverton v. Taylor*, 157 Ill. 485, where it was held that an assignee for collection could not sue the directors of the maker corporation on their statutory liability.

4. *Beeson v. Shively*, 28 Kan. 574; *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Howland v. Spencer*, 14 N. H. 580; *Butterfield v. Macomber*, 22 How. Pr. (N. Y. Supreme Ct.) 150; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488; *Ferrall v. Paine*, 2 Strobb. L. (S. Car.) 293; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373. Compare *Case v. Marchand*, 23 La. Ann. 60. And see *Brush v. Curtis*, 4 Conn. 312.

Action at Law or in Equity. — In *Lenox v. Roberts*, 2 Wheat. (U. S.) 373, it was held that assignees under a general assignment for the purpose of liquidating the affairs of the Bank of the United States, might maintain actions in equity on notes payable to that bank, but that their right to sue at law was doubtful.

Assignee in Another State. — In *Brush*

assignment is not necessary to give the assignee a right of action,¹ and that an action may be maintained by an assignee on a guaranty of payment indorsed on a promissory note.² An assignment in pledge as collateral security is sufficient to authorize an action in the name of the assignee,³ and it seems that the instrument at the time of assignment need not be in the actual possession of the assignor.⁴ An assignment by a separate instrument is sufficient to transfer the right of action to the assignee.⁵ It is not necessary that an assignment be under seal.⁶

Whether Writing Necessary. — According to the weight of authority, an assignee may sue in his own name, although the assignment under which he claims is not in writing,⁷ and of course an assign-

v. Curtis, 4 Conn. 312, it was held that an assignee in insolvency in another state could not sue in Connecticut under such assignment.

Assignment in Fraud of Creditors. — In *Eason v. Locherer*, 42 Tex. 173, the assignee of a note which the assignor transferred to avoid payment of debts, was permitted to sue thereon in his own name; but in *Rohrer v. Turrill*, 4 Minn. 407, it was held that where notes which had been assigned by a judgment debtor for the purpose of defrauding his creditors were levied upon under process valid on its face, the officer levying such process might sue on such notes in his own name, and that the assignee could not sue upon them.

1. *Callahan v. Crow*, 91 Hun (N. Y.) 346. *Contra*, *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547.

2. *Hance v. Miller*, 21 Ill. 636; *McPherson Nat. Bank v. Velde*, 49 Ill. App. 21; *Wright v. Boyd*, 3 Barb. (N. Y.) 523. *Contra*, *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547; *Lamourieux v. Hewit*, 5 Wend. (N. Y.) 307.

3. *Rowe v. Haines*, 15 Ind. 445.

4. *Allison v. Barrett*, 16 Iowa 278, in which case there was an assignment of a promissory note by its owner while the note was in the hands of his agent, and an order to the agent, directing the latter to deliver the note, was given to the assignee.

5. *Morris v. Poillon*, 50 Ala. 403; *Adams v. Robinson*, 69 Ga. 627; *Instone v. Williamson*, 2 Bibb (Ky.) 83; *Jones v. Elliott*, 4 La. Ann. 303; *Stine v. Young*, 26 Md. 233; *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427; *Thornton v. Crowther*, 24 Mo. 164; *McClain v. Weidemeyer*, 25 Mo. 364. *Contra*, *Biscoe v. Sneed*, 11 Ark. 104; *Hopkirk v. Page*, 2 Brock. (U. S.) 20.

Assignment Before Execution of Instrument. — A deed of assignment, executed before the date of a negotiable instrument in suit, is not sufficient to transfer the title to such instrument, so that the assignee can sue thereon. *Grist v. Backhouse*, 4 Dev. & B. L. (N. Car.) 362.

6. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84; *Dawson v. Coles*, 16 Johns. (N. Y.) 51. *Contra*, under a statute. *Kinniken v. Dulaney*, 5 Harr. (Del.) 384.

Sealed Note. — In *Dawson v. Coles*, 16 Johns. (N. Y.) 51, it was held that the assignee of a sealed note by a writing not under seal, might sue thereon.

Assignment by Corporation. — In *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84, it was held that an assignee might sue in his own name on a note assigned to him by an agent of a corporation, though the seal of the corporation was not affixed to such assignment.

7. *Arkansas*. — *Caldwell v. Meshew*, 44 Ark. 564.

Iowa. — *Yunker v. Martin*, 18 Iowa 143; *Green v. Marble*, 37 Iowa 95; *Warnock v. Richardson*, 50 Iowa 450; *Creighton v. Gordon*, 1 Morr. (Iowa) 41. But see *Andrews v. Brown*, 1 Iowa 154.

Massachusetts. — *Jones v. Witter*, 13 Mass. 304; *Grover v. Grover*, 24 Pick. (Mass.) 261.

Missouri. — *Willard v. Moies*, 39 Mo. 142; *Weinick v. Bender*, 33 Mo. 80.

New York. — *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344. But see *Savage v. Bevier*, 12 How. Pr. (N. Y. C. Pl.) 166.

North Carolina. — *Wilcoxon v. Logan*, 91 N. Car. 449; *Kiff v. Weaver*, 94 N. Car. 274.

ment in writing is sufficient.¹

Assignment of Part of Claim. — The assignee of part of a demand evidenced by a negotiable instrument cannot sue thereon in his own name.² It seems that an assignment "of the money due" upon a note is not such an assignment of the note itself as to vest the assignee with a right of action.³

4. ON WHAT INSTRUMENTS. — In most states an action may, under the present statutes, be maintained by the assignee of a negotiable instrument,⁴ or an instrument payable in property⁵ or in

United States. — *Harrisburg Trust Co. v. Shufeldt*, 87 Fed. Rep. 669.

Contra. — *Freeman v. Perry*, 22 Conn. 617; *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533; *Turner v. Peoria, etc.*, R. Co., 95 Ill. 134; *Bradley v. Trammel, Hempst.* (U. S.) 164.

Open Account. — In *Andrews v. Brown*, 1 Iowa 154, it was held that an open account of sums of money due on a contract could not be sued upon by an assignee, unless the assignment was in writing, under Iowa Code 1851, § 952.

Agreement to Pay Money or Property. — In *Turner v. Peoria, etc.*, R. Co., 95 Ill. 134, it was held that the assignment of all instruments for the payment of money or articles of personal property must be in writing, to enable the assignee to sue thereon.

Fire Insurance Policy. — In *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533, it was held that an assignee of a fire insurance policy could not maintain an action thereon in his own name, under Ga. Code, § 2244, making all choses in action assignable, unless the assignment was in writing.

Negotiable Notes. — In *Freeman v. Perry*, 22 Conn. 617, and in *Bradley v. Trammel, Hempst.* (U. S.) 164, it was held that the assignment of a negotiable note must be in writing to enable the assignee to maintain an action thereon.

1. *Smith v. Clopton*, 4 Tex. 109; *Smith v. Clapp*, 15 Pet. (U. S.) 125.

2. *Miller v. Bledsoe*, 2 Ill. 530; *Douglass v. Wilkeson*, 6 Wend. (N. Y.) 637; *Martin v. Hayes*, Busb. L. (N. Car.) 423; *Knight v. Wilmington, etc.*, R. Co., 1 Jones L. (N. Car.) 357. **Contra**, *Cochran v. Glover*, 1 Morr. (Iowa) 151. See also *Lawrence v. U. S.*, 8 Ct. of Cl. 252, where it was held that the assignees of several vouchers issued by a government contractor might sue thereon in their own names.

3. *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563.

4. *Harlan v. Sigler*, 1 Morr. (Iowa) 39; *Hatch v. Spearin*, 11 Me. 354; *Hampson v. Owens*, 55 Md. 583; *Redmond v. Stansbury*, 24 Mich. 445; *Spinning v. Sullivan*, 48 Mich. 5; *Allgoever v. Edmunds*, 66 Barb. (N. Y.) 579; *U. S. v. White*, 2 Hill (N. Y.) 59; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273; *Thompson v. Malone*, 13 Rich. L. (S. Car.) 252; *Ware v. Key*, 2 McCord L. (S. Car.) 373; *Ogden v. Slade*, 1 Tex. 13; *Weston v. Penniman*, 1 Mason (U. S.) 306. **Contra**, *Matlack v. Hendrickson*, 13 N. J. L. 263.

Subsequent Act of Legislature. — In *Harlan v. Sigler*, 1 Morr. (Iowa) 39, it was held that where a note was not negotiable at the time of its execution, it is competent for the legislature by a subsequent act to authorize the assignee to sue in his own name.

Special Agreement. — Where the drawee of a non-negotiable bill of exchange accepts it, and agrees to pay it to any person to whom it may be assigned, an assignee may sue thereon. *Weston v. Penniman*, 1 Mason (U. S.) 306. But see *Hatch v. Spearin*, 11 Me. 354, where it was held that a second assignee of a note not negotiable could not maintain an action on a special promise made to the first assignee, but must resort to his action on the note.

5. *Flexner v. Dickerson*, 65 Ala. 72; *Smith v. Berry*, 18 Me. 122; *Farnum v. Virgin*, 52 Me. 576; *Hicks v. Lyle*, 46 Mich. 488; *Currier v. Hodgdon*, 3 N. H. 82; *Tibbets v. Gerrish*, 25 N. H. 41; *Moore v. Weir*, 3 Sneed (Tenn.) 46. **Contra**, *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102.

Subject to Defenses. — The effect of a statute making notes for specific articles assignable has been held simply to confer upon the assignee the right

work.¹ It has been held that an action may be maintained in the name of the assignee of an insurance policy,² a duebill,³ a certificate of deposit,⁴ a certificate of indebtedness,⁵ a receipt for grain,⁶ a renewal note taken in the name of the assignor,⁷ a lost note,⁸ the residue of a claim on a promissory note,⁹ a non-negotiable note,¹⁰ a sealed note,¹¹ a guaranty,¹² an agreement to subscribe for the capital stock of a corporation,¹³ an implied agreement to reimburse an accommodation acceptor,¹⁴ or by an assignee on a special agreement to pay him.¹⁵ On the other hand, it has been held that an action could not be maintained in the name of an assignee of interest coupons containing no negotiable words,¹⁶ or an assignee

of action in his own name at law or in equity, and not to take away any defenses which the assignor would have in the absence of such a statute. *Moore v. Weir*, 3 Sneed (Tenn.) 46.

Payable in Part in Property.—If the maker of a note payable in part in specific articles expressly promises to pay its contents to an assignee, the holder may sue in his own name. *Farnum v. Virgin*, 52 Me. 576.

1. *Schnier v. Fay*, 12 Kan. 184.

2. *Delahunt v. Aetna Ins. Co.*, 97 N. Y. 537; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Watertown F. Ins. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 41 Mich. 131. *Contra*, *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88; *Briggs v. Brown*, 3 Hill (N. Y.) 87. See article INSURANCE, vol. II, pp. 399, 400.

3. *Brady v. Chandler*, 31 Mo. 28. But see *Hunt v. Pierpont*, 27 Conn. 305, where it was held that a duebill originally due to the plaintiff and another, and subsequently assigned to the plaintiff, must be sued by the plaintiff in the names of the parties to whom it was payable. The court said: "In this respect it was like a non-negotiable note in the hands of an assignee. He could only sue it in the name of the promisee, but the surrendering it to the maker on his promise to pay the amount, or on an agreement to charge it on book, would give a right of action to the assignee in his own name."

4. *Jacks v. Nelson*, 34 Ark. 531, where it was held that a certificate of deposit, although not commercial paper, negotiable by the law merchant, when not containing a promise to pay, was nevertheless *prima facie* evidence of a chose in action, which

was assignable by statute, and gave a right of action by the assignee.

5. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541.

6. *Merchants', etc., Bank v. Hewitt*, 3 Iowa 93, decided, however, under a statute making such instruments assignable, and authorizing suit in the name of the assignee.

7. *Seattle Nat. Bank v. Emmons*, 16 Wash. 585.

8. *Long v. Constant*, 19 Mo. 320; *Leavitt v. Cowles*, 2 McLean (U. S.) 491. *Contra*, *Willis v. Creasey*, 17 Me. 9, at least where the assignment is after the loss.

9. *Durgin v. Ireland*, 14 N. Y. 322, where fifty per cent of the amount originally due had been paid and discharged under a composition with creditors, and it was held that the assignee of the balance might sue thereon in his own name.

10. *Dorsey v. Hadlock*, 7 Blackf. (Ind.) 113; *Tibbets v. Gerrish*, 25 N. H. 41.

11. *McIntosh v. Stubb*, Dec. Col. Dec. (S. Car.) 1829.

12. *Dubuque First Nat. Bank v. Carpenter*, 41 Iowa 518.

13. *Glenn v. Scott*, 28 Fed. Rep. 804, decided under Va. Code, c. 141, § 17, which authorizes actions on non-negotiable instruments to be maintained in the name of an assignee, and holding that a trustee and assignee of a joint stock company might sue in his own name for unpaid subscriptions.

14. *De Barry v. Withers*, 44 Pa. St. 356.

15. *Hatch v. Spearin*, 11 Me. 354, holding, however, that a subsequent assignee must sue on the note, and not on the special promise.

16. *Jackson v. York, etc., R. Co.*, 48 Me. 147.

of an open account.¹ An assignee cannot sue on a note upon which a judgment has been obtained before the assignment,² and before the statute of Anne an action could not be maintained by the assignee of a promissory note.³

c. TRANSFER BY WHAT ASSIGNORS. — An assignee is entitled to sue in his own name on an instrument assigned to him by a statutory trustee,⁴ by stockholders of the defendant corporation,⁵ by an executrix,⁶ or by a foreign executor or administrator.⁷ On an instrument payable to several persons, the assignee of one of the payees may sue in his own name,⁸ and on a note payable to two persons, if one assigns his interest to the other, the latter may sue in his own name,⁹ but where a negotiable instrument is made by a firm to one of its members, or *vice versa*, the assignee of such instrument cannot maintain an action thereon in his own name at law.¹⁰ It has been held that one to whom a note is assigned, after it has been taken up by an indorser, cannot sue thereon in his own name,¹¹ and it seems that on a bill of exchange payable to an agent, a person to whom such bill has been assigned by the principal is not entitled to sue as assignee.¹²

6. Transferee by Delivery Only — *a.* GENERAL RULE DENYING RIGHT OF ACTION. — The general rule of the common law is that one who holds a note payable to the order of the payee or bearing special indorsements cannot sue thereon in his own name, when the instrument has been transferred to him by delivery only and not by indorsement or written assignment.¹³

1. St. Louis, etc., R. Co. v. Camden Bank, 47 Ark. 542. But in *Andrews v. Brown*, 1 Iowa 154, it was held that the assignee of such an account, under an assignment in writing, might sue thereon in his own name.

2. *Sawyer v. Bradford*, 6 Ala. 572.

3. *Clerke v. Martin*, 2 Ld. Raym. 757; *Burton v. Souler*, 2 Ld. Raym. 774; *Williams v. Cutting*, 2 Ld. Raym. 825.

4. *Savage v. Walshe*, 26 Ala. 619.

5. *Herman v. Hecht*, 116 Cal. 553, in which case indorsing stockholders of the corporation which made the note in suit, after taking it up, assigned it to the plaintiff, and it was held that he might sue thereon in his own name.

6. *Peltier v. Babillion*, 45 Mich. 384.

7. *Campbell v. Brown*, 64 Iowa 425; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Harper v. Butler*, 2 Pet. (U. S.) 239. *Contra*, *Stearns v. Burnham*, 5 Me. 261; *McCarty v. Hall*, 13 Mo. 480. See generally article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 711.

8. *Wright v. McLemore*, 10 Yerg. (Tenn.) 235. But see *Robinson v. Denton*, 6 Ark. 283.

9. *Smith v. Oldham*, 5 Mo. 483; *Cane-fox v. Anderson*, 22 Mo. 347; *Smith v. Gregory*, 75 Mo. 121.

Action by One Partner. — Where a note was executed by three partners, and two of them sold and transferred their interest in it to the third, the third was held entitled to bring suit on the note in his own name. *Canefox v. Anderson*, 22 Mo. 347.

After Dissolution of a Partnership, it has been held that the assignee of one of the partners cannot maintain an action on a note payable to the firm. *Dickerson v. Wheeler*, 1 Humph. (Tenn.) 51.

10. *Planters', etc., Bank v. Willis*, 5 Ala. 770; *Davis v. Merrill*, 51 Mich. 480; *Hill v. McPherson*, 15 Mo. 204; *Young v. Chew*, 9 Mo. App. 387; *Knaus v. Givens*, 110 Mo. 58; *Johnson v. Peck*, 3 Stark. 66, 14 E. C. L. 165.

11. *Swann v. Scholfield*, 2 Cranch (C. C.) 140.

12. *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

13. *Alabama*. — *Taylor v. Acre*, 8 Ala. 491; *Alday v. Jamison*, 3 Port. (Ala.) 112; *Phillips v. Sellers*, 42 Ala. 658.

b. WHEN AN ACTION LIES — (1) Under Statutes. — In some states, under special statutes or under the provisions of the codes of practice, the plaintiff in an action on a promissory note, bill of

Florida.—Hooker *v.* Gallagher, 6 Fla. 351. *Smith v. Bryan*, 11 Ired. L. (N. Car.) 418.

Georgia.—Craig *v.* Tingle, 63 Ga. 274; Benson *v.* Abbott, 95 Ga. 69.

Illinois.—Porter *v.* Cushman, 19 Ill. 572; Burnap *v.* Cook, 32 Ill. 168.

Indiana.—Templin *v.* Krahn, 3 Ind. 373; Lewis *v.* Hathman, 7 Ind. 585.

Kansas.—Kohn *v.* Watkins, 26 Kan. 691.

Maine.—Clark *v.* Peabody, 22 Me. 500; Nutter *v.* Stover, 48 Me. 163; Brown *v.* Nourse, 55 Me. 230; Durgin *v.* Bartol, 64 Me. 473; Marsh *v.* Hayford, 80 Me. 97.

Maryland.—Whiteford *v.* Burckmyer, 1 Gill (Md.) 127; Lancaster *v.* Baltzell, 7 Gill & J. (Md.) 468.

Massachusetts.—Taylor *v.* Binney, 7 Mass. 482; Allen *v.* Ayres, 3 Pick. (Mass.) 298. But see Carnegie *v.* Morrison, 2 Met. (Mass.) 381, where it was held that the holder of a bill of exchange might maintain an action in his own name against the drawee, who had given a letter of credit to another, authorizing the draft, though the bill had not been transferred to the plaintiff by indorsement; and Pitts *v.* Holmes, 10 Cush. (Mass.) 92, where the note in suit was payable to a certain person or order, and was sold by his assignee in insolvency to the payee himself but not indorsed.

Michigan.—Redmond *v.* Stansbury, 24 Mich. 445; Blackwood *v.* Brown, 32 Mich. 104; Robinson *v.* Wilkinson, 38 Mich. 299; Minor *v.* Bewick, 55 Mich. 491.

Mississippi.—Bacon *v.* Cohea, 12 Smed. & M. (Miss.) 516; Eckford *v.* Hogan, 44 Miss. 398; Nowlin *v.* Rand, (Miss. 1891) 8 So. Rep. 511; Haynes *v.* Ezell, 25 Miss. 242; Dowell *v.* Brown, 13 Smed. & M. (Miss.) 43.

New Hampshire.—Foster *v.* Shattuck, 2 N. H. 446; Woodbury *v.* Woodbury, 47 N. H. 11.

New Jersey.—Nixon *v.* Dickey, 3 N. J. L. 252; Fine *v.* High Bridge M. E. Church Assoc., 44 N. J. L. 148.

New York.—Edwards *v.* Campbell, 23 Barb. (N. Y.) 423; Savage *v.* Bevier, 12 How. Pr. (N. Y. C. Pl.) 166. But see Gage *v.* Kendall, 15 Wend. (N. Y.) 640.

North Carolina.—Grist *v.* Backhouse, 4 Dev. & B. L. (N. Car.) 362;

Smith v. Bryan, 11 Ired. L. (N. Car.) 418.

Pennsylvania.—Lawrance *v.* Fustell, 77 Pa. St. 460; Reamer *v.* Bell, 79 Pa. St. 292; Bank *v.* Butler, 4 Kulp (Pa.) 99.

South Carolina.—Henneman *v.* Thomson, 8 S. Car. 115; Marvin *v.* M'Rae, Rice L. (S. Car.) 171.

Tennessee.—Nelson *v.* Marly, 2 Yerg. (Tenn.) 576; Cardwell *v.* Tennison, 10 Humph. (Tenn.) 446; Eakin *v.* Burger, 1 Sneed (Tenn.) 417; Bradley County *v.* Surgoine, 9 Baxt. (Tenn.) 407.

Texas.—Ross *v.* Smith, 19 Tex. 171; Merrill *v.* Smith, 22 Tex. 53.

Vermont.—Royce *v.* Nye, 52 Vt. 372.

United States.—U. S. Bank *v.* Moore, 3 Cranch (C. C.) 330; Bradley *v.* Trammel, Hempst. (U. S.) 164; Waters *v.* Millar, 1 Dall. (U. S.) 369.

England.—Good *v.* Walker, 61 L. J. Q. B. 736.

Action by Drawee of Bill of Exchange.

—In *Smith v. Bryan*, 11 Ired. L. (N. Car.) 418, it was held that the drawer of a bill of exchange could not recover against the acceptor without showing an indorsement to him, or that he had been obliged to take up the bill. To the same effect, see *Henneman v. Thomson*, 8 S. Car. 115.

In Equity.—In *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516, it was held that a suit in equity might be maintained by the holder of a note without indorsement where his transferrer, the payee, was dead, and there was no representative of such payee, and no means of providing such representative.

Assignment Before Execution of Instrument.—It seems that an assignment made before the execution of the instrument in suit will not enable the holder thereof, without an indorsement or assignment on the instrument, to sue in his own name. *Grist v. Backhouse*, 4 Dev. & B. L. (N. Car.) 362.

The Death of the Holder of an instrument payable to his order does not enable one into whose hands it comes to sue thereon in his own name, unless he can show title through administration on the estate of the decedent. *Woodbury v. Woodbury*, 47 N. H. 11; *Edwards v. Campbell*, 23 Barb. (N. Y.) 423.

exchange, or other instrument for the payment of money, need not hold the same by an indorsement or assignment written on the instrument itself.¹

(2) *Real Owner*. — In some states it has been held that the real owner of such an instrument may sue thereon in his own name, although he does not hold title to the instrument by a written

Judgment by Default. — In *Nowlin v. Rand*, (Miss. 1891) 8 So. Rep. 511, a judgment by default was set aside where it had been recovered in an action on a note payable to the order of another person and not indorsed to the plaintiff.

The Mere Possession of a Notebill Not Payable to Bearer, and not negotiable, does not enable the holder to sue thereon in his own name without an indorsement. *Blackwood v. Brown*, 32 Mich. 104.

The Holder of a County Warrant payable to the order of another person, and not assigned or indorsed, cannot sue thereon in his own name. *Bradley County v. Surgoine*, 6 Baxt. (Tenn.) 108, 9 Baxt. (Tenn.) 407.

Guaranty. — That the holder of an instrument on which a guaranty is written cannot sue on the guaranty in his own name without some assignment or indorsement thereof to him, see *Taylor v. Binney*, 7 Mass. 482; and compare *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Holder to Procure Discount. — In *Nutter v. Stover*, 48 Me. 163, it was held that a person to whom a note had been given under an agreement that he should indorse it and procure its discount, could not sue thereon in his own name, it not having been indorsed to him.

An Indorsement After Suit Brought will not enable the holder to sue thereon in his own name, if he did not have that right at the time of instituting the action. *Clark v. Peabody*, 22 Me. 500; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43; *Eckford v. Hogan*, 44 Miss. 398; *Weinwick v. Bender*, 33 Mo. 80. *Contra*, *Weeks v. Medler*, 20 Kan. 57.

Striking Out Special Indorsement. — The holder of an instrument specially indorsed cannot strike out the indorsement so as to make the instrument payable in blank or to himself. *Porter v. Cushman*, 19 Ill. 572; *U. S. Bank v. Moore*, 3 Cranch (C. C.) 330; *Burnap v. Cook*, 32 Ill. 168. But see *Cardwell v. Tenneson*, 10 Humph. (Tenn.) 446.

1. *Iowa*. — *Yunker v. Martin*, 18 Iowa 143; *Rubey v. Culbertson*, 35 Iowa

264; *Northwestern College v. Schwagler*, 37 Iowa 577; *Hesser v. Doran*, 41 Iowa 468; *Rising v. Teabout*, 73 Iowa 419; *Harlan v. Ash*, 84 Iowa 38. But see *Montague v. Reineger*, 11 Iowa 503; *Andrews v. Brown*, 1 Iowa 154.

Minnesota. — *Pease v. Rush*, 2 Minn. 107.

Missouri. — *Boeka v. Nuella*, 28 Mo. 180; *Lewis v. Bowen*, 29 Mo. 202; *Willard v. Moies*, 30 Mo. 142. But see *Weinwick v. Bender*, 33 Mo. 80, and *Ashworth v. Crockett*, 11 Mo. 636, where it was held that the holder of an instrument by an unsigned assignment could not sue thereon in his own name.

Ohio. — *Cushman v. Welsh*, 19 Ohio St. 536. But see *Nichols v. Gross*, 26 Ohio St. 425.

Oregon. — *Moore v. Miller*, 6 Oregon 254.

North Carolina. — *Bresee v. Crumpton*, 121 N. Car. 122; *Kiff v. Weaver*, 94 N. Car. 274, which was a case of transfer as a *donatio causa mortis*.

England. — *M'Neillage v. Holloway*, 1 B. & Ald. 218; *M'Lean v. Clydesdale Banking Co.*, L. R. 9 App. 95.

Marriage of Payee. — In *M'Neillage v. Holloway*, 1 B. & Ald. 218, it was held that on a bill payable to a *feme sole*, who subsequently married, her husband might sue in his own name, without procuring an indorsement.

A Banker's Draft was held in *M'Lean v. Clydesdale Banking Co.*, L. R. 9 App. 95, to be such an instrument as might be transferred by delivery, so as to entitle the transferee to sue thereon.

Action by a Stockholder. — In *Moore v. Miller*, 6 Oregon 254, it was held that a stockholder of a bank, who, on a division of the assets of the bank, received a note payable to the bank without indorsement or assignment, might maintain an action thereon in his own name.

Negotiability Immaterial. — In *Rising v. Teabout*, 73 Iowa 419, it was held that a person in possession of a promissory note, although not transferred to him by indorsement or assignment, might sue thereon in his own name, whether such note was negotiable or not.

indorsement or assignment to himself.¹

(3) *Transfer After Maturity*. — It seems that the holder of an instrument transferred after maturity, though without written assignment or indorsement, may sue thereon in his own name.²

(4) *On Particular Instruments* — *Instrument Payable to Payee Only*. — On a note not payable to order or bearer, but to the payee alone, a person holding it without a written transfer may sue in his own name.³

Non-negotiable Instruments. — In some jurisdictions the holder of a non-negotiable instrument may sue thereon in his own name without showing a transfer to himself by assignment or indorsement.⁴

An Action by a Principal will lie on an instrument payable or specially indorsed to his agent, without an assignment or indorsement in writing by such agent to the principal.⁵

Instrument Payable in Blank, to Bearer, or to Fictitious Person. — A holder may sue in his own name without a written assignment or indorsement on an instrument payable in blank or to bearer or to a fictitious person,⁶ except in those states where such instruments

1. *Arkansas*. — *Heartman v. Franks*, 36 Ark. 501; *Caldwell v. Meshew*, 44 Ark. 564.

Indiana. — *Kimball v. Whitney*, 15 Ind. 280; *Casto v. Evinger*, 17 Ind. App. 298.

Iowa. — *Pearson v. Cummings*, 28 Iowa 344; *Warnock v. Richardson*, 50 Iowa 450.

Kansas. — *Williams v. Norton*, 3 Kan. 295; *Weeks v. Medler*, 20 Kan. 57.

Kentucky. — *Rogge v. Cassidy*, (Ky. 1890) 13 S. W. Rep. 716.

Minnesota. — *White v. Phelps*, 14 Minn. 27.

Missouri. — *Harvey v. Brooke*, 36 Mo. 493.

New York. — *Houghton v. Dodge*, 5 Bosw. (N. Y.) 326; *Billings v. Jane*, 11 Barb. (N. Y.) 620; *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344.

North Carolina. — *Bresee v. Crumpton*, 121 N. Car. 122; *Andrews v. McDaniel*, 68 N. Car. 385.

Texas. — *Merlin v. Manning*, 2 Tex. 351; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170. *Contra*, *Ross v. Smith*, 19 Tex. 171.

Contra. — *Fine v. High Bridge M. E. Church Assoc.*, 44 N. J. L. 148.

2. *Howell v. McCracken*, 87 N. Car. 399.

3. *Wilcoxon v. Logan*, 91 N. Car. 449.

4. *Redmond v. Stansbury*, 21 Mich. 445; *Mowry v. Todd*, 12 Moss. 591, in which case, however, the party bound recognized the transfer and promised to pay the contents to the holder.

Bennett v. Pound, 28 Mo. 598. See also *Barrick v. Austin*, 21 Barb. (N. Y.) 241; *Merrill v. Smith*, 22 Tex. 53. *Compare* *Blackwood v. Brown*, 32 Mich. 104.

5. *Nave v. Lebanon First Nat. Bank*, 87 Ind. 204; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Lacey v. Central Nat. Bank*, 4 Neb. 179; *Angelica First Nat. Bank v. Hall*, 44 N. Y. 395; *Look-out Bank v. Aull*, 93 Tenn. 645; *Pacific Guano Co. v. Holleman*, 4 Woods (U. S.) 462, 12 Fed. Rep. 61. See also *Dutch v. Boyd*, 81 Ind. 146, where it was held that the successor of a cashier named as payee in a promissory note might sue thereon, without an assignment by the payee.

6. *Arkansas*. — *Buckner v. Real Estate Bank*, 5 Ark. 536.

District of Columbia. — *In re Wagner, MacArthur & M.* (D. C.) 395.

Georgia. — *Craige v. Tingle*, 63 Ga. 274.

Iowa. — *Montague v. Reineger*, 11 Iowa 503; *Creighton v. Gordon*, 1 Morr. (Iowa) 41.

Maryland. — *Elliott v. Cheshut*, 30 Md. 562; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.

Massachusetts. — *Beekman v. Willson*, 9 Met. (Mass.) 434; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192; *Rider v. Taintor*, 4 Allen (Mass.) 356.

Michigan. — *Blackwood v. Brown*, 32 Mich. 104; *Blitzer v. Wagar*, 83 Mich. 223.

are required by statute to be transferred in writing.¹

Payee Not a Real Party.—It seems that an instrument which is payable to the order of a particular person, but discounted by another, and in which the payee has never had any interest, may be sued on by the owner without showing a written transfer from such payee.²

7. Transferrer—*a. OWNERSHIP REACQUIRED*—(1) *In General.*—It is a rule supported by the overwhelming weight of authority that a person who has transferred a negotiable instrument by indorsement or assignment, and who has subsequently acquired title to the instrument again, may sue in his own name prior parties liable to him.³

Mississippi.—Dowell v. Brown, 13 Smed. & M. (Miss.) 43.

New Hampshire.—Foster v. Shattuck, 2 N. H. 446; Elliot v. Abbot, 12 N. H. 549.

New Jersey.—Fine v. High Bridge M. E. Church Assoc., 44 N. J. L. 149.

New York.—Maniort v. Roberts, 4 E. D. Smith (N. Y.) 83; Plets v. Johnson, 3 Hill (N. Y.) 112.

Tennessee.—Smyth v. Carden, 1 Swan (Tenn.) 28. And see Wolfe v. Tyler, 1 Heisk. (Tenn.) 313.

Texas.—Ross v. Smith, 19 Tex. 171.

United States.—Smith v. Clapp, 15 Pet. (U. S.) 125.

1. White v. Joy, 4 Ala. 571; Sawyer v. Patterson, 11 Ala. 523; Cobb v. Bryant, 86 Ala. 316; Roosa v. Crist, 17 Ill. 450; Rabberman v. Muehlhausen, 3 Ill. App. 326; M'Nitt v. Hatch, 4 Blackf. (Ind.) 531.

2. Bird v. Wooley, 23 Ala. 717; Spurrier v. Briggs, 17 Ind. 529; Rogge v. Cassidy, (Ky. 1890) 13 S. W. Rep. 716; Newbury Bank v. Rand, 38 N. H. 166; Barrick v. Austin, 21 Barb. (N. Y.) 241; Montpelier Bank v. Joyner, 33 Vt. 481. *Contra*, Allen v. Ayres, 3 Pick. (Mass.) 298.

Action in Name of Payee.—In Newbury Bank v. Rand, 38 N. H. 166, it was held that on a note made payable to a bank, but in fact discounted by a third person, such person might sue either in the name of the bank or in his own name, without procuring an indorsement from the bank to himself.

3. *Alabama.*—Kirksey v. Bates, 1 Ala. 303; Pitts v. Keyser, 1 Stew. (Ala.) 154; Johnson v. English, 1 Stew. (Ala.) 169; Carroll v. Meeks, 3 Port. (Ala.) 226; Herndon v. Taylor, 6 Ala. 461; Evans v. Gordon, 8 Port. (Ala.) 142; Phillips v. Poindexter, 18 Ala. 579; Price v. Lavender, 38 Ala. 389; Beeson

v. Lippman, 52 Ala. 276; Tuscaloosa Cotton-Seed Oil Co. v. Perry, 85 Ala. 158; Anniston Pipe Works v. Mary Pratt Furnace Co., 94 Ala. 606; Berney v. Steiner, 108 Ala. 111.

Arkansas.—Purdy v. Brown, 4 Ark. 535; Jordan v. Thornton, 7 Ark. 224.

California.—Naglee v. Lyman, 14 Cal. 450.

Colorado.—Spencer v. Carstarphen, 15 Colo. 445.

Connecticut.—Bond v. Storrs, 13 Conn. 412; Merrills v. Swift, 18 Conn. 257; Dann v. Norris, 24 Conn. 337; French v. Jarvis, 29 Conn. 347. *Compare* Elderkin v. Elderkin, 1 Root (Conn.) 139.

Georgia.—Atkins v. Cobb, 56 Ga. 86; Southern Bank v. Mechanics' Sav. Bank, 27 Ga. 252.

Illinois.—Kyle v. Thompson, 3 Ill. 432; Campbell v. Humphries, 3 Ill. 478; Parks v. Brown, 16 Ill. 454; Henderson v. Davisson, 57 Ill. App. 17; Best v. Nokomis Nat. Bank, 76 Ill. 608; Palmer v. Gardiner, 77 Ill. 143.

Indiana.—Hanna v. Pegg, 1 Blackf. (Ind.) 180; Harris v. Smith, 4 Blackf. (Ind.) 550; Williams v. Dyer, 5 Blackf. (Ind.) 160; Lemon v. Temple, 7 Ind. 556; Pilkington v. Woods, 10 Ind. 432; McCormick v. Eckland, 11 Ind. 293; Mendenhall v. Banks, 16 Ind. 284.

Iowa.—Sater v. Hendershott, 1 Morr. (Iowa) 118; Gordon v. Pitt, 3 Iowa 385; Goddard v. Cunningham, 6 Iowa 400; Norris v. Hix, 74 Iowa 524. But see Allen v. Newberry, 8 Iowa 65.

Kansas.—Whittenhall v. Korber, 12 Kan. 618.

Kentucky.—Eldridge v. Duncan, 1 B. Mon. (Ky.) 102; Miller v. Henshaw, 4 Dana (Ky.) 326; Bell v. Morehead, 3 A. K. Marsh. (Ky.) 158. But see

(2) *Transferrer Taking Up Instrument.* — When a person who has transferred a negotiable instrument pays the amount thereof

Storm v. Chestnut, (Ky. 1897) 39 S. W. Rep. 54.

Louisiana. — *Hebrard v. Bollenhagen*, 9 Rob. (La.) 155; *Gordon v. Nelson*, 16 La. 321; *Delisle v. Gaines*, 4 Martin (La.) 666; *Bell v. Norwood*, 7 La. 96; *Arnold v. Bureau*, 7 Martin (La.) 287; *Barbarin v. Daniels*, 7 La. 479; *Mourain v. Devall*, 12 La. 93; *Hart v. Windle*, 15 La. 265; *Huie v. Bailey*, 16 La. 213; *Bullard v. Wilson*, 5 Martin N. S. (La.) 196; *Dicks v. Cash*, 6 Martin N. S. (La.) 45; *Sprigg v. Cuny*, 7 Martin N. S. (La.) 253; *Robson v. Earley*, 1 Martin N. S. (La.) 373; *Dick v. Maxwell*, 6 Martin N. S. (La.) 398; *Squier v. Stockton*, 5 La. Ann. 120; *Alcock v. McKain*, 12 La. Ann. 614; *Cooper v. Cooper*, 14 La. Ann. 675; *Merz v. Kaiser*, 20 La. Ann. 377.

Maine. — *Thornton v. Moody*, 11 Me. 253; *Bradford v. Bucknam*, 12 Me. 15; *Warren v. Gilman*, 15 Me. 70; *Green v. Jackson*, 15 Me. 136; *Eaton v. McKown*, 34 Me. 510; *Longfellow v. Andrews*, 45 Me. 75; *Bishop v. Rowe*, 71 Me. 263. But see *Willis v. Hobson*, 37 Me. 403.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Bell v. Hagerstown Bank*, 7 Gill (Md.) 216; *Thomas v. Hunter*, 29 Md. 406; *Canton Nat. Bldg. Assoc. v. Weber*, 34 Md. 669.

Massachusetts. — *Boylston v. Greene*, 8 Mass. 464; *Emerson v. Cutts*, 12 Mass. 77; *Guild v. Eager*, 17 Mass. 615; *Pinney v. McGregory*, 102 Mass. 186; *Tucker v. Tucker*, 119 Mass. 79; *Barker v. Parker*, 10 Gray (Mass.) 339; *Robinson v. Hall*, 11 Gray (Mass.) 483; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 116.

Michigan. — *Locke v. Leonard Silk Co.*, 37 Mich. 479; *Reading v. Beardsley*, 41 Mich. 123; *Kerrick v. Stevens*, 58 Mich. 297; *Atkinson v. Weidner*, 79 Mich. 575.

Mississippi. — *Lake v. Hastings*, 24 Miss. 490; *McLemore v. Hawkins*, 46 Miss. 715; *Smith v. Runnells*, Walk. (Miss.) 144; *Planters' Bank v. Chewning*, 5 How. (Miss.) 413; *Rawlings v. Poindexter*, 14 Smed. & M. (Miss.) 66.

Missouri. — *Wickersham v. Jarvis*, 2 Mo. App. 279; *Davis v. Christy*, 8 Mo. 569; *Glasgow v. Switzer*, 12 Mo. 396; *Williams v. Smith*, 21 Mo. 419; *Page*

v. Lathrop, 20 Mo. 589; *Beattie v. Lett*, 28 Mo. 596; *Bobb v. Letcher*, 30 Mo. App. 43.

Nevada. — *Todman v. Purdy*, 5 Nev. 238.

New Hampshire. — *Little v. Ingalls*, 13 N. H. 44; *Witherell v. Ela*, 42 N. H. 295. See *Howland v. Spencer*, 14 N. H. 580.

New Jersey. — *Boylan v. Vichte*, 2 N. J. L. 89; *Bright v. Hand*, 16 N. J. L. 273; *Middleton v. Griffith*, 57 N. J. L. 442.

New York. — *Manhattan Co. v. Reynolds*, 2 Hill (N. Y.) 140; *Dollfus v. Frosch*, 1 Den. (N. Y.) 367; *Watervliet Bank v. White*, 1 Den. (N. Y.) 608; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *Stephens v. McNiell*, 26 Barb. (N. Y.) 651; *Wright v. Butler*, 6 Wend. (N. Y.) 284; *Chautauqua County Bank v. Davis*, 21 Wend. (N. Y.) 584; *Havens v. Huntington*, 1 Cow. (N. Y.) 387; *Norris v. Badger*, 6 Cow. (N. Y.) 449; *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353; *Utica Bank v. Smith*, 18 Johns. (N. Y.) 230; *Mottram v. Mills*, 1 Sandf. (N. Y.) 37; *Hargous v. Lahens*, 3 Sandf. (N. Y.) 213; *Concord Granite Co. v. French*, 3 Civ. Pro. Rep. (N. Y. C. Pl.) 445, 65 How. Pr. (N. Y.) 317, *affirming* 3 Civ. Pro. Rep. (N. Y.) 56; *Butler v. Wright*, 20 Johns. (N. Y.) 367.

North Carolina. — *Johnson v. Hooker*, 2 Jones L. (N. Car.) 29; *Howell v. McCracken*, 87 N. Car. 399.

Pennsylvania. — *Morris v. Foreman*, 1 Dall. (Pa.) 193; *Small v. Jones*, 8 Watts (Pa.) 265; *Mullen v. French*, 9 Watts (Pa.) 96; *Weakly v. Bell*, 9 Watts (Pa.) 273; *Lawrance v. Fussell*, 77 Pa. St. 460; *Dean v. Warnock*, 98 Pa. St. 565.

Rhode Island. — *Bank of America v. Senior*, 11 R. I. 376.

South Carolina. — *Wood v. M'Claurin*, 2 Brev. (S. Car.) 377; *Sawyer v. Macaulay*, 18 S. Car. 550.

Tennessee. — *Smith v. McManus*, 7 Yerg. (Tenn.) 477; *Southworth v. Thompson*, 10 Heisk. (Tenn.) 10; *McCandless v. Polk*, 10 Humph. (Tenn.) 617; *Union Bank v. Carr*, 2 Humph. (Tenn.) 345.

Texas. — *Ogden v. Slade*, 1 Tex. 13; *Hays v. Cage*, 2 Tex. 501; *Texas Land, etc., Co. v. Carroll*, 63 Tex. 48; *Daugherty v. Eastburn*, 74 Tex. 68; *Collins v. Panhandle Nat. Bank*,

to a subsequent party, and takes it up, he may maintain an action in his own name against prior parties liable to him.¹

75 Tex. 254; *Jensen v. Hays*, 2 Tex. App. Civ. Cas., § 367.

Utah. — *Anderson v. Yosemite Min. Co.*, 9 Utah 420.

United States. — *Lonsdale v. Brown*, 3 Wash. (U. S.) 404; *U. S. v. Barker*, 1 Paine (U. S.) 156; *Kirkman v. Hamilton*, 6 Pet. (U. S.) 20; *Cohant v. Wills*, 1 McLean (U. S.) 427; *Leavitt v. Cowles*, 2 McLean (U. S.) 491; *Picquet v. Curtis*, 1 Sumn. (U. S.) 478; *Dugan v. U. S.*, 3 Wheat. (U. S.) 173; *Gorgerat v. M'Carty*, 2 Dall. (U. S.) 144; *Cox v. Simms*, 1 Cranch (C. C.) 238; *Oneale v. Beall*, 2 Cranch (C. C.) 569; *Welch v. Lindo*, 7 Cranch (U. S.) 159.

England. — *Parminster v. Symonds*, 4 Bro. P. C. 610; *Williams v. James*, 15 Q. B. 505, 69 E. C. L. 505; *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390, 15 E. C. L. 12; *Mendez v. Carteroon*, 1 Ld. Raym. 742; *Low v. Copestake*, 3 C. & P. 300, 14 E. C. L. 316; *Anonymous*, 12 Mod. 345; *Clerk v. Pigot*, 12 Mod. 192; *Dehors v. Harriot*, 1 Show. 163.

Transferor Not Owner. — The transferor's right of action may, however, be defeated by showing that he is not the owner of the instrument which he has transferred. *Pitts v. Keyser*, 1 Stew. (Ala.) 154.

Presumption as to Erasure. — When a person has assigned a promissory note in his possession, and has subsequently erased the assignment, it is presumed that the erasure was properly made, and that he has a right to sue on the note. *Goddard v. Cunningham*, 6 Iowa 400.

Presumption as to Beneficial Interest. — The payee of a negotiable note may sue thereon in his own name, although there is an indorsement on the note by him, which has been stricken out, since it is presumed that the holder of such an interest is the beneficial owner. *Gordon v. Pitt*, 3 Iowa 385. Likewise where the instrument is a check. *Stephens v. McNeill*, 26 Barb. (N. Y.) 651.

Collateral Security. — The owner of a note who has indorsed it to a bank as collateral security may sue thereon in his own name, when the bank has delivered it to him for that purpose. *Henderson v. Davisson*, 157 Ill. 379.

Irregular Indorser. — Where a person writes his name on a note so as to ren-

der himself liable as an indorser to the person holding the note at that time, he does not, by subsequently paying the note to such holder, become entitled to sue the makers thereon as an indorser, when his indorsement was without the knowledge and consent of the makers. *Willis v. Hobson*, 37 Me. 403.

Recovery of Note from Transferee. — In *Storm v. Chestnut*, (Ky. 1897) 39 S. W. Rep. 54, it was held that a person who had transferred a note in payment for certain property purchased by him, could not maintain an action on such note against the maker, before he had recovered the note from the seller, though he had disaffirmed the contract of purchase.

Alabama. — *Kirksey v. Bates*, 1 Ala. 303; *Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158; *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606.

Arkansas. — *Jordan v. Thornton*, 7 Ark. 224.

Connecticut. — *Merrills v. Swift*, 18 Conn. 257.

Georgia. — *Litner v. Miller*, 49 Ga. 486.

Illinois. — *Campbell v. Humphries*, 3 Ill. 478; *Humphreyville v. Culver*, 73 Ill. 485; *Palmer v. Gardiner*, 77 Ill. 143.

Iowa. — *Norris v. Hix*, 74 Iowa 524.

Kentucky. — *Eldridge v. Duncan*, 1 B. Mon. (Ky.) 102; *Miller v. Henshaw*, 4 Dana (Ky.) 326; *Bell v. Morehead*, 3 A. K. Marsh. (Ky.) 158.

Maine. — *Eaton v. McKown*, 34 Me. 510; *Bishop v. Rowe*, 71 Me. 263. But see *Durham v. Giles*, 52 Me. 206.

Massachusetts. — *Boylston v. Greene*, 8 Mass. 465; *Emerson v. Cutts*, 12 Mass. 77; *Guild v. Eager*, 17 Mass. 615; *Pinney v. McGregory*, 102 Mass. 186; *Barker v. Parker*, 10 Gray (Mass.) 339; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316.

Mississippi. — *Lake v. Hastings*, 24 Miss. 400; *Rawlings v. Poindexter*, 14 Smed. & M. (Miss.) 66.

New Hampshire. — *Witherell v. Ela*, 42 N. H. 295.

New York. — *Havens v. Huntington*, 1 Cow. (N. Y.) 387; *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353; *Concord Granite Co. v. French*, 3 Civ. Pro.

Payment Necessary Before Action. — It seems to be the rule that the transferrer of a negotiable instrument cannot sue thereon in his

Rep. (N. Y. C. Pl.) 445, 65 How. Pr. (N. Y.) 317, *affirming* 3 Civ. Pro. Rep. (N. Y.) 56; *Kelsey v. Bradbury*, 21 Barb. (N. Y.) 531; *Leavitt v. Putnam*, 3 N. Y. 494; *Oneida County Bank v. Lewis*, 23 Misc. Rep. (N. Y. Supreme Ct.) 34.

North Carolina. — *Howell v. McCracken*, 87 N. Car. 399; *Johnson v. Hooker*, 2 Jones L. (N. Car.) 29.

Pennsylvania. — *Mullen v. French*, 9 Watts (Pa.) 96; *Weakley v. Bell*, 9 Watts (Pa.) 273; *Lawrance v. Fussell*, 77 Pa. St. 460.

Rhode Island. — *Bank of America v. Senior*, 11 R. I. 376.

Tennessee. — *Tucker v. Pruett*, 4 Yerg. (Tenn.) 553; *Smith v. McManus*, 7 Yerg. (Tenn.) 477.

United States. — *Lonsdale v. Brown*, 3 Wash. (U. S.) 404.

Canada. — *Black v. Strickland*, 3 Ont. Rep. 217.

England. — *Low v. Copestake*, 3 C. & P. 300, 14 E. C. L. 316; *Williams v. James*, 15 Q. B. 505, 69 E. C. L. 505; *Hubbard v. Jackson*, 4 Bing. 390, 15 E. C. L. 12; *Callow v. Lawrence*, 3 M. & S. 95.

Indorser Liable as Surety. — The *North Carolina* Code making indorsers of notes liable as sureties, was held not to prevent an indorser who had paid off such a note from striking out the indorsement, and suing the maker of it in his own name. *Johnson v. Hooker*, 2 Jones L. (N. Car.) 29.

Payment by Maker with Indorser's Funds. — The maker of a note having no funds to meet it at its maturity, the payee, who had indorsed it to another person, sent funds to the maker, and requested him to take it up, which he did. It was held that the payee could in such case sue the maker in his own name on the note. *Merrills v. Swift*, 18 Conn. 257.

Payment Pending Suit. — In *Durham v. Giles*, 52 Me. 206, it was held that an indorser, by paying the amount due on a note, after an action had been begun on it against the maker and sureties, did not by such payment acquire the right to sue the maker and sureties, in his own name; and in *Heighe v. Farmers' Bank*, 5 Har. & J. (Md.) 68, it was held that where an indorser paid a note after judgment against the maker, and pending a suit

in equity by the indorsee to annul certain conveyances made by the maker, alleged to be fraudulent, the latter suit could not be continued for the benefit of such indorser; but in *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353, where suits were brought against the maker and indorser of a promissory note, and the indorser paid the amount due, it was held that the suit against the maker might be prosecuted for the benefit of the indorser under an agreement to do so made between the holder and such indorser.

Legal Obligation to Pay. — In *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316, it was held that the indorser of a negotiable note, who had taken it up, might sue thereon against a prior party without showing that such payment was made under a legal obligation to pay, as where the indorser does not show that he received proper notice of dishonor.

Nature of Action. — In *Rawlings v. Poindexter*, 14 Smed. & M. (Miss.) 66, it was said that an action by an indorser of a promissory note or bill of exchange who had paid the amount thereof and was seeking to recover for such payment against the maker or drawer, was in the nature of a bill in equity, and therefore that the plaintiff could only recover what was equitable and just, that is, the amount he had actually paid, and not a sum paid by another indorser for the same purpose.

Accommodation Paper. — An indorser of a bill of exchange who takes it up may maintain an action thereon against the acceptor, though the bill was merely given for accommodation. *Eldridge v. Duncan*, 1 B. Mon. (Ky.) 102.

An accommodation indorser may maintain an action on a negotiable note taken by him, though he knew when he indorsed the note that the payee thereof was largely indebted to the maker. *Barker v. Parker*, 10 Gray (Mass.) 339.

Guarantor. — In *Bishop v. Rowe*, 71 Me. 263, it was held that if a guarantor by a separate paper who agrees "to be holden precisely the same as if I had indorsed said note," becomes liable to pay such note, and does pay it, he may maintain an action on it in his own name.

own name until he has fully paid the amount due thereon to the subsequent holder.¹

b. INCOMPLETE TRANSFER. — When the holder of a negotiable instrument has placed an indorsement or assignment thereon, but has not completed the transfer of such instrument, as where he has not delivered it to the intended transferee, or where he has made the indorsement or assignment for some other purpose than to pass title, he does not lose his right to sue on such instrument, since he is still the owner thereof; and the effect is the same when an attempted transfer for any reason proves defective, or insufficient to pass such a title to the transferee as will enable him to maintain an action on the instrument in his own name.²

1. *Bullard v. Wilson*, 5 Martin N. S. (La.) 196; *Arnold v. Bureau*, 7 Martin (La.) 287; *Bradford v. Bucknam*, 12 Me. 15; *Longfellow v. Andrews*, 45 Me. 75; *Little v. Ingalls*, 13 N. H. 44; *Small v. Jones*, 8 Watts (Pa.) 265; *Gorgerat v. M'Carty*, 2 Dall. (U. S.) 144; *Mendez v. Carreroon*, 1 Ld. Raym. 742; *Butler v. Wright*, 20 Johns. (N. Y.) 367. But see, in connection with the case last cited, *Wright v. Butler*, 6 Wend. (N. Y.) 284, which was a subsequent action between the same parties, and where it was held that assumpsit would lie without such payment. Compare *Norris v. Badger*, 6 Cow. (N. Y.) 449.

Payment or Reindorsement. — In *Arnold v. Bureau*, 7 Martin (La.) 287, it was held that an action could not be maintained on a note by the indorser thereof unless he could show payment, or a reindorsement to him.

Possession Evidence of Payment. — In *Norris v. Badger*, 6 Cow. (N. Y.) 449, it was held that although an indorser, in order to sue a previous indorser, must show payment, yet the possession of the note was *prima facie* evidence of such payment.

Novation or Payment. — In *Bullard v. Wilson*, 5 Martin N. S. (La.) 196, it was held that an indorser might recover against a prior party on a negotiable note by showing that he had taken up the note, either by payment or by novation.

Agreement to Pay. — The indorser of a bill of exchange that has been protested for non-payment cannot legally institute suit thereon, in his own name, against the acceptor, before he has paid the same to the holder, although he has admitted his liability and agreed on the mode in which he would pay it. *Longfellow v. Andrews*, 45 Me. 75.

2. *Alabama*. — *Planters', etc., Bank v. Willis*, 5 Ala. 770. But see *Bullock v. Ogburn*, 13 Ala. 346.

Arkansas. — *Roane v. Williams*, 12 Ark. 74; *Taylor v. Coolidge*, 17 Ark. 454.

Georgia. — *Leitner v. Miller*, 49 Ga. 486; *Daniel v. Royce*, 96 Ga. 566; *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533.

Illinois. — *Pardee v. Lindley*, 31 Ill. 174; *Richards v. Darst*, 51 Ill. 140; *Humphreyville v. Culver*, 73 Ill. 485; *Henderson v. Davisson*, 57 Ill. App. 17. Compare *Miller v. Bledsoe*, 2 Ill. 530.

Indiana. — *McCormick v. Eckland*, 11 Ind. 293.

Maine. — *Titcomb v. Thomas*, 5 Me. 282.

Maryland. — *Kiersted v. Rogers*, 6 Har. & J. (Md.) 282; *Hampson v. Owens*, 55 Md. 583.

Massachusetts. — *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Mosher v. Allen*, 16 Mass. 451; *Day v. Whitney*, 1 Pick. (Mass.) 503.

Michigan. — *Atkinson v. Weidner*, 79 Mich. 575.

Minnesota. — *Helper v. Alden*, 3 Minn. 332.

Mississippi. — *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563; *Eckford v. Hogan*, 44 Miss. 398.

Missouri. — *Williams v. Smith*, 21 Mo. 419.

Pennsylvania. — *Dean v. Warnock*, 98 Pa. St. 565.

Texas. — *Jensen v. Hays*, 2 Tex. App. Civ. Cas., § 567; *Texas Land, etc., Co. v. Carroll*, 63 Tex. 48.

United States. — *York Bank v. Asbury*, 1 Biss. (U. S.) 230.

England. — *Pease v. Hirst*, 10 B. & C. 122, 21 E. C. L. 38.

Indorsement a Memorandum Only. — Where the owner of a note has placed

Transfer for Collection. — The transfer of an instrument for collection does not prevent an action thereon by the owner in his own name, since the transferee is merely his agent.¹

c. INDORSEMENT IN FULL OR IN BLANK. — The indorser of a note who retains or reacquires the ownership thereof may sue thereon in his own name, whether the indorsement was special or in blank.²

his indorsement on the back thereof merely as a memorandum, it does not prevent his suing thereon in his own name. *Humphreyville v. Culver*, 73 Ill. 485; *Henderson v. Davison*, 57 Ill. App. 17.

Special Indorsement of Sealed Instrument. — In *Dean v. Warnock*, 98 Pa. St. 565, it was held that the payee of an instrument under seal, specially indorsed, could sue thereon in his own name, because it did not appear that there had ever been any delivery under such indorsement.

1. *Alabama.* — *Phillips v. Poindexter*, 18 Ala. 579.

Arkansas. — *Dickinson v. Burr*, 15 Ark. 372.

California. — *Naglee v. Lyman*, 14 Cal. 450.

Connecticut. — *Dann v. Norris*, 24 Conn. 337.

Georgia. — *Atkins v. Cobb*, 56 Ga. 86.

Illinois. — *Best v. Nokomis Nat. Bank*, 76 Ill. 608.

Louisiana. — *Huie v. Bailey*, 16 La. 213.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175.

Michigan. — *Locke v. Leonard Silk Co.*, 37 Mich. 479; *Reading v. Beardsley*, 41 Mich. 123.

Missouri. — *Glasgow v. Switzer*, 12 Mo. 396; *Beattie v. Lett*, 28 Mo. 596.

New Jersey. — *Middleton v. Griffith*, 57 N. J. L. 442.

New York. — *Utica Bank v. Smith*, 18 Johns. (N. Y.) 230; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *Watervliet Bank v. White*, 1 Den. (N. Y.) 608; *Manhattan Co. v. Reynolds*, 2 Hill (N. Y.) 140; *Chautauqua County Bank v. Davis*, 21 Wend. (N. Y.) 584.

Pennsylvania. — *Morris v. Foreman*, 1 Dall. (Pa.) 193, for the facts of which case see *Gorgerat v. McCarty*, 2 Dall. (Pa.) 147.

South Carolina. — *Sawyer v. Macaulay*, 18 S. Car. 550.

Tennessee. — *Union Bank v. Carr*, 2 Humph. (Tenn.) 345; *McCandless v. Polk*, 10 Humph. (Tenn.) 617; *Smith v. McManus*, 7 Yerg. (Tenn.) 477; *South-*

worth v. Thompson, 10 Heisk. (Tenn.) 10.

Texas. — *Texas Land, etc., Co. v. Carroll*, 63 Tex. 48; *Daugherty v. Eastburn*, 74 Tex. 68.

United States. — *Leavitt v. Cowles*, 2 McLean (U. S.) 491.

In New Hampshire, in *Howland v. Spencer*, 14 N. H. 580, it was left undecided whether the payee of a negotiable note which he had transferred to another person for collection by indorsement, could sue thereon in his own name, after he had revoked the authority to collect.

Reason of Rule. — An indorsement for collection does not prevent an action by the indorser, since the indorsement is subject to recall at the pleasure of the indorser at all times. *Daugherty v. Eastburn*, 74 Tex. 68.

Indorsed for Safety in Transmission. — Indorsements placed upon a negotiable instrument so that it can be transmitted with safety do not prevent an action thereon by the indorser. *Union Bank v. Carr*, 2 Humph. (Tenn.) 345; *McCandless v. Polk*, 10 Humph. (Tenn.) 617.

2. *Connecticut.* — *French v. Jarvis*, 29 Conn. 347.

Indiana. — *Lemon v. Temple*, 7 Ind. 556; *Menden v. Banks*, 16 Ind. 284; *Hanna v. Pegg*, 1 Blackf. (Ind.) 180; *Harris v. Smith*, 4 Blackf. (Ind.) 550; *Williams v. Dyer*, 5 Blackf. (Ind.) 160.

Iowa. — *Sater v. Hendershott*, 1 Morr. (Iowa) 118.

Louisiana. — *Dick v. Maxwell*, 6 Martin N. S. (La.) 398; *Gordon v. Nelson*, 16 La. 321; *Alcock v. McKain*, 12 La. Ann. 614. But see *Bell v. Norwood*, 7 La. 96, and *Sprigg v. Cuny*, 7 Martin N. S. (La.) 253, where it was held that mere possession of a note, specially indorsed, would not entitle the indorser to sue thereon.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175.

Mississippi. — *Planters' Bank v. Chewning*, 5 How. (Miss.) 413, *overruling* by inference *Smith v. Rannels*, Walk. (Miss.) 144, which held that an

d. REASSIGNMENT UNNECESSARY. — By what is apparently the better reasoning, the transferrer of an instrument may sue thereon in his own name, without showing a reindorsement or reassignment to him by the transferee.¹

indorser by a special indorsement could not maintain an action on the note without reindorsement, though he could where the indorsement was in blank or to bearer.

Missouri. — Page *v.* Lathrop, 20 Mo. 589; Wickersham *v.* Jarvis, 2 Mo. App. 279. But see Davis *v.* Christy, 8 Mo. 569.

New York. — Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Mottram *v.* Mills, 1 Sandf. (N. Y.) 37.

Pennsylvania. — Morris *v.* Foreman, 1 Dall. (Pa.) 193, for the facts of which case see Gogerat *v.* McCarty, 2 Dall. (Pa.) 144.

United States. — U. S. *v.* Barker, 1 Paine (U. S.) 156; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478.

Contra. — Wood *v.* M'Claurin, 2 Brev. (S. Car.) 377. See also Southern Bank *v.* Mechanics' Sav. Bank, 27 Ga. 252, where it was held that an action could not be maintained in the name of the payees of a bill of exchange if they had indorsed it in full, as long as the indorsement stood. The court said: "It is said that it was a mere inadvertence that the indorsements were not stricken out, having been put there merely for the convenience of collecting these bills. This may be so, and probably is. And yet it is rather unaccountable that when the objection was made in the court below, to the plaintiff's right to maintain this action, thus calling the attention, of course, specially to this point, the indorsement was suffered to remain."

1. *Colorado*. — Spencer *v.* Carstarphen, 15 Colo. 445.

Indiana. — Hanna *v.* Pegg, 1 Blackf. (Ind.) 180.

Iowa. — Norris *v.* Hix, 74 Iowa 524.

Louisiana. — Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155; Delisle *v.* Gaines, 4 Martin (La.) 666; Barbarin *v.* Daniels, 7 La. 479; Mourain *v.* Devall, 12 La. 93; Huie *v.* Bailey, 16 La. 213; Cooper *v.* Cooper, 14 La. Ann. 675; Merz *v.* Kaiser, 20 La. Ann. 377. But see Dicks *v.* Cash, 7 Martin N. S. (La.) 365, where it was held that one who had transferred a note by special indorsement must show title by a retransfer in

order to maintain an action thereon in his own name.

Maryland. — Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.

Mississippi. — McLemore *v.* Hawkins, 46 Miss. 715. But see Smith *v.* Runnels, Walk. (Miss.) 144, where it was held that there must be a reindorsement of a note specially indorsed. This case was, however, *overruled* in effect by Planters' Bank *v.* Chewning, 5 How. (Miss.) 413.

Missouri. — Glasgow *v.* Switzer, 12 Mo. 396; Beattie *v.* Lett, 28 Mo. 596.

New Jersey. — Middleton *v.* Griffith, 57 N. J. L. 442. But see Bright *v.* Hand, 16 N. J. L. 273.

New York. — Chautauqua County Bank *v.* Davis, 21 Wend. (N. Y.) 584; Mottram *v.* Mills, 1 Sandf. (N. Y.) 37.

United States. — Dugan *v.* U. S., 3 Wheat. (U. S.) 172; Picquet *v.* Curtis, 1 Sumn. (U. S.) 478. But see Welch *v.* Lindo, 7 Cranch (U. S.) 159; Leavitt *v.* Cowles, 2 McLean (U. S.) 491.

Canada. — Black *v.* Strickland, 3 Ont. Rep. 217.

Contra. — Anderson *v.* Yosemite Min. Co., 9 Utah 420. And compare Purdy *v.* Brown, 4 Ark. 535.

Bill Indorsed by United States Treasurer. — In Dugan *v.* U. S., 3 Wheat. (U. S.) 173, it was held that an action might be maintained against a prior indorser of a bill of exchange which had been indorsed to the treasurer of the United States, and by him indorsed to another person, without producing a receipt or reindorsement from the last indorsee.

Assignment for Security. — One who has assigned negotiable instruments as security can sue on them when he has subsequently obtained possession of them by paying the debt for which they were pledged, without a written reassignment from the pledgee. Norris *v.* Hix, 74 Iowa 524.

Drawer of Bill. — In Parminter *v.* Symons, 4 Bro. P. C. 610, it was held that the drawer of a bill of exchange, accepted generally by the drawee and protested for nonpayment, who took up the bill, might sue the acceptor in his own name, without a previous indorsement by the payee.

e. STRIKING OUT INDORSEMENT OR ASSIGNMENT. — Where the indorser or assignor of a negotiable instrument retains or reacquires the same, it is held by the weight of authority to be unnecessary for him to strike out his indorsement or assignment either before or at the trial of an action on the instrument in his own name.¹

8. Legal Title — *a.* RIGHT OF LEGAL OWNER TO SUE — Legal Title as a Prerequisite. — The legal title to a negotiable instrument is necessary to enable the plaintiff to maintain an action thereon at common law in his own name.²

1. *Alabama.* — *Beeson v. Lippman*, 52 Ala. 276.

Connecticut. — *Bond v. Storrs*, 13 Conn. 412; *Dann v. Norris*, 24 Conn. 337.

Georgia. — *Atkins v. Cobb*, 56 Ga. 86. *Indiana.* — *Pilkington v. Woods*, 10 Ind. 432.

Louisiana. — *Hebrard v. Bollenhagen*, 9 Rob. (La.) 155; *Huie v. Bailey*, 16 La. 213; *Cooper v. Cooper*, 14 La. Ann. 675. But see *Robson v. Earley*, 1 Martin N. S. (La.) 373.

Maine. — *Thornton v. Moody*, 11 Me. 253; *Warren v. Gilman*, 15 Me. 70; *Green v. Jackson*, 15 Me. 136; *Eaton v. McKown*, 34 Me. 510.

Maryland. — *Canton Nat. Bldg. Assoc. v. Weber*, 34 Md. 669.

Mississippi. — *McLemore v. Hawkins*, 46 Miss. 715.

Missouri. — *Glasgow v. Switzer*, 12 Mo. 396.

New Jersey. — *Middleton v. Griffith*, 57 N. J. L. 442.

New York. — *Mottram v. Mills*, 1 Sandf. (N. Y.) 37; *Hargous v. Lahens*, 3 Sandf. (N. Y.) 213. But see *Manhattan Co. v. Reynolds*, 2 Hill (N. Y.) 140.

Tennessee. — *Smith v. McManus*, 7 Yerg. (Tenn.) 477.

Contra. — *Kyle v. Thompson*, 3 Ill. 432, where it was held that an action on a promissory note specially assigned could not be maintained unless the assignment was erased at the trial. And see also *Leavitt v. Cowles*, 2 McLean (U. S.) 491, where it was held that one who had assigned a note for collection could not sue thereon without striking out the assignment or showing a reassignment. Compare *Anonymous*, 12 Mod. 345.

Indorsement Without Recourse. — In *Thornton v. Moody*, 11 Me. 253, it was held that one who had indorsed a note without recourse might sue thereon in his own name, without striking out such indorsement.

2. *Alabama.* — *White v. Joy*, 4 Ala. 571; *Moore v. Penn*, 5 Ala. 135; *Planters', etc., Bank v. Willis*, 5 Ala. 770; *Lea v. Branch Bank*, 8 Port. (Ala.) 119; *Phillips v. Sellers*, 42 Ala. 658; *Taylor v. Acre*, 8 Ala. 491; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505; *McGnee v. Importers', etc., Nat. Bank*, 93 Ala. 193; *Rice v. Rice*, 106 Ala. 636; *Berney v. Steiner*, 108 Ala. 111. But see *Hudson v. Weir*, 29 Ala. 234; *Cobb v. Bryant*, 86 Ala. 316; *Crook v. Douglass*, 35 Ala. 693; *Bryan v. Wilson*, 27 Ala. 208; *Morris v. Poillon*, 50 Ala. 403.

California. — *Woodsum v. Cole*, 69 Cal. 142.

Connecticut. — *Chaplin v. Canada*, 8 Conn. 286; *Lee v. Jilson*, 9 Conn. 94; *Vila v. Weston*, 33 Conn. 42.

Illinois. — *Orr v. Thompson*, 9 Ill. 451; *Simons v. Waterman*, 17 Ill. 371; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Lockridge v. Nuckolls*, 25 Ill. 178; *Burnap v. Cook*, 32 Ill. 168.

Iowa. — *Cottle v. Cole*, 20 Iowa 481.

Kentucky. — *Wilson v. Ryan*, 7 J. J. Marsh. (Ky.) 350.

Louisiana. — *Foltier v. Schroder*, 19 La. Ann. 17; *Moore v. Maxwell*, 2 Martin N. S. (La.) 249, where it was held that the payee of a note who has indorsed it has not the legal title thereto.

Maryland. — *Lancaster v. Baltzell*, 7 Gill & J. (Md.) 468.

Mississippi. — *Lake v. Hastings*, 24 Miss. 490; *Anderson v. Williams*, 24 Miss. 685; *Eckford v. Hogan*, 44 Miss. 398; *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43.

Missouri. — *Jeffers v. Oliver*, 5 Mo. 433; *Linn County v. Holland*, 12 Mo. 127. *Contra*, *Boeka v. Nuella*, 28 Mo. 180, where it was said that under the practice act then in force only the real party in interest could sue. Compare *Thornton v. Crowther*, 24 Mo. 164.

South Carolina. — *Rose v. Laffan*, 2 Spears L. (S. Car.) 424.

Legal Owner May Sue. — But without regard to the beneficial ownership¹ the holder of a negotiable instrument having the legal title thereto may sue upon it in his own name. In accord-

Tennessee. — *Nelson v. Marly*, 2 Yerg. (Tenn.) 576; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

West Virginia. — *Spence v. Robinson*, 35 W. Va. 313. *Compare* *Clarke v. Hogeman*, 13 W. Va. 718.

Instrument Not Commercial Paper. — In *Cobb v. Bryant*, 86 Ala. 316, it was held that on a note, not commercial paper, the legal title need not be in the plaintiff in order to enable him to sue, under the Code, § 2594.

Trover. — In *Fulton v. Fulton*, 48 Barb. (N. Y.) 581, it was held that in an action of trover for a promissory note, the plaintiff must have the legal title. *Compare* *Robertson v. Dunn*, 87 N. Car. 191.

Specialty Executed in Trust. — It was held in *Chaplin v. Canada*, 8 Conn. 286, that in a suit on a specialty executed to one person in trust for the benefit of another, the action must be brought in the name of the person having the legal title.

Sufficient Ownership to Protect Defendant. — It was held in *Hays v. Hathorn*, 74 N. Y. 486, that to enable a party to sue on a promissory note he must have such legal ownership thereof as would be sufficient to protect the defendant on a recovery by the plaintiff from a subsequent action thereon by another person.

Policy of Insurance "For Whom It Concerns." — In *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192, it was held that on a policy of insurance issued by a mutual company "for whom it concerns," an action might be maintained in the name of a person having no beneficial interest in the property of the insured.

Note in Payment of Judgment. — In *Harriman v. Hill*, 14 Me. 127, it was held that an action might be maintained in the name of the payee of a note taken in satisfaction of a judgment for the benefit of the equitable owner of such judgment, the judgment having been originally recovered in the name of the same person who was also payee of the note which was the foundation of the original action.

In Equity. — It was held in *Thompson v. Cartwright*, 1 Tex. 87, that in equity the party in interest must sue,

though at law an action might be maintained in the name of another person than the beneficial owner.

No Interest or Knowledge. — In *Moore v. Maple*, 25 Ill. 341, it was held that suit could not be brought on a note in the name of a party who had no claim to the money nor interest in it either legal or equitable, and who had no knowledge of the bringing of the suit. See also *Southwick v. Ely*, 15 N. H. 541.

Bill of Lading. — In *Lineker v. Ayeshford*, 1 Cal. 78, it was held that an agent having no beneficial interest in a bill of lading could not sue thereon in his own name, though on a negotiable instrument such an action might be maintained.

At Commencement of Suit. — The legal title to a note must be vested in the plaintiff at the time the suit is begun, and if vested in another person when the suit is commenced the plaintiff cannot afterwards invest himself with the legal title so as to continue the action. *Burnap v. Cook*, 32 Ill. 168; *Hovey v. Sebring*, 24 Mich. 232.

1. *Alabama.* — *Bancroft v. Paine*, 15 Ala. 834; *Moore v. Penn*, 5 Ala. 135; *Chisholm v. Newton*, 1 Ala. 371; *Brazier v. Tarver*, 4 Ala. 569; *Henley v. Bush*, 33 Ala. 636; *Morris v. Poillon*, 50 Ala. 403; *Carmelich v. Mims*, 88 Ala. 335; *Grigsby v. Nance*, 3 Ala. 347; *Planters', etc., Bank v. Willis*, 5 Ala. 770; *Rice v. Rice*, 106 Ala. 636; *Berney v. Steiner*, 108 Ala. 111. *Compare* *Dwyer v. Kennemore*, 31 Ala. 404; *McGhee v. Importers', etc., Nat. Bank*, 93 Ala. 193.

Arkansas. — *Taylor v. Coolidge*, 17 Ark. 454.

California. — *Scribner v. Hanke*, 116 Cal. 613; *Lineker v. Ayeshford*, 1 Cal. 76; *Price v. Dunlap*, 5 Cal. 483.

Colorado. — *Gomer v. Stockdale*, 5 Colo. App. 489.

Connecticut. — *Chaplin v. Canada*, 8 Conn. 286.

District of Columbia. — *Keyser v. Fendall*, 5 Mackey (D. C.) 47.

Florida. — *Gregory v. McNealy*, 12 Fla. 578; *McCallum v. Driggs*, 35 Fla. 277.

Georgia. — *Houser v. Houser*, 43 Ga. 415; *Nisbet v. Lawson*, 1 Ga. 275; *Field*

ance with this doctrine it is evident that a person who holds a

- v. Thornton*, 1 Ga. 306; *Epting v. Jones*, 47 Ga. 622; *Greer v. Woolfolk*, 60 Ga. 623; *Davis v. Baker*, 71 Ga. 33.
- Illinois*. — *Miller v. Bledsoe*, 2 Ill. 530; *Palmer v. Gardiner*, 77 Ill. 143; *Campbell v. Humphries*, 3 Ill. 478; *Burnap v. Cook*, 32 Ill. 168; *Richards v. Betzer*, 53 Ill. 466; *Newman v. Ravenscroft*, 67 Ill. 496; *Caldwell v. Lawrence*, 84 Ill. 161; *Dickinson v. Bull*, 72 Ill. App. 75; *McHenry v. Ridgely*, 3 Ill. 309; *Orr v. Thompson*, 9 Ill. 451; *Laffin v. Sherman*, 28 Ill. 391; *Harpham v. Haynes*, 30 Ill. 404; *Kuehne v. Goit*, 54 Ill. App. 596; *Lohman v. Cass County Bank*, 87 Ill. 616; *Hutchinson v. Crane*, 100 Ill. 269; *Henderson v. Davisson*, 157 Ill. 379. But see *Moore v. Maple*, 25 Ill. 341; *Wolverton v. Taylor*, 157 Ill. 485.
- Iowa*. — *Fear v. Jones*, 6 Iowa 169; *Cottle v. Cole*, 20 Iowa 481; *Allensworth v. Moore*, 3 Greene (Iowa) 273.
- Kansas*. — *Williams v. Norton*, 3 Kan. 295; *Linney v. Thompson*, 3 Kan. App. 718; *Scantlin v. Allison*, 12 Kan. 85.
- Kentucky*. — *Harpending v. Daniel*, 80 Ky. 449; *Brooking v. Clarke*, 2 Litt. (Ky.) 197.
- Louisiana*. — *Lacoste v. De Armas*, 2 La. 263; *Louisiana Bank v. Roberts*, 4 La. 530; *Newton v. Turner*, 5 La. 46; *Kelly v. Ledoux*, 11 La. Ann. 689; *Shaw v. Thompson*, 3 Martin N. S. (La.) 392; *Findley v. Breedlove*, 4 Martin N. S. (La.) 107; *Bacon v. Smith*, 2 La. Ann. 441; *Stanbrough v. M'Call*, 4 La. Ann. 322; *Banks v. Eastin*, 3 Martin N. S. (La.) 291; *Wood v. Hardy*, 11 La. Ann. 760; *Mitaine v. Ferguson*, 18 La. 92; *Ricard v. Harrison*, 19 La. Ann. 181; *McKown v. Mathes*, 19 La. 542; *Case v. Watson*, 21 La. Ann. 731; *Klein v. Buckner*, 30 La. Ann. 680; *Scionneaux v. Waguespack*, 32 La. Ann. 283.
- Maine*. — *Bradford v. Bucknam*, 12 Me. 15; *Marr v. Plummer*, 3 Me. 73; *Harriman v. Hill*, 14 Me. 127; *Bragg v. Greenleaf*, 14 Me. 395; *Lewis v. Hodgdon*, 17 Me. 267; *Sibley v. Robinson*, 23 Me. 70; *Southard v. Wilson*, 29 Me. 56; *Franklin Bank v. Lawrence*, 32 Me. 586; *Whitcomb v. Smart*, 38 Me. 264; *Golder v. Foss*, 43 Me. 364; *Granite Bank v. Ellis*, 43 Me. 367; *Patten v. Moses*, 49 Me. 255; *Demuth v. Cutler*, 50 Me. 298; *Baker v. Stinchfield*, 57 Me. 363. *Compare* *Garland v. Reynolds*, 20 Me. 45.
- Maryland*. — *Gray v. Wood*, 2 Har. & J. (Md.) 328; *Ellicott v. Martin*, 6 Md. 509; *Hampson v. Owens*, 55 Md. 583. *Compare* *Whiteford v. Burckmyer*, 1 Gill (Md.) 127.
- Massachusetts*. — *Fairfield v. Adams*, 16 Pick. (Mass.) 381; *Way v. Richardson*, 3 Gray (Mass.) 412; *Pettee v. Prout*, 3 Gray (Mass.) 502; *Sigourney v. Severy*, 4 Cush. (Mass.) 176; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Brigham v. Marean*, 7 Pick. (Mass.) 40; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Grew v. Breed*, 10 Met. (Mass.) 569; *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Wheeler v. Johnson*, 97 Mass. 39; *Spooford v. Norton*, 126 Mass. 533; *Troeder v. Hyams*, 153 Mass. 536. *Compare* *Sherwood v. Roys*, 14 Pick. (Mass.) 172; *Towne v. Wason*, 128 Mass. 517.
- Michigan*. — *Hovey v. Sebring*, 24 Mich. 232; *Brigham v. Gurney*, 1 Mich. 349; *Wintermute v. Torrent*, 83 Mich. 555; *Boyd v. Corbitt*, 37 Mich. 52. *Compare* *Bachelder v. Brown*, 47 Mich. 366, where it was held that the legal owner might sue in the name of another person.
- Minnesota*. — *Castner v. Austin*, 2 Minn. 44; *Vanstrum v. Liljengren*, 37 Minn. 191; *Elmquist v. Markoe*, 45 Minn. 305; *Minnesota Thresher Mfg. Co. v. Heipler*, 49 Minn. 395; *Cooper v. Hayward*, 67 Minn. 92, (Minn. 1898) 74 N. W. Rep. 152. But see *Van Eman v. Stanchfield*, 13 Minn. 75.
- Mississippi*. — *Anderson v. Williams*, 24 Miss. 685; *Field v. Weir*, 28 Miss. 56; *Fox v. Hilliard*, 35 Miss. 160; *Eckford v. Hogan*, 44 Miss. 398; *Sims v. Wilkins*, 5 Smed. & M. (Miss.) 234; *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563; *Smith v. Walker*, Smed. & M. Ch. (Miss.) 432; *Taylor v. Reese*, 44 Miss. 89. *Contra*, *Netterville v. Stevens*, 2 How. (Miss.) 642; *Anderson v. Patrick*, 7 How. (Miss.) 347.
- Missouri*. — *Overall v. Ellis*, 32 Mo. 323; *Wickersham v. Jarvis*, 2 Mo. App. 279; *Barry County v. McGlothlin*, 19 Mo. 307; *Nicolay v. Fritschle*, 40 Mo. 67.
- Nebraska*. — *McWilliams v. Bridges*, 7 Neb. 419.
- New Hampshire*. — *Berry v. Gillis*, 17 N. H. 9; *Edgerton v. Brackett*, 11 N. H. 218; *Southwick v. Ely*, 15 N. H. 541.

negotiable instrument as trustee for another may sue thereon in his own name.¹

New Jersey. — *Fine v. High Bridge M. E. Church Assoc.*, 44 N. J. L. 148.

New York. — *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52; *Mynnderse v. Snook*, 1 Lans. (N. Y.) 488, 53 Barb. (N. Y.) 234; *Ogilby v. Wallace*, 2 Hall (N. Y.) 553; *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Fish v. Jacobsohn*, 5 Bosw. (N. Y.) 514; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Waggoner v. Colvin*, 11 Wend. (N. Y.) 27; *Burbank v. Beach*, 15 Barb. (N. Y.) 326; *Gage v. Kendall*, 15 Wend. (N. Y.) 640; *Guernsey v. Burns*, 25 Wend. (N. Y.) 411; *Nelson v. Eaton*, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, *reversing* 7 Abb. Pr. (N. Y. Supreme Ct.) 305; *Allen v. Brown*, 44 N. Y. 228. But see *Gunn v. Cantine*, 10 Johns. (N. Y.) 387.

North Carolina. — *Robertson v. Dunn*, 87 N. Car. 191; *Davidson v. Elms*, 67 N. Car. 228.

Ohio. — *Osborn v. McClelland*, 43 Ohio St. 284; *Smead v. Fay*, 1 Disney (Ohio) 531; *Numlin v. Westlake*, 2 Ohio 24; *Wayne v. Minor*, 3 Cinc. Wkly. L. Bul. 365, 7 Am. L. Rec. 9; *White v. Stanley*, 29 Ohio St. 423.

Pennsylvania. — *Thompson v. Clark*, 56 Pa. St. 33; *Holmes v. Paul*, 3 Grant's Cas. (Pa.) 299, 6 Am. L. Reg. 482; *Hodge v. Comly*, 2 Miles (Pa.) 286; *Brown v. Clark*, 14 Pa. St. 469; *Logan v. Cassell*, 88 Pa. St. 288.

Rhode Island. — *Mechanics' Sav. Bank v. Goff*, 13 R. I. 516; *Bank of America v. Senior*, 11 R. I. 376; *Mumford v. Weaver*, 18 R. I. 801.

South Carolina. — *Jackson v. Heath*, 1 Bailey L. (S. Car.) 355; *O'Brien v. Sauls*, 2 Rich. L. (S. Car.) 332.

Tennessee. — *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Rutherford v. Mitchell*, 1 Martin & Y. (Tenn.) 261; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522; *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

Texas. — *Thompson v. Cartwright*, 1 Tex. 87; *McMillan v. Croft*, 2 Tex. 397; *Andrews v. Hoxie*, 5 Tex. 171; *Fowler v. Willis*, 4 Tex. 46; *Butler v. Robertson*, 11 Tex. 142; *Rider v. Duval*, 28 Tex. 622; *Martel v. Hensheim*, 5 Tex. 205; *De Cordova v. Atchison*, 13 Tex. 372; *Wimbish v. Holt*, 26 Tex. 673; *Barnett v. Louge*, 29 Tex. 282; *Rodgers*

v. Bass, 46 Tex. 506; *Allen v. Pannell*, 51 Tex. 165; *Jones v. Nowland*, Dall. (Tex.) 451; *McCarty v. Brackenridge*, 1 Tex. Civ. App. 170; *Mensing v. Ayres*, 2 Tex. App. Civ. Cas., § 565; *Ezell v. Edwards*, 2 Tex. App. Civ. Cas., § 769; *McKinney v. Peters*, Dall. (Tex.) 545; *Bremond v. Manley*, 31 Tex. 7; *Lewis v. Womack*, (Tex. Civ. App. 1896) 33 S. W. Rep. 894; *Jackson v. Elliott*, 49 Tex. 62; *Wheeler v. Roberts*, 2 Tex. App. Civ. Cas., § 128; *Anderson v. Shaw*, 2 Tex. Unrep. Cas. 285. *Compare* *Merlin v. Manning*, 2 Tex. 351; *Knight v. Holloman*, 6 Tex. 153.

Vermont. — *Fletcher v. Fletcher*, 29 Vt. 98; *Austin v. Birchard*, 31 Vt. 589; *Sanford v. Huxley*, 18 Vt. 170; *Johnson v. Catlin*, 27 Vt. 87.

West Virginia. — *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717; *Clarke v. Hogeman*, 13 W. Va. 718; *Smith v. Lawson*, 18 W. Va. 212.

Wisconsin. — *Bicknell v. Tallman*, 4 Chand. (Wis.) 95, 3 Pin. (Wis.) 388.

Wyoming. — *Stamper v. Gay*, 3 Wyoming 322.

United States. — *Perrine v. Thompson*, 17 Blatchf. (U. S.) 18; *Halsted v. Lyon*, 2 McLean (U. S.) 226; *Lum v. Robertson*, 6 Wall. (U. S.) 277; *Irwin v. Bailey*, 8 Biss. (U. S.) 523. *Compare* *Lanning v. Lockett*, 10 Fed. Rep. 451.

England. — *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286; *Coleman v. Biedman*, 7 C. B. 871, 62 E. C. L. 871.

Trover for the conversion of a note may be maintained by the holder of the legal title. *Robertson v. Dunn*, 87 N. Car. 191.

Consideration Immaterial. — In *Scribner v. Hanke*, 116 Cal. 613, it was held that the holder of the legal title by indorsement of a promissory note might sue thereon in his own name, regardless of whether or not he had given a consideration for the transfer.

1. *Alabama.* — *Bumpass v. Richardson*, 1 Stew. (Ala.) 16.

Arkansas. — *Roane v. Williams*, 12 Ark. 74.

Georgia. — *Field v. Thornton*, 1 Ga. 306.

Iowa. — *Cottle v. Cole*, 20 Iowa 481.

Kansas. — *Scantlin v. Allison*, 12 Kan. 85.

Louisiana. — *Bacon v. Smith*, 2 La. Ann. 441; *Stanbrough v. M'Call*, 4 La. Ann. 322; *Peters v. Pacific Guano Co.*,

Qualification of the Rule. — But the general rule above mentioned is subject to the qualification that the defendant may set up any equitable defense to which he may be entitled under the law merchant.¹ It has been held that the action could not be maintained by one person for the benefit of another who is the real owner of the instrument in suit, where by alleging such ownership in the other person it is made to appear that the plaintiff has no legal title to the instrument.²

b. WHO IS THE LEGAL OWNER. — Within the rule that the holder of the legal title to a negotiable instrument must or may sue thereon in his own name, it has been held that the plaintiff was the holder of such legal title when he was payee,³ though

42 La. Ann. 690; *Banks v. Eastin*, 3 Martin N. S. (La.) 291.

Maine. — *Cooper v. Curtis*, 30 Me. 488.

Maryland. — *Ellicott v. Martin*, 6 Md. 509.

Massachusetts. — *Grew v. Breed*, 10 Met. (Mass.) 569.

Mississippi. — *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563. But see *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516.

Missouri. — *Nicolay v. Fritschle*, 40 Mo. 67.

New Hampshire. — *Edgerton v. Brackett*, 11 N. H. 218.

New York. — *Nelson v. Eaton*, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, 15 How. Pr. (N. Y. Supreme Ct.) 305, *reversing* 7 Abb. Pr. (N. Y.) 305; *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599; *Cross v. Jackson*, 5 Hill (N. Y.) 478.

Pennsylvania. — *Logan v. Cassell*, 88 Pa. St. 288; *Hodge v. Comly*, 2 Miles (Pa.) 286.

South Carolina. — *Jackson v. Heath*, 1 Bailey L. (S. Car.) 355.

Tennessee. — *Kyle v. Ewing*, 5 Lea (Tenn.) 583; *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

Texas. — *Barnett v. Logue*, 29 Tex. 282.

Vermont. — *Binney v. Plumley*, 5 Vt. 500.

United States. — *Lum v. Robertson*, 6 Wall. (U. S.) 277.

1. *California.* — *Price v. Dunlap*, 5 Cal. 483.

Florida. — *Gregory v. McNealy*, 12 Fla. 578.

Georgia. — *Nisbet v. Lawson*, 1 Ga. 275; *Epting v. Jones*, 47 Ga. 622; *Greer v. Woolfolk*, 60 Ga. 623.

Indiana. — *Deuel v. Newlin*, 131 Ind. 40.

Iowa. — *Cottle v. Cole*, 20 Iowa 481.

Louisiana. — *Banks v. Eastin*, 3 Martin N. S. (La.) 291; *Findley v. Breedlove*, 4 Martin N. S. (La.) 107; *Newton v. Turner*, 5 La. 46; *Kelly v. Ledoux*, 11 La. Ann. 689; *Mitaine v. Ferguson*, 18 La. 92; *Ricard v. Harrison*, 19 La. Ann. 181; *Case v. Watson*, 21 La. Ann. 731; *Klein v. Buckner*, 30 La. Ann. 680; *Scionneaux v. Waguespack*, 32 La. Ann. 283.

Massachusetts. — *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192.

Michigan. — *Wintermute v. Torrent*, 83 Mich. 555.

New York. — *Eaton v. Alger*, 57 Barb. (N. Y.) 179.

Pennsylvania. — *Brown v. Clark*, 14 Pa. St. 469; *Logan v. Cassell*, 88 Pa. St. 288.

Texas. — *Barnett v. Logue*, 29 Tex. 282.

2. *Pitts v. Keyser*, 1 Stew. (Ala.) 154; *Johnson v. English*, 1 Stew. (Ala.) 169; *Hunt v. Stewart*, 7 Ala. 525; *Southworth v. Thompson*, 10 Heisk. (Tenn.) 10.

3. *Miller v. Bledsoe*, 2 Ill. 530; *Campbell v. Humphries*, 3 Ill. 478; *Palmer v. Gardiner*, 77 Ill. 143; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 230; *Ezell v. Edwards*, 2 Tex. App. Civ. Cas., § 769. But see *Langham v. Lebarge*, 6 Mo. 355; *Rogge v. Cassidy*, (Ky. 1890) 13 S. W. Rep. 716, 12 Ky. L. Rep. 54, where it was held that on a note payable to a bank and discounted by another person, the payee was not a necessary party plaintiff, as it had never been the legal holder of the note; and *Moore v. Maxwell*, 2 Martin N. S. (La.) 249, where it was held that the payee of a note who has indorsed it has not the legal title thereto.

merely an agent of the beneficial owner,¹ or indorsee,² even though the indorsement be for collection merely.³ So the holder of an instrument indorsed in blank,⁴ or of one payable to bearer, may sue thereon in his own name, as the holder of the legal title,⁵ and the same seems to be true of an assignee.⁶ According to some authorities, the transferee of a negotiable instrument, without an indorsement or written assignment, may sue thereon as the legal owner.⁷ It has been held that the legal title to a negotiable instrument is not lost by recovering a judgment on it,⁸ by a mortgage of a note,⁹ nor by going into bankruptcy.¹⁰ On the other hand, a surety on a note, before paying the same, does not have the legal title so that he can sue

Guardian a Joint Payee. — In *Ezell v. Edwards*, 2 Tex. App. Civ. Cas., § 769, it was held that a guardian, to whom a note was made payable jointly with his ward, might sue thereon as the legal owner.

A Payee Taking Up a Note becomes the legal owner by doing so, and he may sue thereon in his own name. *Campbell v. Humphries*, 3 Ill. 478; *Palmer v. Gardiner*, 77 Ill. 143. See also *supra* p. 383.

1. *Fear v. Jones*, 6 Iowa 169; *Vansturm v. Liljengren*, 37 Minn. 191; *Rose v. Laffan*, 2 Spears L. (S. Car.) 424; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

2. *Burnap v. Cook*, 32 Ill. 168; *Whittenhall v. Korber*, 12 Kan. 618; *Castner v. Austin*, 2 Minn. 44; *Sims v. Wilkins*, 5 Smed. & M. (Miss.) 234; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43; *Osborn v. McClelland*, 43 Ohio St. 284; *Spence v. Robinson*, 35 W. Va. 313; *Stamper v. Gay*, 3 Wyoming 322; *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286.

An Indorsement After Maturity has been held to transfer the legal title to the indorsee, so as to enable him to sue thereon in his own name. *Osborn v. McClelland*, 43 Ohio St. 284; *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286. See *contra*, as to indorsement after suit pending, *Eckford v. Hogan*, 44 Miss. 398; *Dowell v. Brown*, 13 Smed. & M. (Miss.) 43.

An Indorsement in Pledge will make the indorsee the legal holder of a note, so that he can sue thereon in his own name. *Castner v. Austin*, 2 Minn. 44.

A Restrictive Indorsement transfers the legal title to the indorsee, so that he is a proper party plaintiff. *Sims v. Wilkins*, 5 Smed. & M. (Miss.) 234.

An Indorsement Without Recourse has been held sufficient to make the in-

dorsee the holder of the legal title, within the rule permitting such holder to sue in his own name. *Whittenhall v. Korber*, 12 Kan. 618.

3. *Laffin v. Sherman*, 28 Ill. 391; *Moore v. Hall*, 48 Mich. 143.

4. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505; *Fairfield v. Adams*, 16 Pick. (Mass.) 381; *Boyd v. Corbitt*, 37 Mich. 52; *Lovell v. Evertson*, 11 Johns. (N. Y.) 52.

5. *Houser v. Houser*, 43 Ga. 415; *Butler v. Robertson*, 11 Tex. 142; *Perrine v. Thompson*, 17 Blatchf. (U. S.) 18. *Contra*, by statute, *White v. Joy*, 4 Ala. 571; *M'Nitt v. Hatch*, 4 Blackf. (Ind.) 531.

6. *Jeffers v. Oliver*, 5 Mo. 433.

An Invalid Assignment does not, however, give the assignee the right to sue in his own name. *Lockridge v. Nuckolls*, 25 Ill. 178.

Assignment by One Partner has been held insufficient to transfer the legal title to a note payable to a partnership, so that the assignee could sue thereon. *Planters', etc., Bank v. Willis*, 5 Ala. 770.

7. *Heartman v. Franks*, 36 Ark. 501; *Warnock v. Richardson*, 50 Iowa 450; *Weeks v. Medler*, 20 Kan. 57; *Overall v. Ellis*, 32 Mo. 323; *Harvey v. Brooke*, 36 Mo. 493; *Billings v. Jane*, 11 Barb. (N. Y.) 620. *Contra*, *Boeka v. Nuella*, 28 Mo. 180; *Fine v. High Bridge M. E. Church Assoc.*, 44 N. J. L. 148; *Nelson v. Marly*, 2 Yerg. (Tenn.) 576.

A Forged Indorsement does not, of course, transfer the legal title to the indorsee, so as to enable him to sue thereon in his own name. *Lancaster v. Baltzell*, 7 Gill & J. (Md.) 468.

8. *Smith v. Walker*, Smed. & M. Ch. (Miss.) 432.

9. *Fox v. Hilliard*, 35 Miss. 160.

10. *McMillan v. Croft*, 2 Tex. 397.

thereon,¹ and a plaintiff who transfers the legal title to an instrument in suit, while the suit is pending, cannot continue the action in his own name.²

General Assignment. — It has been held in several cases that a general deed of assignment did not transfer the legal title to negotiable instruments, so that the assignee would be a proper party plaintiff.³

Possession Necessary. — It seems that the plaintiff in an action on a negotiable instrument must have the possession thereof at the time he institutes the action.⁴

9. Beneficial Ownership — *a.* NOT NECESSARY. — We have seen that beneficial ownership is not usually necessary in order to enable the plaintiff to sue on a negotiable instrument.⁵

Action in the Name of Person Having No Interest. — It seems that the holder or beneficial owner of a negotiable instrument may bring an action thereon in the name of any third person who really has no interest in the instrument, provided the necessary transfer or indorsement is made to give the nominal plaintiff an apparent title,⁶ at least with the consent of such third person;⁷ and in some cases it has been held that such consent is not necessary.⁸

b. RIGHT OF BENEFICIAL OWNER TO SUE. — In some states the beneficial owner of a negotiable instrument may, however, maintain an action thereon in his own name.⁹

1. *Dennison v. Soper*, 33 Iowa 183.
2. *Lee v. Jilson*, 9 Conn. 94; *Vila v. Weston*, 33 Conn. 42.
3. *Buckner v. Real Estate Bank*, 5 Ark. 536; *Biscoe v. Sneed*, 11 Ark. 104; *Bradford v. Bucknam*, 12 Me. 15.
4. *Crandall v. Schroepfel*, 1 Hun (N. Y.) 557; *Emmett v. Tottenham*, 8 Exch. 884; *Marsh v. Newell*, 1 Taunt. 109. *Contra*, *Vastine v. Wilding*, 45 Mo. 89; *Stones v. Butt*, 2 Crompton & M. 416.
5. See *supra*, p. 422.
6. *Field v. Thornton*, 1 Ga. 306; *Golder v. Foss*, 43 Me. 364; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *O'Brien v. Sauls*, 2 Rich. L. (S. Car.) 332. *Contra*, *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Hampson v. Owens*, 55 Md. 583; *Hocker v. Jamison*, 2 W. & S. (Pa.) 438.
7. *Harpham v. Haynes*, 30 Ill. 404; *Kuchne v. Goit*, 54 Ill. App. 596; *Marr v. Plummer*, 3 Me. 73; *Franklin Bank v. Lawrence*, 32 Me. 586; *Granite Bank v. Ellis*, 43 Me. 367; *Patten v. Moses*, 49 Me. 255; *Demuth v. Cutler*, 50 Me. 298; *Baker v. Stinchfield*, 57 Me. 363; *Sigourney v. Severy*, 4 Cush. (Mass.) 170; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Sanford v. Huxley*, 18 Vt. 170.
8. *Troeder v. Hyams*, 153 Mass. 536; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Gage v. Kendall*, 15 Wend. (N. Y.) 640.
9. *Arkansas*. — *Biscoe v. Sneed*, 11 Ark. 104; *Heartman v. Franks*, 36 Ark. 501.
- Indiana*. — *Speelman v. Culbertson*, 15 Ind. 441; *Kimball v. Whitney*, 15 Ind. 280; *Spurrier v. Briggs*, 17 Ind. 529; *Judah v. Potter*, 18 Ind. 224; *Garner v. Cook*, 30 Ind. 331.
- Iowa*. — *McDowell v. Bartlett*, 14 Iowa 157; *Warnock v. Richardson*, 50 Iowa 450. *Compare* *Allen v. Newberry*, 8 Iowa 65; *Dennison v. Soper*, 33 Iowa 183.
- Kansas*. — *Weeks v. Medler*, 20 Kan. 57.
- Minnesota*. — *White v. Phelps*, 14 Minn. 27.
- Nebraska*. — *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 626.
- New York*. — *Houghton v. Dodge*, 5 Bosw. (N. Y.) 326; *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Billings v. Jane*, 11 Barb. (N. Y.) 620; *Hays v. Southgate*, 10 Hun (N. Y.) 511; *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273. See *Hays v. Hathorn*, 74 N. Y. 486.

Partial Interest Sufficient. — An action may be maintained in the name of a person who is beneficial owner of only a part of the instrument sued on.¹

c. REAL PARTY IN INTEREST. — In many states it is provided by statute that with specified exceptions every action must be prosecuted by the real party in interest. For a general discussion of the effect of such provisions see the article PARTIES.

10. Officers, Agents, and Principals — **a. INSTRUMENT PAYABLE TO OFFICER** — (1) *Action by Officer.* — On negotiable instruments made payable to an officer of a corporation, such officer can sue in his own name,² and this rule has been applied so as to author-

North Carolina. — Kiff v. Weaver, 94 N. Car. 274.

Ohio. — John v. John, Wright (Ohio) 584. *Contra*, Moore v. Lancaster, Wright (Ohio) 35.

Texas. — McCarty v. Brackenridge, 1 Tex. Civ. App. 170; Frazier v. Moore, 11 Tex. 755; Guest v. Rhine, 16 Tex. 549. *Compare* Wheeler v. Roberts, 2 Tex. App. Civ. Cas., § 128; Anderson v. Shaw, 2 Tex. Unrep. Cas. 285.

Vermont. — Rutland, etc., R. Co. v. Cole, 24 Vt. 33; U. S. National Bank v. Burton, 58 Vt. 426; U. S. Bank v. Lyman, 20 Vt. 666; Arlington v. Hinds, 1 D. Chip. (Vt.) 431; Manchester Bank v. Slason, 13 Vt. 334; Vermont Cent. R. Co. v. Claves, 21 Vt. 30. See also Hyde v. Lawrence, 49 Vt. 361. *Compare* Binney v. Plumley, 5 Vt. 500; U. S. Bank v. Lyman, 20 Vt. 666.

Note Payable in Merchandise. — It was held in *Combs v. Bateman*, 10 Barb. (N. Y.) 573, that on a note payable in oats to a certain person or bearer the action was properly brought by the beneficial owner thereof.

In Equity. — In *Biscoe v. Sneed*, 11 Ark. 104, and *Bacon v. Cohea*, 12 Smed. & M. (Miss.) 516, it was held that the beneficial owner of a promissory note might sue thereon in his own name in equity. *Compare* Frazier v. Moore, 11 Tex. 755.

1. *Alabama.* — Pond v. Lockwood, 8 Ala. 669.

Colorado. — Gomer v. Stockdale, 5 Colo. App. 489.

Illinois. — Lohman v. Cass County Bank, 87 Ill. 616.

Iowa. — Allensworth v. Moore, 3 Greene (Iowa) 273.

Kansas. — Williams v. Norton, 3 Kan. 295.

Louisiana. — Wood v. Hardy, 11 La. Ann. 760.

Maine. — Lowney v. Perham, 20 Me. 235.

Minnesota. — Lundberg v. Northwestern Elevator Co., 42 Minn. 37.

New York. — Fish v. Jacobsohn, 2 Abb. App. Dec. (N. Y.) 132.

Texas. — Lewis v. Womack, (Tex. Civ. App. 1896) 33 S. W. Rep. 894.

United States. — Halsted v. Lyon, 2 McLean (U. S.) 226.

In *Miller v. Bledsoe*, 2 Ill. 530, it was held that the assignee of half a promissory note could not sue in his own name, but that the action must be maintained in the name of the assignor.

2. *Connecticut.* — Chaplin v. Canada, 8 Conn. 286.

Georgia. — Martin v. Lamb, 77 Ga. 252; Lester v. McIntosh, 101 Ga. 675.

Illinois. — McHenry v. Ridgely, 3 Ill. 309; Friedline v. Carthage College, 23 Ill. App. 494.

Indiana. — Thompson v. Weaver, 7 Blackf. (Ind.) 552; Rock v. Stinger, 36 Ind. 346. But see Harper v. Ragan, 2 Blackf. (Ind.) 39, where it was held that an agent appointed to collect subscriptions for building a new county seat could not sue in his own name to recover such subscriptions.

Maine. — Clap v. Day, 2 Me. 305. But see State v. Boies, 11 Me. 474; Garland v. Reynolds, 20 Me. 45; Irish v. Webster, 5 Me. 171.

Maryland. — Hymer v. Ijams, 56 Md. 470.

Massachusetts. — Fairfield v. Adams, 16 Pick. (Mass.) 381.

Missouri. — Bryant v. Durkee, 9 Mo. 169; Barry County v. McGlothlin, 19 Mo. 307; Durfee v. Morris, 49 Mo. 55; Ely v. Porter, 58 Mo. 158. But see Linn County v. Holland, 12 Mo. 127.

New York. — Chase v. Behrman, 1 N. Y. City Ct. 352; Considerant v. Brisbane, 22 N. Y. 389, reversing 2 Bosw. (N. Y.) 471, 14 How. Pr. (N. Y.) 487. But see Olcott v. Rathbone, 5 Wend. (N. Y.) 490, where it was held

ize suits by the officers of unincorporated associations or joint-stock companies.¹

Successor. — Where an instrument is made payable to an officer

that the cashier of a bank could not sue in his own name on a note belonging to the bank, without showing that the bank directed the suit.

North Carolina. — *Horah v. Long*, 4 Dev. & B. L. (N. Car.) 274.

Ohio. — *White v. Stanley*, 29 Ohio St. 423.

South Carolina. — *Rose v. Laffan*, 2 Spears L. (S. Car.) 424.

Vermont. — *Binney v. Plumley*, 5 Vt. 500; *Johnson v. Catlin*, 27 Vt. 87; *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431. But see *Middlebury v. Case*, 6 Vt. 165.

Texas. — *Wimbish v. Holt*, 26 Tex. 673; *McDonald v. Young*, (Tex. Civ. App. 1897) 41 S. W. Rep. 885.

United States. — *O'Brien v. Smith*, 1 Black (U. S.) 99.

England. — *Law v. Parnell*, 7 C. B. N. S. 282, 97 E. C. L. 282, 6 Jur. N. S. 172, 29 L. J. C. P. 17, 8 W. R. 6, 1 L. T. N. S. 32.

Action by Trustees Only. — In *Chaplin v. Canada*, 8 Conn. 286, it was held that an action on a note payable to A, B, and C, and their successors for the time being as trustees of a society, could be brought only in the name of such trustees and not in the name of the society.

State Land Agent. — In *Irish v. Webster*, 5 Me. 171, it was held that the state land agent could not maintain an action in his own name upon a non-negotiable note given to him in his official capacity for timber belonging to the state, on the ground that the note was not negotiable, and that it did not appear that any discharge had been given to the defendants on their liability to the state on the written contract. See also *State v. Boies*, 11 Me. 474.

Action by County for State. — In *Barry County v. McGlothlin*, 19 Mo. 307, it was held that suit might be maintained in the name of the county upon a note payable to the county for the use of the state school fund.

After Term of Office Expires. — In *Rock v. Stinger*, 36 Ind. 346, it was held that a note given to a township trustee in his personal capacity, for public moneys in his hands loaned to the maker of the note, might be collected

by such trustee, though his term of office had expired.

School Commissioner. — In *Thompson v. Weaver*, 7 Blackf. (Ind.) 552, it was held that a school commissioner for a certain county might sue on a promissory note given for the use of a congressional township in his own name, under the Act of 1843.

Assignment by Corporation. — In *White v. Stanley*, 29 Ohio St. 423, a cashier of a bank was permitted to maintain an action in his own name on a note transferred to him without designating him as cashier, the bank having subsequently assigned its interest in the note to him for the purpose of the suit.

Without Indorsement by Corporation. — In *Law v. Parnell*, 7 C. B. N. S. 282, 97 E. C. L. 282, it was held that the manager of an association carrying on the business of a discount and deposit bank might sue in his own name on a bill indorsed in blank, received from a customer, and that the indorsement of the association to such manager was not necessary, it being part of his duties as manager to realize on securities which came into his hands.

Expiration of Charter. — In *Horah v. Long*, 4 Dev. & B. L. (N. Car.) 274, it was held that a note payable to the plaintiff, "cashier, or order," and "negotiable and payable" at a particular bank, might be sued upon by such cashier in his own name after the expiration of the charter of the bank at which the note was payable.

Liability to Account. — In *Fairfield v. Adams*, 16 Pick. (Mass.) 381, it was held that a bill of exchange indorsed to a person as cashier might be sued upon in his own name although he was liable to account for the proceeds to the bank of which he was an officer.

1. *Wolcott v. Standley*, 62 Ind. 198; *Whitcomb v. Smart*, 38 Me. 264; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Davis v. Garr*, 6 N. Y. 124; *Tibbetts v. Blood*, 21 Barb. (N. Y.) 650; *Ramey v. Anderson*, 1 McMull. L. (S. Car.) 300. But see *Ewing v. Medlock*, 5 Port. (Ala.) 82, where it was held that no action could be maintained by the treasurer of an unincorporated association on a promise to pay money to the treasurer of such association alone.

of a corporation, his successor in office may sue thereon in his own name.¹

(2) *Action by Corporation.* — By the weight of authority, a corporation may also sue in its own name upon negotiable instruments made payable to one of its officers.²

1. *Manlove v. McHatton*, 5 Ill. 95; *Dutch v. Boyd*, 81 Ind. 146; *Tainter v. Winter*, 53 Me. 348; *Rollins v. Lashus*, 74 Me. 218; *McDonald v. Laughlin*, 74 Me. 480; *Packard v. Nye*, 2 Met. (Mass.) 47; *Ranney v. Brooks*, 20 Mo. 105. But see *Upton v. Starr*, 3 Ind. 508, where it was held that the successor of a county agent could not sue on a note payable to his predecessor, for the reason that a county agent was not a *quasi* corporation.

Successor Instead of Assignee. — In *Ranney v. Brooks*, 20 Mo. 105, it was held that the successor of a sheriff was the proper person to sue on a note given to the sheriff for land sold on partition, and that a person to whom the sheriff had assigned such note could not sue thereon.

Note for Fine and Costs. — In *Rollins v. Lashus*, 74 Me. 218, it was held that the successor of a county treasurer might sue in his own name upon a note given for the payment of a fine and costs, although such note was not made payable to the successor of such treasurer.

Payee a Co-maker. — In *Packard v. Nye*, 2 Met. (Mass.) 47, it was held that the successor in office to the treasurer of a parish might sue the executor of the treasurer on a note payable to the treasurer and signed by him and another person.

Officer Not Named. — An action on a note payable to the treasurer of a society, without naming him, should be brought in the name of the treasurer in office at the time of the action. *McDonald v. Laughlin*, 74 Me. 480.

School Commissioner. — In *Manlove v. McHatton*, 5 Ill. 95, it was held that an action might be maintained by the successor in office of a school commissioner upon a note made payable to the latter, under the Act of February 26, 1841, authorizing suits in the name of the school commissioners.

2. *Alabama.* — *Alston v. Heartman*, 2 Ala. 699; *Hazard v. Planters'*, etc., Bank, 4 Ala. 299; *Darbey v. Berney* Nat. Bank, 97 Ala. 643.

Florida. — *Southern L. Ins., etc., Co. v. Gray*, 3 Fla. 262.

Georgia. — *Martin v. Lamb*, 77 Ga. 252.

Illinois. — *Friedline v. Carthage College*, 23 Ill. App. 494.

Indiana. — *Black v. Enterprise Ins. Co.*, 33 Ind. 223; *Nave v. Lebanon First Nat. Bank*, 87 Ind. 204; *Erwin Lane Paper Co. v. Farmers' Nat. Bank*, 130 Ind. 367. But see *Robbins v. Dishon*, 19 Ind. 204, where it was held that if a township trustee loaned money belonging to the township in such a way as to make the loan a conversion of the money of the township to his own use, and took a note, payable to himself as trustee, he would be liable on his bond for the money, but that the township could not sue on the note.

Kansas. — *Pratt v. Topeka Bank*, 12 Kan. 570.

Maine. — *Warren Academy v. Starrett*, 15 Me. 443; *Garland v. Reynolds*, 20 Me. 45.

Maryland. — *Hymer v. Ijams*, 56 Md. 470.

Massachusetts. — *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Fisher v. Ellis*, 3 Pick. (Mass.) 322; *Commercial Bank v. French*, 31 Pick. (Mass.) 486.

Michigan. — *Garton v. Union City Nat. Bank*, 34 Mich. 279.

Nebraska. — *Lacey v. Central Nat. Bank*, 4 Neb. 179.

New York. — *Angelica First Nat. Bank v. Hall*, 44 N. Y. 395; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *Camden Bank v. Rodgers*, 4 How. Pr. (N. Y. Supreme Ct.) 63.

South Carolina. — *Dupont v. Mount Pleasant Ferry Co.*, 9 Rich. L. (S. Car.) 255.

Tennessee. — *Lookout Bank v. Aull*, 93 Tenn. 645; *State Bank v. Burke*, 1 Coldw. (Tenn.) 623.

Vermont. — *Middlebury v. Case*, 6 Vt. 165; *Manchester Bank v. Slason*, 13 Vt. 334; *Rutland, etc., R. Co. v. Cole*, 24 Vt. 33; *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431; *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30; *Johnson v. Catlin*, 27 Vt. 87; *Tremont Bank v. Paine*, 28 Vt. 24; *U. S. National Bank v. Burton*, 58 Vt. 426. Compare *Binney v. Plumley*, 5 Vt. 500; *U. S. Bank v. Lyman*, 20 Vt. 666.

(3) *Action by State or United States.* — On a negotiable instrument made payable to a state officer, an action may be maintained by the state,¹ and so, on one payable to an officer of the United States, the United States may sue.²

b. INSTRUMENT PAYABLE TO CORPORATION — *Change in Name of Corporation.* — Where the name of a corporation is changed, it may nevertheless sue in its name as changed on instruments payable in the old name.³

Action by Officer. — An officer of a corporation may sue in his own name on a negotiable instrument transferred to the corporation by an indorsement in blank.⁴

c. INSTRUMENT PAYABLE TO AGENT — (1) *Action by Agent.* — The rule supported by the great weight of authority is, that on a

United States. — *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234; *Pacific Guano Co. v. Holleman*, 12 Fed. Rep. 61.

Real Party in Interest. — An action by a corporation on an instrument payable to its agent has been sustained on the theory that such corporation was the real party in interest under a statute requiring the real party in interest to sue. *Black v. Enterprise Ins. Co.*, 33 Ind. 223.

Indorsement to Corporation Unnecessary. — On a negotiable instrument payable to an officer of a corporation, an indorsement by such officer is not necessary to enable the corporation to sue in its own name. *Lookout Bank v. Aull*, 93 Tenn. 645; *Lacey v. Central Nat. Bank*, 4 Neb. 179; *Nave v. Lebanon First Nat. Bank*, 87 Ind. 204; *Pacific Guano Co. v. Holleman*, 12 Fed. Rep. 61. But see *Chaplin v. Canada*, 8 Conn. 289; *Fine v. High Bridge M. E. Church Assoc.*, 44 N. J. L. 148, where it was held that an action could not be maintained upon a note payable to the order of a certain person, "treasurer of" a church, in the name of the church, without the note being indorsed.

Payable to Officer or Successor. — In *Fisher v. Ellis*, 3 Pick. (Mass.) 322, it was held that a parish might maintain an action in the name of its treasurer or his successor, on a note payable to the treasurer or his successor.

Branch Bank. — In *State Bank v. Burke*, 1 Coldw. (Tenn.) 623, it was held that a principal bank might sue in its own name upon an instrument payable to a branch of such bank.

Corporation Not Named. — Where an instrument is made payable to an officer of a corporation, designating

him by the name of his office, but without naming the corporation, the corporation may nevertheless sue thereon in its own name. *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234.

Payable to Office. — In *Friedline v. Carthage College*, 23 Ill. App. 494, it was held that a corporation might sue on a note payable to an officer of the corporation by the name of the office, without mentioning the individual officer.

1. *Rogers v. Gibson*, 15 Ind. 218; *People v. Bank of North America*, 75 N. Y. 547.

Conversion. — The state has such an interest in a draft indorsed to the state treasurer and delivered into his office by a county treasurer for the payment of taxes due the state, that an action may be maintained for the conversion of such draft. *People v. Bank of North America*, 75 N. Y. 547.

2. *Dugan v. U. S.*, 3 Wheat. (U. S.) 173; *U. S. v. Boice*, 2 McLean (U. S.) 352; *U. S. v. Barker*, 1 Paine (U. S.) 156.

3. *Madison College v. Burke*, 6 Ala. 494; *Cumberland College v. Ish*, 22 Cal. 641; *North-western College v. Schwagler*, 37 Iowa 577.

4. *Pearce v. Austin*, 4 Whart. (Pa.) 489; *Law v. Parnell*, 6 Jur. N. S. 172.

Who Is the Proper Officer. — In *Yerby v. Sexton*, 48 Ala. 311, it was held that a county superintendent of education was the proper officer to sue on notes given for school moneys under section 2523 of the Revised Code then in force; and in *Oconto County v. Hall*, 42 Wis. 59, it was held that a county board of supervisors could properly sue on an instrument promising the payment of money to the county.

negotiable instrument payable to an agent, either as payee, indorsee, or assignee, the agent may maintain an action in his own name.¹ This right of action in the agent for the benefit of

1. *Alabama*. — *Castleberry v. Fennell*, 4 Ala. 642; *Bird v. Daniel*, 9 Ala. 302; *Bancroft v. Paine*, 15 Ala. 834; *Bryan v. Wilson*, 27 Ala. 208; *Goodman v. Walker*, 30 Ala. 482; *Rice v. Rice*, 106 Ala. 636; *Berney v. Steiner*, 108 Ala. 111. But see *Bryant v. Owen*, 1 Port. (Ala.) 201.

California. — *Lineker v. Ayeshford*, 1 Cal. 76; *Ord v. McKee*, 5 Cal. 515; *Poorman v. Mills*, 35 Cal. 118; *McPherson v. Weston*, 64 Cal. 275.

Colorado. — *Gomer v. Stockdale*, 5 Colo. App. 489.

Florida. — *Gregory v. McNealy*, 12 Fla. 578.

Georgia. — *Nisbet v. Lawson*, 1 Ga. 275; *Austell v. Rice*, 5 Ga. 472; *Wilson v. Tolson*, 79 Ga. 137; *Martin v. Lamb*, 77 Ga. 252; *Haug v. Riley*, 101 Ga. 372.

Illinois. — *Bond v. Betts*, 1 Ill. 205; *McHenry v. Ridgely*, 3 Ill. 309; *Laffin v. Sherman*, 28 Ill. 391; *Forster v. New Albany Second Nat. Bank*, 61 Ill. App. 272; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Friedline v. Carthage College*, 23 Ill. App. 494; *Gillham v. State Bank*, 3 Ill. 245. But see *Wolverton v. Taylor*, 157 Ill. 485, where it was held that an agent for collection could not sue the directors of a corporation for issuing notes in excess of the statutory limit.

Iowa. — *Fear v. Jones*, 6 Iowa 169; *Cottle v. Cole*, 20 Iowa 481; *Abell Note Brokerage, etc., Co. v. Hurd*, 85 Iowa 559.

Kentucky. — *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84.

Louisiana. — *Lacoste v. De Armas*, 2 La. 263; *West v. Wilson*, 4 La. 219; *Lapice v. Clifton*, 17 La. 152; *Mitaine v. Ferguson*, 18 La. 92; *McKown v. Mathes*, 19 La. 542; *Conrey v. Harrison*, 4 La. Ann. 349; *Clumas v. Gallagher*, 6 La. Ann. 757; *Kelly v. Ledoux*, 11 La. Ann. 689; *Ricard v. Harrison*, 19 La. Ann. 181; *Hunt v. Stone*, 19 La. Ann. 526; *Klein v. Buckner*, 30 La. Ann. 680; *Peters v. Pacific Guano Co.*, 42 La. Ann. 690.

Massachusetts. — *Buffum v. Chadwick*, 8 Mass. 103; *Pettee v. Prout*, 3 Gray (Mass.) 502; *Royce v. Barnes*, 11 Met. (Mass.) 276. But see *Sherwood v. Roys*, 14 Pick. (Mass.) 172, where it was held that a person holding a note

as a mere agent or bailee could not sue thereon in his own name, though a trustee might.

Michigan. — *Brigham v. Gurney*, 1 Mich. 349; *Boyd v. Corbitt*, 37 Mich. 52; *Moore v. Hall*, 48 Mich. 143; *Coy v. Stiner*, 53 Mich. 42; *Wintermute v. Torrent*, 83 Mich. 555; *Horrigan v. Wyman*, 90 Mich. 121; *Watkins v. Plummer*, 93 Mich. 215.

Missouri. — *Bryant v. Durkee*, 9 Mo. 169; *Webb v. Morgan*, 14 Mo. 428; *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Saulsbury v. Corwin*, 40 Mo. App. 373; *Cummings v. Kohn*, 12 Mo. App. 585. But see *Griffith v. Conway*, 45 Mo. App. 574.

Nebraska. — *Stoll v. Sheldon*, 13 Neb. 207; *Roberts v. Snow*, 27 Neb. 425.

New Hampshire. — *Edgerton v. Brackett*, 11 N. H. 218; *Doe v. Thompson*, 22 N. H. 217; *Southwick v. Ely*, 15 N. H. 541.

New Jersey. — *Fine v. High Bridge M. E. Church Assoc.*, 44 N. J. L. 148.

New York. — *Commercial Bank v. Union Bank*, 11 N. Y. 203, 19 Barb. (N. Y.) 391; *Considerant v. Brisbane*, 22 N. Y. 389, *reversing* 2 Bosw. (N. Y.) 471, 14 How. Pr. (N. Y.) 487; *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 50 N. Y. St. Rep. 15; *Newcomb v. Clark*, 1 Den. (N. Y.) 226; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599; *Eaton v. Alger*, 57 Barb. (N. Y.) 179; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Devol v. Barnes*, 7 Hun (N. Y.) 342; *Hollingsworth v. Moulton*, 53 Hun (N. Y.) 91; *Freeman v. Falconer*, 44 N. Y. Super. Ct. 132, 45 N. Y. Super. Ct. 383; *Fish v. Jacobsohn*, 5 Bosw. (N. Y.) 514. But see *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Killmore v. Culver*, 24 Barb. (N. Y.) 656; *Bell v. Tilden*, 16 Hun (N. Y.) 346, in which case it was held that a collecting agent could not sue on a bill of exchange, indorsed in blank, under the code provision requiring actions to be brought by the real party in interest.

North Carolina. — *Savage v. Carter*, 64 N. Car. 196. *Contra*, *Abrams v. Cureton*, 74 N. Car. 523, which was decided under a statute requiring every action to be prosecuted in the name of the real party in interest.

Ohio. — *Smead v. Fay*, 1 Disney

his principal is not permitted to work injury to the defendant, who may set up the fact of the agency to let in any defense which he could rely upon in an action by the principal himself on the

(Ohio) 531; *Wayne v. Minor*, 3 Cinc. Wkly. L. Bul. 365, 7 Am. L. Rec. 9.

Oregon. — *Roberts v. Parrish*, 17 Oregon 583.

Pennsylvania. — *Pearce v. Austin*, 4 Whart. (Pa.) 489; *Ward v. Tyler*, 52 Pa. St. 393; *Hanway v. McCullough*, 26 Pa. L. J. 79; *City Bank v. Traders, Nat. Bank*, 2 Lack. Leg. N. (Pa.) 213; *Sterling v. Marietta, etc., Trading Co.*, 11 S. & R. (Pa.) 179.

Rhode Island. — *Cross v. Brown*, 19 R. I. 220.

Tennessee. — *Rutherford v. Mitchell*, 1 Mart. & Y. (Tenn.) 261; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29; *Herron v. Bullitt*, 3 Sneed (Tenn.) 497; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522; *King v. Fleece*, 7 Heisk. (Tenn.) 273.

Texas. — *Andrews v. Hoxie*, 5 Tex. 171; *Frazier v. Moore*, 11 Tex. 755.

Vermont. — *Burlington Bank v. Beach*, 1 Aik. (Vt.) 62; *Binney v. Plumley*, 5 Vt. 500; *Johnson v. Catlin*, 27 Vt. 87.

Washington. — *Riddell v. Prichard*, 12 Wash. 601; *McDaniel v. Pressler*, 3 Wash. 636.

United States. — *Irwin v. Bailey*, 8 Biss. (U. S.) 523; *Orr v. Lacy*, 4 McLean (U. S.) 243.

England. — *Ancona v. Marks*, 7 H. & N. 686; *Adams v. Oakes*, 6 C. & P. 70, 25 E. C. L. 286; *Law v. Parnell*, 7 C. B. N. S. 282, 97 E. C. L. 282, 6 Jur. N. S. 172, 29 L. J. C. P. 17, 8 W. R. 6, 1 L. T. N. S. 32.

Contra. — *Gillispie v. Ft. Wayne, etc., R. Co.*, 12 Ind. 398; *Bostwick v. Bryant*, 113 Ind. 448; *Deuel v. Newlin*, 131 Ind. 40; *Thatcher v. Winslow*, 5 Mason (U. S.) 58; *Welles v. Newberry*, 4 McLean (U. S.) 226. See also *Garland v. Reynolds*, 20 Me. 45; *Richardson v. Gower*, 10 Rich. L. (S. Car.) 109.

Non-negotiable Instruments. — An agent may maintain an action in his own name upon a non-negotiable instrument taken for the benefit of his principal. *Newcomb v. Clark*, 1 Den. (N. Y.) 226; *Doe v. Thompson*, 22 N. H. 217, in which case the action was on a contract promising to pay money on a condition, where no time for the performance of the condition or for payment of the money was mentioned. But see *Gunn v. Cantine*, 10 Johns.

(N. Y.) 387, where it was held that an agent in that case could not maintain an action in his own name, the facts being that the defendant had given the plaintiff a receipt for the article of agreement, under which the defendant had collected the money which the plaintiff sought to recover from him.

Payable to Agent "for Account of" Principal. — In *Ridgely Nat. Bank v. Patton*, 109 Ill. 479, it was held that an attorney might sue in his own name on a check payable to him "for account of" his client.

Special Interest in Agent. — Where an attorney or agent has a lien on a note in his hands he may maintain an action on the note against the persons liable thereon, or against a sub-agent who has collected the note, for the proceeds thereof. *Herron v. Bullitt*, 3 Sneed (Tenn.) 497.

Unauthorized Loan. — An agent may maintain an action in his own name on a promissory note given to him as payee for money of his principal loaned by him without authority. *Bryan v. Wilson*, 27 Ala. 208.

Effect of Right of Action in Principal. — In *Frazier v. Moore*, 11 Tex. 755, it was held that the fact that the principal could have maintained an action on the promissory note in suit in his own name, because the court was one of equity as well as law, did not affect the agent's right to sue thereon.

The Death of the Principal has been held not to prevent the agent from suing in his own name on a note to which he held the legal title. *Moore v. Hall*, 48 Mich. 143; *Clunas v. Gallagher*, 6 La. Ann. 757, in which case, however, the principal was a partnership, of which one member had died, the partnership continuing in business.

Agent of Another Person. — In *Griffith v. Conway*, 45 Mo. App. 574, the right of an agent to maintain an action on a negotiable note was denied because he was not the agent of the person owning the note.

No Action Against Principal. — The fact that an agent cannot sue his principal on a note indorsed to him, is not because he is an improper party plaintiff, but because he has no right of action against the principal. *Herrick v. Carman*, 10 Johns. (N. Y.) 224.

same instrument.¹ An action, however, cannot be maintained by an agent against the express wish or order of the principal, as the latter has at all times the control of the instrument.²

(2) *Action by Principal.* — In most states the principal may also sue on a negotiable instrument payable to an agent.³

d. INSTRUMENT PAYABLE TO PRINCIPAL. — Ordinarily an agent cannot sue on a negotiable instrument payable to his principal.⁴

1. *Gregory v. McNealy*, 12 Fla. 578; *Lacoste v. De Armas*, 2 La. 263.

2. *Bancroft v. Paine*, 15 Ala. 834; *Barker v. Prentiss*, 6 Mass. 430; *Howland v. Spencer*, 14 N. H. 580; *Comstock v. Hoag*, 5 Wend. (N. Y.) 599.

Objection by Assignee in Bankruptcy. — An attorney holding a note for collection has no right to maintain an action thereon against the wishes of his client's assignee in bankruptcy, who has demanded the note from the attorney. *Howland v. Spencer*, 14 N. H. 580.

Payee Forbidden to Pay Agent. — In *Comstock v. Hoag*, 5 Wend. (N. Y.) 599, it was held that an agent could not maintain an action on a note in his hands for collection, after the principal had forbidden the payee to pay it to the agent.

3. *Alabama.* — *McGhee v. Importers'*, etc., Nat. Bank, 93 Ala. 193.

Florida. — *Southern L. Ins., etc., Co. v. Gray*, 3 Fla. 262.

Georgia. — *Martin v. Lamb*, 77 Ga. 252.

Indiana. — *Black v. Enterprise Ins. Co.*, 33 Ind. 223; *Sims v. Wilson*, 47 Ind. 226; *Summers v. Hutson*, 48 Ind. 228; *Nave v. Hadley*, 74 Ind. 155.

Iowa. — *McDowell v. Bartlett*, 14 Iowa 157.

Louisiana. — *Hart v. Windle*, 15 La. 265.

Massachusetts. — *Sherwood v. Roys*, 14 Pick. (Mass.) 172; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 230; *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *National L. Ins. Co. v. Allen*, 116 Mass. 398.

Mississippi. — *Clerk v. Reed*, 12 Smed. & M. (Miss.) 554.

North Carolina. — *Jordan v. Tarkington*, 4 Dev. L. (N. Car.) 358; *Abrams v. Cureton*, 74 N. Car. 523. But see *Savage v. Carter*, 64 N. Car. 196, which was decided before the adoption of the present code.

Vermont. — *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431; *Manchester Bank v. Slason*, 13 Vt. 334; *Vermont Cent. R.*

Co. v. Clayes, 21 Vt. 30; *Rutland, etc., R. Co. v. Cole*, 24 Vt. 33; *U. S. National Bank v. Burton*, 58 Vt. 426. But see *Binney v. Plumley*, 5 Vt. 500; *U. S. Bank v. Lyman*, 20 Vt. 666.

United States. — *Dugan v. U. S.*, 3 Wheat. (U. S.) 172; *Ford v. Williams*, 21 How. (U. S.) 287; *U. S. v. Boice*, 2 McLean (U. S.) 352; *Pacific Guano Co. v. Holleman*, 4 Woods (U. S.) 462; *U. S. v. Barker*, 1 Paine (U. S.) 156.

Contra. — *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29, where it was held that the principal could not sue on a note payable to his agent, because he did not hold the legal title.

An Undisclosed Principal may sue on a promissory note made payable to his agent. *Nave v. Hadley*, 74 Ind. 155; *Ford v. Williams*, 21 How. (U. S.) 287.

Non-negotiable Note. — In *National L. Ins. Co. v. Allen*, 116 Mass. 398, it was held that a principal might maintain an action in his own name on a non-negotiable promissory note payable to his agent, though in fact made for the benefit of the principal; and in *Ford v. Williams*, 21 How. (U. S.) 287, it was held that a principal could sue on an agreement made with his agent to receive and pay for flour at a fixed price.

Original Consideration. — In *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 230, it was held that a principal might recover on the original consideration of a note taken by a factor in his own name for goods of the principal sold by the factor.

The Death of an Agent does not prevent his principal suing in his own name on a note made payable to the agent, who did not transfer it to the principal. *McDowell v. Bartlett*, 14 Iowa 157.

Intervention by Principal. — A principal has been permitted to intervene in an action brought by an assignee of a non-negotiable note made payable to an agent and by him assigned. *Sims v. Wilson*, 47 Ind. 226; *Summers v. Hutson*, 48 Ind. 228.

4. *Jarrell v. Lillie*, 40 Ala. 271; *Chin*

11. Pledgee. — A pledgee of a negotiable instrument may maintain an action thereon in his own name.¹ This is the case, although the pledge is for less than the amount of the security

- Kem You v. Ah Joan*, 75 Cal. 124;
Whiteford v. Burckmyer, 1 Gill (Md.) 127. But see *Elliott v. Miller*, 8 Mich. 132, where it was held that a tax collector's agent, who took a draft on the collector in payment for taxes, might sue thereon when the collector refused to accept the draft. Compare also *Hargous v. Lahens*, 3 Sandf. (N. Y.) 213.
 1. *Arkansas*. — *Turner v. Stroud*, 37 Ark. 556.
Georgia. — *Houser v. Houser*, 43 Ga. 415; *Benson v. Abbott*, 95 Ga. 69.
Illinois. — *Tooke v. Newman*, 75 Ill. 215.
Indiana. — *Rowe v. Haines*, 15 Ind. 445.
Iowa. — *Sheldon v. Middleton*, 10 Iowa 17; *McCarty v. Clark*, 10 Iowa 588; *Bennett v. Stoddard*, 58 Iowa 654.
Kansas. — *Williams v. Norton*, 3 Kan. 295.
Kentucky. — *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790, (Ky. 1892) 18 S. W. Rep. 234.
Louisiana. — *Dolhonde's Succession*, 21 La. Ann. 3; *Ducasse v. Keyser*, 28 La. Ann. 419; *Mechanics', etc., Ins. Co. v. Lozano*, 39 La. Ann. 321; *Gibert v. Siess*, 40 La. Ann. 667.
Maine. — *Fisher v. Bradford*, 7 Me. 28; *Sibley v. Robinson*, 23 Me. 70; *Bean v. Dolliff*, 67 Me. 228.
Massachusetts. — *Bowman v. Wood*, 15 Mass. 534; *Lindsay v. Chase*, 104 Mass. 253; *Paine v. Furnas*, 117 Mass. 290; *New England Trust Co. v. New York Belting, etc., Co.*, 166 Mass. 42.
Michigan. — *Lobdell v. Merchants', etc., Bank*, 33 Mich. 408.
Minnesota. — *Castner v. Austin*, 2 Minn. 44; *White v. Phelps*, 14 Minn. 27.
Mississippi. — *Fox v. Hilliard*, 35 Miss. 160.
Missouri. — *Overall v. Ellis*, 32 Mo. 322.
Nebraska. — *Herron v. Cole*, 25 Neb. 692.
New York. — *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344; *Rogers v. Squires*, 26 Hun (N. Y.) 388; *Delahunt v. Aetna Ins. Co.*, 97 N. Y. 537; *Wagman v. Hoag*, 14 Barb. (N. Y.) 232; *Nelson v. Edwards*, 40 Barb. (N. Y.) 279; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178; *Smith v. Hall*, 5 Bosw. (N. Y.) 319.
North Carolina. — *Triplett v. Foster*, 115 N. Car. 335.
Pennsylvania. — *Logan v. Cassell*, 88 Pa. St. 288.
Tennessee. — *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.
Texas. — *Jackson v. Fawkes*, (Tex. 1892) 20 S. W. Rep. 136.
Vermont. — *Tarbell v. Sturtevant*, 26 Vt. 513.
Washington. — *Seattle Nat. Bank v. Emmons*, 16 Wash. 585.
Wisconsin. — *Hilton v. Waring*, 7 Wis. 492.
 But see *Newbury Bank v. Rand*, 38 N. H. 166; *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717; *Good v. Walker*, 61 L. J. Q. B. 736. And see in general article PLEDGES.
The Mortgage of a Note gives the mortgagee such a property therein that he can sue in his own name on the note. *Fox v. Hilliard*, 35 Miss. 160.
Bona Fide Indebtedness. — Where a promissory note is indorsed as collateral security, the title passes to the indorsee, and he may sue thereon in his own name, without showing that the indebtedness is *bona fide*. *McCarty v. Clark*, 10 Iowa 588.
No New Credit. — In *Rowe v. Haines*, 15 Ind. 445, it was held that the indorsee of a promissory note as collateral security might sue thereon in his own name on an instrument transferred to him by the following indorsement: "I assign the within to A, to secure him as security to E," although he advanced no new credit on the note.
Demand of Repayment. — It is unnecessary that the pledgee of a negotiable note demand repayment to himself from the pledgor, before suing in his own name on the pledged note. *Paine v. Furnas*, 117 Mass. 290.
Indorsed "for the Account of" the Pledgor. — In *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178, and in *Smith v. Hall*, 5 Bosw. (N. Y.) 319, it was held that an indorsee for collateral security might sue on a note transferred to him under an indorsement "for the account of" his pledgor.
Pledgor's Assent. — In *Lobdell v. Merchants', etc., Bank*, 33 Mich. 408, it was said that a pledgee of a note as collateral security might sue thereon with the assent of the pledgor.

transferred,¹ and it is immaterial to the pledgor's right to maintain the action whether the instrument was transferred to him before² or after its maturity.³ It has even been held that a pledgee may sue on a negotiable instrument in his hands as collateral security after the pledge has been redeemed,⁴ but there are authorities to the contrary.⁵

Without Indorsement. — It seems that to entitle a pledgee to sue in his own name on an instrument transferred to him as collateral security, no indorsement by the pledgor is necessary.⁶

12. Pledgor. — Some cases hold that a pledgor may also sue on an instrument pledged by him, at least with the assent of the pledgee.⁷ He may, of course, maintain such an action after the pledge has been redeemed.⁸

13. Heir, Distributee, or Legatee — In General. — At common law an action cannot be maintained by an heir, distributee, or legatee, on a negotiable instrument payable to the decedent.⁹

Legatee. — At common law a legatee cannot sue in his own name on a negotiable instrument bequeathed to him by the payee.¹⁰

14. Executors and Administrators — a. INSTRUMENT PAYABLE TO EXECUTOR OR ADMINISTRATOR. — On negotiable instruments made payable to an executor or administrator, such repre-

1. *Tooke v. Newman*, 75 Ill. 215; *Jackson v. Fawkes*, (Tex. 1892) 20 S. W. Rep. 136.

2. *Dolhonde's Succession*, 21 La. Ann. 3.

3. *White v. Phelps*, 14 Minn. 27.

4. *Sibley v. Robinson*, 23 Me. 70; *Logan v. Cassell*, 88 Pa. St. 288.

5. *Bean v. Dolliff*, 67 Me. 228; *New England Trust Co. v. New York Belting, etc., Co.*, 166 Mass. 42.

6. *Benson v. Abbott*, 95 Ga. 69; *Williams v. Norton*, 3 Kan. 295; *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344. But see *Good v. Walker*, 61 L. J. Q. B. 736.

7. *Greer v. Woolfolk*, 60 Ga. 623; *Haug v. Riley*, 101 Ga. 372; *Henderson v. Davisson*, 157 Ill. 379; *Hapgood v. Wellington*, 136 Mass. 217; *Utica Bank v. M'Kinster*, 11 Wend. (N. Y.) 473, affirming 9 Wend. (N. Y.) 46. *Contra*, *Felton v. Smith*, 84 Ind. 485; *Smith v. Felton*, 85 Ind. 223.

Negligence in Collecting. — In *Utica Bank v. M'Kinster*, 11 Wend. (N. Y.) 473, affirming 9 Wend. (N. Y.) 46, it was held that a pledgor might recover in his own name against a bank which had been guilty of negligence in collecting negotiable paper left with it for collection, though the plaintiff had transferred his rights in such paper to another person as collateral security.

8. *Norris v. Hix*, 74 Iowa 524.

9. *Leamon v. McCubbin*, 82 Ill. 263; *Haynes v. Harris*, 33 Iowa 516; *Wilcox v. Matteson*, 53 Wis. 23. For the general rule and its exceptions, with a citation of numerous authorities, see article LEGATEES AND DISTRIBUTEES, vol. 13, p. 2.

After Distribution by Agreement. — In *Carter v. Owens*, 41 Ala. 217, a distributee of a decedent's estate, to whom a promissory note, assets of the estate, had been allotted as part of his share under a division of the estate on an agreement among the parties interested, was permitted to maintain an action at law in his own name on such instrument, under Ala. Code, § 2523.

10. *Bishop v. Curtis*, 18 Q. B. 878, 83 E. C. L. 878, 21 L. J. Q. B. 391, 17 Jur. 23; *Kent v. Somervell*, 7 Gill & J. (Md.) 265, holding, however, that under the statute of Maryland then in force such an action might be maintained.

Donee Causa Mortis. — In *Kiff v. Weaver*, 94 N. Car. 274, it was held that a donee causa mortis might, under the statutes of North Carolina, sue in his own name on bills of exchange or promissory notes payable to the order of the decedent, and transferred to the plaintiff without indorsement.

sentative may sue either in his official or in his individual capacity.¹

Death of Executor or Administrator. — Where a negotiable instrument is made payable to an executor or administrator, and such executor or administrator dies, an action on the instrument may be brought by his personal representative.² It has also been held, however, that in such case the administrator *de bonis non* of the first decedent may sue on such instrument.³

b. INSTRUMENT PAYABLE TO DECEDENT. — On negotiable instruments payable or transferred to a deceased person in his lifetime, his executor or administrator may maintain an action,⁴

1. *Waldrop v. Pearson*, 42 Ala. 636; *Oglesby v. Gilmore*, 5 Ga. 56; *Ratcliff v. Everman*, 87 Ind. 446; *Carleton v. Byington*, 17 Iowa 579; *Clampitt v. Newport*, 8 La. Ann. 124; *Rector v. Langham*, 1 Mo. 568; *Smith v. Monks*, 55 Mo. 106; *Smith v. Gregory*, 75 Mo. 121; *Merritt v. Seaman*, 6 N. Y. 168; *Litchfield v. Flint*, 104 N. Y. 543; *King v. Thom*, 1 T. R. 487; *Betts v. Mitchell*, 10 Mod. 316. For authorities on the same point, see article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 660, note.

Note Payable to Agent of Administrator. — On a promissory note made payable "to W. A. M., agent of M. W., executrix of J. H. W. deceased," the executrix may maintain an action in her official capacity. *Goodman v. Walker*, 30 Ala. 482.

After Transfer. — Where a sealed note, payable to A as administrator, has been transferred to B, and he thereby becomes the legal owner and holder of it, an action on the note may be maintained in the name of A as administrator, who sues for the sole use and benefit of B. *Carroll v. Still*, 13 S. Car. 430.

Administrator as Surety. — In *Moore v. Randolph*, 70 Ala. 575, it was held that an administrator could not maintain an action on a note payable to himself in his representative capacity, and signed by him as surety for the principal maker, yet it seems that his successor in the administration might sue upon such a note.

Uncertainty as to Payee. — In *Bennington v. Dinsmore*, 2 Gill (Md.) 348, it was held that an action could not be maintained upon a note payable to "the heirs, administrators, or assigns of the estate of A., deceased," because of the uncertainty as to which party ought to sue.

After Resignation or Removal. —

Where an executor takes a non-negotiable instrument from one to whom he loans money of the estate without authority, he may sue on such contract in his own name, notwithstanding he has resigned or been removed from the administration, unless it is shown that he has been in some way discharged from the liability incurred. *Tomkies v. Reynolds*, 17 Ala. 109.

2. *Arrington v. Hair*, 19 Ala. 243; *Cook v. Holmes*, 29 Mo. 61.

Death Pending Suit. — In *Arrington v. Hair*, 19 Ala. 243, it was held that an action brought by an executor or administrator on a note payable to himself in that capacity, might on his death, pending the suit, be revived in the name of his personal representative.

3. *Sheets v. Pabody*, 6 Blackf. (Ind.) 120; *Batchelor v. Douglas*, 31 Tex. 182.

4. *Georgia.* — *Austell v. Rice*, 5 Ga. 472.

Illinois. — *Orr v. Thompson*, 9 Ill. 451; *Newhall v. Turney*, 14 Ill. 338.

Louisiana. — *Ricard v. Harrison*, 19 La. Ann. 181.

Maine. — *Gage v. Johnson*, 20 Me. 437; *Brown v. Nourse*, 55 Me. 230.

Maryland. — *Lucas v. Byrne*, 35 Md. 485.

Massachusetts. — *Russell v. Swan*, 16 Mass. 314; *Holcomb v. Beach*, 112 Mass. 450; *Sigourney v. Severy*, 4 Cush. (Mass.) 176; *Bates v. Kempton*, 7 Gray (Mass.) 382.

Minnesota. — *Cooper v. Hayward*, (Minn. 1898) 74 N. W. Rep. 152.

Missouri. — *Bobb v. Letcher*, 30 Mo. App. 43.

New Hampshire. — *Woodbury v. Woodbury*, 47 N. H. 11.

New Jersey. — *Nash v. Hogan*, 45 N. J. Eq. 108.

New York. — *Barlow v. Myers*, 24

either in his official capacity¹ or in his individual capacity, if the instrument be indorsed in blank or payable to bearer.²

Action for Another's Benefit. — It seems that a personal representative may maintain an action on negotiable instruments payable to his testator or intestate, though the beneficial ownership of such instruments is in another person, and they do not belong to the estate.³

Hun (N. Y.) 286; Patchen v. Wilson, 4 Hill (N. Y.) 57.

North Carolina. — Blankenship v. Hunt, 76 N. Car. 377.

South Carolina. — Brooks v. Floyd, 2 McCord L. (S. Car.) 364.

Tennessee. — Walker v. Galbreath, 3 Head (Tenn.) 315.

Texas. — Rider v. Duval, 28 Tex. 622.

Vermont. — Baxter v. Buck, 10 Vt. 548. Compare Wheelock v. Wheelock, 5 Vt. 433.

West Virginia. — Keller v. McMuffman, 15 W. Va. 64.

Wisconsin. — Sanford v. McCreedy, 28 Wis. 103.

England. — Murray v. East India Co., 5 B. & Ald. 204, 7 E. C. L. 66; Bishop v. Curtis, 18 Q. B. 878, 83 E. C. L. 878, 21 L. J. Q. B. 391, 17 Jur. 23.

Payable to A, "Lawful Attorney of B." — An administrator of A may sue on a note payable to A, "lawful attorney of B," after the death of A. Austell v. Rice, 5 Ga. 472.

Joint Note. — In Russell v. Swan, 16 Mass. 314, it was held that an action was properly brought in the name of the executrix of one of the joint payees of a note, to whom the other payee had indorsed it.

Delivery After Death. — An administrator in his representative capacity may maintain an action as bearer on a note payable to the intestate or bearer, although such note was not delivered until after the death of the intestate. Baxter v. Buck, 10 Vt. 548.

Transfer by Widow of Payee. — In *New Jersey* an action at law lies on a negotiable promissory note transferred to the holder by the widow of the payee, without indorsement, and should be brought in the name of the payee's representatives. Nash v. Hogan, 45 N. J. Eq. 108.

Personal Representative of Survivor. — If a note is executed to two, as partners or joint payees, upon the death of one the legal title and right to sue on the note rests in the survivor, and his personal representatives can maintain

an action thereon after his death. Walker v. Galbreath, 3 Head (Tenn.) 315.

1. Gage v. Johnson, 20 Me. 437; Patchen v. Wilson, 4 Hill (N. Y.) 57; Brooks v. Floyd, 2 McCord L. (S. Car.) 364; Baxter v. Buck, 10 Vt. 548; Murray v. East India Co., 5 B. & Ald. 204, 7 E. C. L. 66.

Instrument Executed After Death of Decedent. — In Murray v. East India Co., 5 B. & Ald. 204, 7 E. C. L. 66, an agent purchased a bill of exchange with money belonging to his principal, and indorsed it specially to the principal, in ignorance of the latter's death prior to such transaction, and it was held that the administrator of the principal might sue thereon in his official capacity.

2. Ricard v. Harrison, 19 La. Ann. 181; Gage v. Johnson, 20 Me. 437; Lucas v. Byrne, 35 Md. 485; Holcomb v. Beach, 112 Mass. 450; Barlow v. Myers, 24 Hun (N. Y.) 286; Brooks v. Floyd, 2 McCord L. (S. Car.) 364; Rider v. Duval, 28 Tex. 622; Sanford v. McCreedy, 28 Wis. 103.

A Note Payable to the Decedent or Order, and Not Indorsed, must be sued on by the administrator or executor in his representative capacity. Woodbury v. Woodbury, 47 N. H. 11; Patchen v. Wilson, 4 Hill (N. Y.) 57.

3. Orr v. Thompson, 9 Ill. 451; Bates v. Kempton, 7 Gray (Mass.) 382; Sigourney v. Severy, 4 Cush. (Mass.) 176; Cooper v. Hayward, (Minn. 1898) 74 N. W. Rep. 152.

Administrator of Beneficiary. — It was held in Wheelock v. Wheelock, 5 Vt. 433, that on a note payable to A B, guardian of C D, an action must be brought in the name of A B, and not in the name of the administrator of C D.

Notes Payable to Sheriff. — It was held in Pratt v. Carr, 46 Ind. 67, that where a sheriff was ordered to sell property attached by him, and take notes in payment, and to hold the proceeds subject to the order of the court, and the sheriff took the notes payable to himself personally, his administrator

Reviver. — Where, pending an action on a negotiable instrument, the owner dies, the action may be revived by his executor or administrator in his own name.¹

Foreign Executor or Administrator. — In some cases a foreign executor or administrator may sue in his own name on promissory notes belonging to the estate; in others the action should be brought in his representative capacity.²

16. Guardian. — On a negotiable instrument made payable to a guardian, the guardian may maintain an action³ in his own name.⁴

could not sue on such notes, as they were payable to the sheriff merely as a trustee.

1. *Bradley v. Graves*, 46 Ala. 277; *Biggs v. Williams*, 66 N. Car. 427; *Godbold v. Meggison*, 16 Ala. 140, in which last case it was held that where a note given to one as guardian is sued on in his name, and he dies, the suit should be revived in the name of his administrator, and not in that of the minor, or of a guardian subsequently appointed.

In Name of Original Plaintiff. — In *Bentley v. Dickson*, 1 Ark. 165, it was held that if the plaintiff dies pending an action of debt on a promissory note, the action may be revived by his executor in the name of the original plaintiff.

Assignment Pending Suit. — It was held in *Reynolds v. Quaelly*, 18 Kan. 361, where the plaintiff in an action on a note assigned it while suit was pending thereon, and afterwards died, that the action could not be prosecuted to final judgment in the name of the administrator of the plaintiff, but that it should have been revived in the name of the assignee.

2. See article EXECUTORS AND ADMINISTRATORS, vol. 8, pp. 700, 711.

Insurance Policy. — In *Goodwin v. Jones*, 3 Mass. 514, it was held that a foreign administrator could not bring an action in *Massachusetts* on a policy of insurance.

3. *Godbold v. Meggison*, 16 Ala. 140; *Bradley v. Graves*, 46 Ala. 277; *Sainsevain v. Luce*, (Cal. 1894) 35 Pac. Rep. 1033; *Baker v. Ormsby*, 5 Ill. 325; *Shepherd v. Evans*, 9 Ind. 260; *Cocke v. Rucks*, 34 Miss. 105; *Chambless v. Vick*, 34 Miss. 109; *Mebane v. Mebane*, 66 N. Car. 334; *Biggs v. Williams*, 66 N. Car. 427; *Gard v. Neff*, 39 Ohio St. 607; *Zachary v. Gregory*, 32 Tex. 452; *Ezell v. Edwards*, 2 Tex. App. Civ.

Cas., § 769; *Wheelock v. Wheelock*, 5 Vt. 433.

After Final Settlement and Discharge.

— If a note is made payable to A. as guardian, the legal title is *prima facie* in A., and he will be entitled to sue on it, notwithstanding his official settlement and discharge, unless it be shown that he has parted with his title, or that payment to him would be no discharge to the obligor. *Chambless v. Vick*, 34 Miss. 109.

Afterward Reaching Majority. — A guardian may sue on an instrument payable to himself as guardian, notwithstanding the fact that before the action is brought, or while it is pending, the ward attains his majority. *Gard v. Neff*, 39 Ohio St. 607; *Zachary v. Gregory*, 32 Tex. 452.

Possession Not Essential. — Where a note was given and made payable to A. as guardian, and was afterward, in settlement, delivered to the husband of the ward, without indorsement, it was held that a suit upon such note was properly brought in the name of the guardian, to the use of the husband and wife. *Mebane v. Mebane*, 66 N. Car. 334.

4. *Bradley v. Graves*, 46 Ala. 277; *Bingham v. Calvert*, 13 Ark. 399; *Sainsevain v. Luce*, (Cal. 1894) 35 Pac. Rep. 1033; *Baker v. Ormsby*, 5 Ill. 325; *Shepherd v. Evans*, 9 Ind. 260; *Cocke v. Rucks*, 34 Miss. 105; *Zachary v. Gregory*, 32 Tex. 452; *Ezell v. Edwards*, 2 Tex. App. Civ. Cas., § 769.

Under California Code. — It was held in *Sainsevain v. Luce*, (Cal. 1894) 35 Pac. Rep. 1033, that though the Code of California prescribes that a guardian must sue in the name of his ward, an action may be maintained on a note payable to a certain person described as "guardian," unless it is shown that there is a ward or trust estate.

Guardian a Joint Payee. — In *Ezell v.*

16. Husband and Wife — Action by Husband. — On instruments payable to a married woman, at least at common law, an action may be maintained by the husband in his own name,¹ and this whether the instrument was executed to the wife before her marriage² or during coverture.³ So, on an instrument payable to bearer, and belonging to the wife, it seems that the husband may sue,⁴ or on one indorsed in blank.⁵

Action by Wife. — At common law a married woman could not maintain an action in her own name on negotiable instruments payable to her.⁶

17. Drawer — Action Against Acceptor. — The drawer of a bill of exchange which is payable to his own order or which has been taken up by him may maintain an action thereon against the acceptor,⁷ and such an action may be maintained without an

Edwards, 2 Tex. App. Civ. Cas., § 769, it was held that on a note payable jointly to a guardian and her ward, the guardian might maintain an action in her own name.

Guardianship Terminated. — The legal title to the note being in the plaintiff, as guardian, suit may be brought in his name, notwithstanding his guardianship may have lapsed. *Zachary v. Gregory*, 32 Tex. 452.

Payable to Predecessor. — A guardian may maintain an action in his own name to enforce the collection of a note payable to his predecessor, "as guardian" for the ward. *Cocke v. Rucks*, 34 Miss. 105.

1. *Alabama.* — *Hollifield v. Wilkinson*, 54 Ala. 275.

Illinois. — *Young v. Ward*, 21 Ill. 223.

Massachusetts. — *Sutton v. Warren*, 10 Met. (Mass.) 451.

South Carolina. — *Ahrens v. State Bank*, 3 S. Car. 401; *Fort v. Brunson*, 2 Spears L. (S. Car.) 658.

England. — *M'Neillage v. Holloway*, 1 B. & Ald. 218; *Burrough v. Moss*, 10 B. & C. 558, 21 E. C. L. 128; *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Howard v. Okes*, 3 Exch. 136.

Contra. — *Blackwood v. Brown*, 32 Mich. 104.

Payable to Wife or Husband. — In *Young v. Ward*, 21 Ill. 223, it was held that on a note payable to a wife or her husband, action should be brought either in the name of the husband, or by the husband and wife.

2. *M'Neillage v. Holloway*, 1 B. & Ald. 218; *Burrough v. Moss*, 10 B. & C. 558, 21 E. C. L. 128.

3. *Hollifield v. Wilkinson*, 54 Ala. 275; *Sutton v. Warren*, 10 Met. (Mass.)

451; *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Howard v. Okes*, 3 Exch. 136.

Pretended Marriage. — Where a man and woman cohabit as husband and wife, under a pretended marriage, he having a former wife living, and a note is given to her by her name as his wife, an action cannot be sustained thereon in his name. *Cram v. Burnham*, 5 Me. 213.

4. *Fort v. Brunson*, 2 Spears L. (S. Car.) 658.

Contra. — *Blackwood v. Brown*, 32 Mich. 104, where the action was on a duebill, not negotiable; *Craige v. Tingle*, 63 Ga. 274, where the wife was dead.

5. *Ahrens v. State Bank*, 3 S. Car. 401.

6. *Kimbro v. Washington First Nat. Bank*, 1 MacArthur (D. C.) 61; *Tullis v. Fridley*, 9 Minn. 79; *Richards v. Richards*, 2 B. & Ad. 447, 22 E. C. L. 119. Compare *Corcoran v. Doll*, 32 Cal. 83. See generally, for the common-law rule and effect of Married Women's Acts, and of various statutory and code provisions relating to procedure, article HUSBAND AND WIFE, vol. 10, p. 191.

7. *Kinney v. Heald*, 17 Ark. 397; *Cooper v. Jones*, 79 Ga. 379; *Titcomb v. Thomas*, 5 Me. 282; *Kingman v. Hotelling*, 25 Wend. (N. Y.) 423; *Zebley v. Voisin*, 7 Pa. St. 527; *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102; *Coursin v. Ledlie*, 31 Pa. St. 506; *Davis v. M'Connell*, 3 McLean (U. S.) 391; *Parminter v. Symons*, 4 Bro. P. C. 610, 1 Wils. 185; *Louviere v. Laubray*, 10 Mod. 36.

For Benefit of Assignee. — It was held in *Titcomb v. Thomas*, 5 Me. 282, that the drawer of a bill of exchange might

indorsement by the payee.¹

18. Fictitious Payees and Plaintiffs — Instrument Payable to Fictitious Person. — On an instrument made payable to a non-existent or fictitious person, an action may be maintained in the name of any person.²

Action in Name of Fictitious Person. — It seems that, in some states at least, an action on a negotiable instrument may be maintained in the name of a fictitious person.³

19. Transfer Pending Suit. — The transfer of a negotiable instrument on which a suit is pending does not cause a dismissal or abatement of such action, but the suit may continue for the benefit of the transferee,⁴ and even when there is a payment to the plaintiff pending the suit by some person not primarily liable, the action may be continued for the benefit of the person so

sue the acceptor thereon in his own name for the benefit of a person to whom the bill had been assigned by delivery, without indorsement; and in *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102, the same was held of a bill payable in specific articles of merchandise, in which case it was held that the transferee could not sue the acceptor in his own name. In *Beck v. Robley*, 1 H. Bl. 89, note *a*, it was held that one to whom a drawer of a bill of exchange had transferred it after he had taken it up could not maintain an action against the acceptor.

1. *Cooper v. Jones*, 79 Ga. 379; *Kingman v. Hotelling*, 25 Wend. (N. Y.) 423; *Zebble v. Voisin*, 7 Pa. St. 527; *Coursin v. Ledlie*, 31 Pa. St. 506; *Parminter v. Symons*, 4 Bro. P. C. 610, 1 Wils. 185. But see *Smith v. Bryan*, 11 Ired. L. (N. Car.) 418; *Henneman v. Thomson*, 8 S. Car. 115.

2. *Farnsworth v. Drake*, 11 Ind. 101; *Rogers v. Ware*, 2 Neb. 29; *Foster v. Shattuck*, 2 N. H. 446; *Elliot v. Abbot*, 12 N. H. 549; *Hunt v. Aldrich*, 27 N. H. 31; *Plets v. Johnson*, 3 Hill (N. Y.) 112; *Central Bank v. Lang*, 1 Bosw. (N. Y.) 202; *In re Pendleton Hardware Co.*, 24 Oregon 330; *Davega v. Moore*, 3 McCord L. (S. Car.) 482; *Smith v. Clapp*, 15 Pet. (U. S.) 125; *Collis v. Emmet*, 1 H. Bl. 313; *Gibson v. Minet*, 1 H. Bl. 569.

Payable to Person Without Interest. — In *Rogers v. Ware*, 2 Neb. 29, it was held that a bill payable to some person who had no interest in it and was not intended to become a party to it, whether such person was known to exist or not, was to be deemed payable to a fictitious person.

Instrument Discounted by Another than Payee. — Where an instrument is payable to a certain person, but never comes into his hands, being discounted by another person, it has been held in several cases that the latter might treat such instrument as payable to a fictitious person and sue thereon accordingly. *Elliot v. Abbot*, 12 N. H. 549; *Hunt v. Aldrich*, 27 N. H. 31; *In re Pendleton Hardware Co.*, 24 Oregon 330.

Payable to Order of Maker. — Notes payable to the order of the maker have been held, under the *New York* statute, to be capable of being sued on as though payable to a fictitious person. *Plets v. Johnson*, 3 Hill (N. Y.) 112.

Payable to Order Only. — On a note payable "to order" only, no payee being named, an action may be maintained by any holder, as on a note payable to a fictitious person. *Davega v. Moore*, 3 McCord L. (S. Car.) 482.

3. *Lineker v. Ayeshford*, 1 Cal. 78; *Epting v. Jones*, 47 Ga. 622; *Ogilby v. Wallace*, 2 Hall (N. Y.) 553.

Bill of Lading. — In *Lineker v. Ayeshford*, 1 Cal. 78, it was held that an action on a bill of lading was not a negotiable instrument within the rule permitting actions on such instruments to be brought in the names of fictitious persons.

4. *Ivey v. Drake*, 36 Ark. 228; *Keyser v. Shepherd*, 2 Mackey (D. C.) 66; *Williamson v. Allen*, 2 Gill & J. (Md.) 344; *Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563; *Enston v. Friday*, 2 Rich. L. (S. Car.) 427; *Dowell v. Mills*, 32 Tex. 440. *Contra*, *Hall v. Gentry*, 1 A. K. Marsh. (Ky.) 555.

paying.¹ In other cases it has been held that the transferee might be substituted as plaintiff in the action, and the action continued.²

VII. JOINDER OF PARTIES PLAINTIFF — 1. Joint Payees, Indorsees, or Assignees. — Where an instrument is owned by two or more persons as payees, indorsees, or assignees, an action thereon is properly brought in the names of all of them.³

1. *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353; *Low v. Blodgett*, 21 N. H. 121. But see *Heighe v. Farmers' Bank*, 5 Har. & J. (Md.) 68, where it was held that an action by an indorsee to annul a fraudulent conveyance made by the maker of a note, could not be continued for the benefit of an indorser, who paid the claim while this action was pending.

2. *Ferry v. Page*, 8 Iowa 455; *Fannon v. Robinson*, 10 Iowa 272; *Concord Granite Co. v. French*, 3 Civ. Pro. Rep. (N. Y. C. Pl.) 445, 65 How. Pr. (N. Y.) 317, affirming 3 Civ. Pro. Rep. (N. Y.) 56.

3. *Alabama*. — *Hanna v. Ingram*, 93 Ala. 482. Compare *Huntley v. Lang*, 5 Port. (Ala.) 154.

Arkansas. — *Gell v. Snow*, 24 Ark. 554.

Colorado. — *Davis v. Wannamaker*, 2 Colo. 637.

Connecticut. — *Hunt v. Pierpont*, 27 Conn. 305.

Illinois. — *Miller v. Bledsoe*, 2 Ill. 530.

Iowa. — *McNamee v. Carpenter*, 56 Iowa 276.

Kansas. — *Stauffer v. Doty*, 2 Kan. App. 149. But see *Swenson v. Moline Plow Co.*, 14 Kan. 387.

Massachusetts. — *Flint v. Flint*, 6 Allen (Mass.) 34.

Mississippi. — *Morris v. Hillery*, 7 How. (Miss.) 61.

New Hampshire. — *Willoughby v. Willoughby*, 5 N. H. 244.

Ohio. — *Pugh v. Holliday*, 3 Ohio St. 285.

Rhode Island. — *Westgate v. Healy*, 4 R. I. 523.

South Carolina. — *Ellis v. McLemoor*, 1 Bailey L. (S. Car.) 13.

Tennessee. — *Wright v. McLemore*, 10 Yerg. (Tenn.) 235; *Neely v. Morris*, 2 Head (Tenn.) 595.

Texas. — *Avery v. Popper*, (Tex. Civ. App. 1895) 34 S. W. Rep. 325.

Vermont. — *Spencer v. Dearth*, 43 Vt. 98.

Wisconsin. — *School Districts v. Edwards*, 46 Wis. 150.

England. — *Ord v. Portal*, 3 Campb. 239; *Guidon v. Robson*, 2 Campb. 302;

Rordasnz v. Leach, 1 Stark. 446, 2 E. C. L. 172. But see *Machell v. Kinnear*, 1 Stark. 499, 2 E. C. L. 191.

Compare *Herrick v. Swomley*, 56 Md. 439; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301; *Ferriss v. North American F. Ins. Co.*, 1 Hill (N. Y.) 71; *Delano v. Jacoby*, 96 Cal. 275.

Collateral Security for Two Several Debts. — In *Murray v. Judah*, 6 Cow. (N. Y.) 484, it was held that though a check was transferred to two persons as collateral security for two several debts due to them respectively, one alone might sue upon it, and that possession by him was *prima facie* evidence that the other had transferred his interest to him.

Note Payable to A or B. — It was held in *Willoughby v. Willoughby*, 5 N. H. 244, that on a promissory note payable to A or B, they must sue jointly, as such a note is evidence of a joint contract. See also *Westgate v. Healy*, 4 R. I. 523. But in *Ellis v. McLemoor*, 1 Bailey L. (S. Car.) 13, it was held that an action might be maintained on such an instrument by either A or B, the note being construed as a several contract, and not as one that is joint and several.

Duebill. — In *Hunt v. Pierpont*, 27 Conn. 305, it was held that a duebill originally due to the plaintiff and another person, and subsequently assigned to the plaintiff, must be sued upon by the plaintiff in the names of the parties to whom it was payable, the court saying: "In this respect it was like a non-negotiable note in the hands of an assignee. He could only sue it in the name of the promisee, but the surrendering it to the maker, on his promise to pay the amount, or on an agreement to charge it on book, would give a right of action to the assignee in his own name."

Joint and Several Note. — It was held in *Regan v. Jones*, 1 Wyoming 210, that on a joint and several note payable to the order of the plaintiff and another party, and by such person indorsed to the plaintiff, the plaintiff could sue alone on the note.

Survivor. — Where a negotiable instrument is payable to several

Payment to One Joint Payee. — Two or three joint payees of a promissory note may maintain an action against the maker for their interests in the note, where the maker has paid the other payee his proportion. *Donaldson v. Dow*, 5 Dane's Abr. 452.

Negligence in Collecting. — It was held in *Soule v. Mogg*, 35 Hun (N. Y.) 79, that where an agent to whom a check was indorsed for collection had been so negligent that the check became worthless, one of several owners of the check might sue for his interest without joining the co-owners.

Firm or Partner. — Where a note is made payable to one member of a firm, when the consideration is money advanced by the firm, the payee can sue thereon without joining his copartners. *Mynderse v. Snook*, 1 Lans. (N. Y.) 488.

Transfer of Interest of One Joint Payee. — An action may be maintained in the names of the joint payees of an instrument, although one of them has assigned his interest therein. *Hanna v. Ingram*, 93 Ala. 482; *Miller v. Bledsoe*, 2 Ill. 530. But see *Ferriss v. North American F. Ins. Co.*, 1 Hill (N. Y.) 71; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301.

Where one of two persons to whom an instrument is payable assigns all his interest therein to the other, the holder may sue thereon alone. *Jones v. Hawkins*, 17 Ind. 550; *Smith v. Oldham*, 5 Mo. 483; *Smith v. Gregory*, 75 Mo. 121; *Malley v. Weinman*, 48 Vt. 180; *Regan v. Jones*, 1 Wyoming 210.

Refusal to Join. — Where a note is made payable to two or more persons jointly, the payees must join in an action thereon unless one or more of them refuse so to join, in which case those refusing may be made defendants. *McNamee v. Carpenter*, 56 Iowa 276.

Payable to Bearer. — The fact that an instrument is payable to certain persons jointly, or bearer, does not entitle one of the payees to sue thereon in his own name alone. *McNamee v. Carpenter*, 56 Iowa 276.

Assignees of Parts of a Note may join in an action thereon, *Flint v. Flint*, 6 Allen (Mass.) 34; *Avery v. Popper*, (Tex. Civ. App. 1895) 34 S. W. Rep. 325; although their interests are not equal, *Stauffer v. Doty*, 2 Kan. App. 149.

Several School Districts, for whose benefit a town treasurer has turned over a duebill given for drainage funds regularly determined by the town supervisors to be applied to the support of common schools in their town, can maintain a joint action thereon against the makers, even though the proportions in which they are entitled to the money are unascertained and unequal. *School Districts v. Edwards*, 46 Wis. 150.

Partners Not Named in Note. — In an action by partners upon a promissory note, payable to one and company, it should be proved that all joining as plaintiffs were partners with the one named in the note at the time it was executed. *Hunley v. Lang*, 5 Port. (Ala.) 154.

Member of Two Firms. — Under a statute of *Mississippi* declaring all notes joint and several, a member of a firm may be a coplaintiff in a suit on a promissory note against another firm, of which he is a partner, providing he is not also joined in the action as defendant. *Morris v. Hillery*, 7 How. (Miss.) 61.

Indorsement in Blank. — On an instrument indorsed in blank, two or more persons may be joined as plaintiffs, although they are not owners of the instrument as partners. *Neely v. Morris*, 2 Head (Tenn.) 595; *Ord v. Portal*, 3 Campb. 239; *Rordasz v. Leach*, 1 Stark. 446, 2 E. C. L. 172.

Transfer by Bankrupt. — Where one of the payees of a promissory note transfers his interest therein, and subsequently becomes a bankrupt, he may properly be joined as a plaintiff in an action on such instrument by the other payees, but when he becomes bankrupt without having transferred his interest, his assignee in bankruptcy must be joined. *Pugh v. Holliday*, 3 Ohio St. 285.

One in the Name of All. — In *Wright v. McLemore*, 10 Yerg. (Tenn.) 235, it was held that on an instrument payable to several jointly, one of the joint payees or his assignee might maintain an action in the name of all the payees without their consent.

Joint and Several Promisors on a note may join in an action of trover for the note when they have paid it, and the defendant refused to give it up. *Spencer v. Dearth*, 43 Vt. 98.

persons jointly, on the death of one or more of them the survivors may sue thereon alone.¹

2. Transferrer and Transferee. — The transferrer of an instrument need not be joined in an action thereon by the transferee,² but where the transfer is insufficient to pass the legal title to the transferee it seems necessary to join the transferrer as a party plaintiff,³ as where the transfer is by parol,⁴ or where only a portion of the instrument is transferred.⁵ When an accepted bill has been taken up by the drawer, he may sue thereon without joining subsequent parties.⁶

3. Beneficial Owner. — In an action by a person holding the legal title to a negotiable instrument, the beneficial owner of such instrument need not be joined as a coplaintiff,⁷ and so the holder of the legal title may sue alone on an instrument in which there are other persons interested with him,⁸ and one member of a firm need not join his copartner in an action on an instrument payable to him, though really the property of the firm.⁹

1. *Alabama*. — *Waldrop v. Pearson*, 42 Ala. 636.

Arkansas. — *Roane v. Lafferty*, 5 Ark. 465; *Conway v. Roane*, 10 Ark. 242. But see *Robinson v. Denton*, 6 Ark. 283.

Indiana. — *Musselman v. Cravens*, 47 Ind. 1.

Mississippi. — *Allen v. Tate*, 58 Miss. 585.

But see *Hansell v. Gregg*, 7 Tex. 223.

2. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541; *Abshire v. Corey*, 113 Ind. 484; *Swenson v. Moline Plow Co.*, 14 Kan. 387; *True v. Triplett*, 4 Metc. (Ky.) 57; *Leacock v. Hall*, 13 B. Mon. (Ky.) 211; *Castner v. Austin*, 2 Minn. 44; *White v. Phelps*, 14 Minn. 27; *Harding v. Cobb*, 47 Miss. 599; *Gudger v. Baird*, 66 N. Car. 438; *Curtis v. Mohr*, 18 Wis. 615.

No Written Assignment. — In *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541, it was held that the assignee of a written acknowledgment of debt need not be joined as a party plaintiff, although he had transferred it without a written assignment.

Proper Parties. — In *Palmer v. Mt. Sterling Nat. Bank*, (Ky. 1892) 18 S. W. Rep. 234, it was held that the pledgor of a note might properly be joined in an action thereon by the pledgee.

3. *Miller v. Bledsoe*, 2 Ill. 530; *Farnsworth v. Drake*, 11 Ind. 103; *Perry v. Seitz*, 2 Duv. (Ky.) 122; *Gill v. Johnson*, 1 Metc. (Ky.) 649. *Contra*, *Rogge v. Cassidy*, (Ky. 1890) 13 S. W. Rep.

716, 12 Ky. L. Rep. 54; *Harding v. Cobb*, 47 Miss. 599; *Smith v. Walker*, Smed. & M. Ch. (Miss.) 432. But see *Heartman v. Franks*, 36 Ark. 501.

4. *Perry v. Seitz*, 2 Duv. (Ky.) 122; *Gill v. Johnson*, 1 Metc. (Ky.) 649.

5. *Miller v. Bledsoe*, 2 Ill. 530.

6. *Miller v. Henshaw*, 4 Dana (Ky.) 325. But see *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328; *Adair v. Caldwell*, 1 A. K. Marsh. (Ky.) 55.

7. *Stoll v. Sheldon*, 13 Neb. 207; *Nelson v. Eaton*, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113, 15 How. Pr. (N. Y. Supreme Ct.) 305, *reversing* 7 Abb. Pr. (N. Y.) 305; *Davidson v. Elms*, 67 N. Car. 228; *Wilson v. Lexington Bank*, 72 N. Car. 621; *Humphreys v. Pearce*, 1 Duv. (Ky.) 237; *Carpenter v. Miles*, 17 B. Mon. (Ky.) 598. But compare *Northborough v. Wood*, 142 Mass. 551; *Central City First Nat. Bank v. Hummel*, 14 Colo. 259.

Trustees Not Necessary Parties. — In *Rice v. Savery*, 22 Iowa 470, it was held that trustees need not be joined as plaintiffs in an action by the real parties in interest.

8. *Curtis v. Sprague*, 51 Cal. 239; *Speelman v. Culbertson*, 15 Ind. 441; *Scantlin v. Allison*, 12 Kan. 85; *Lowney v. Perham*, 20 Me. 235; *Crew v. Breed*, 10 Met. (Mass.) 569; *Rosemond v. Graham*, 54 Minn. 323; *Mynderse v. Snook*, 53 Barb. (N. Y.) 234.

9. *Wolcott v. Standley*, 62 Ind. 198; *Weaver v. Bromley*, 65 Mich. 212; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37; *Burbank v. Beach*,

4. Husband and Wife. — The husband need not be joined as a coplaintiff in an action by the wife on a negotiable instrument which is her separate property,¹ but on instruments payable to the wife the husband may in some cases join with the wife,² or the husband may sue alone without joining the wife.³

5. Action for Contribution. — Two or more persons, who have been compelled to take up a negotiable instrument on which they are not primarily liable, may join in an action against a person liable over to them, when in taking up the instrument they made the payment out of a joint fund,⁴ but where the payment by the sureties is not joint, they cannot maintain a joint action.⁵

VIII. PARTIES DEFENDANT — 1. Generally. — The rules of legal liability on negotiable instruments determine the persons to be made defendants in actions to enforce such liability. The person to be sued is, of course, the person upon whom the liability to the plaintiff rests.⁶

2. Joinder of Parties Defendant — a. IN GENERAL. — The matter of joining parties defendant in actions upon negotiable paper

15 Barb. (N. Y.) 326; Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427; Bawden v. Howell, 3 M. & G. 638, 42 E. C. L. 333.

1. Carter v. Owens, 41 Ala. 217; Corcoran v. Doll, 32 Cal. 83.

2. Corcoran v. Doll, 32 Cal. 83; Young v. Ward, 21 Ill. 223; Pickrell v. Jerauld, 1 Ind. App. 10; Philliskirk v. Pluckwell, 2 M. & S. 393. See generally article HUSBAND AND WIFE, vol. 10, p. 191.

3. Young v. Ward, 21 Ill. 223; M'Neillage v. Holloway, 1 B. & Ald. 218; Burrough v. Moss, 10 B. & C. 558, 21 E. C. L. 128.

4. Dussol v. Bruguere, 50 Cal. 456; Ross v. Allen, 67 Ill. 317; Clapp v. Rice, 15 Gray (Mass.) 557; Chandler v. Brainard, 14 Pick. (Mass.) 285; Doolittle v. Dwight, 2 Met. (Mass.) 561; Pearson v. Parker, 3 N. H. 366; Whipple v. Briggs, 28 Vt. 65; Prescott v. Newell, 39 Vt. 82; Osborne v. Harper, 5 East 225.

Payment by Joint and Several Note. — Cosureties who pay the debt of their principal by giving their own joint and several promissory note, are not entitled to several actions against him for reimbursement. Yet if one of the sureties sues alone for reimbursement, and the principal does not take advantage of the nonjoinder of the other, but suffers the action to proceed, and pays the sum which is recovered against him, such surety is liable to his cosurety for half the amount so recovered, whether it be the whole or only a part of the sum jointly paid by both.

Doolittle v. Dwight, 2 Met. (Mass.) 561.

And in Chandler v. Brainard, 14 Pick. (Mass.) 285, it was held that where a note made by fourteen promisors was taken up by four of them, who gave in satisfaction thereof their own joint and several note, this was such a payment as would entitle the four to maintain an action for contribution against a copromisor on the first note.

Executor of Surety. — In Gould v. Gould, 8 Cow. (N. Y.) 168, a surety and his partner who was the executor of a cosurety paid the debt out of partnership funds, yet it was held that they should sever in suing the principal.

Fraudulent Concealment of Property. — It was held in Bunker v. Tufts, 55 Me. 180, that a joint action could not be maintained by persons severally signing as sureties, against their principal, for a fraudulent transfer or concealment of property, although they had subsequently given a joint note to the payee of the original note.

5. Dussol v. Bruguere, 50 Cal. 456; Ross v. Allen, 67 Ill. 317; Lombard v. Cobb, 14 Me. 222; Gould v. Gould, 8 Cow. (N. Y.) 168; Doremus v. Selden, 19 Johns. (N. Y.) 213; Prescott v. Newell, 39 Vt. 82. Compare Low v. Copestake, 3 C. & P. 300, 14 E. C. L. 316.

6. See for the liability of parties title Bills and Notes, 3 Am. and Eng. Encyc. of Law (2d ed.), p. 469.

is now very generally regulated by statute. In some states the rule is that all persons may be joined as parties defendant who are liable to the holder of the instrument, or who are adversely interested to him.¹ In some states, also, there are statutes requiring all such parties to be joined in one action.² In other states the rule seems to be to permit any or all the parties liable to the holder to be joined as defendants, that is, to permit the holder to join as defendants any number though less than all.³

1. *Richardson v. White*, R. M. Charl. (Ga.) 53; *Kelsey v. Bradbury*, 21 Barb. (N. Y.) 531; *Sawyer v. Chambers*, 11 Abb. Pr. (N. Y. Supreme Ct.) 110; *Osborn v. McClelland*, 43 Ohio St. 284; *Sharpe v. Fowlkes*, 7 Humph. (Tenn.) 512; *Woods v. Ridley*, 11 Humph. (Tenn.) 194; *Willis v. Willis*, 42 W. Va. 522. But see *Neal v. Pennington*, 65 Ill. App. 68, where it was held that the Illinois statute of 1895, providing for a judgment against all of several defendants, jointly liable, whether served or not, enforceable against their joint property and the several property of those served, could not be extended to the separate property of the parties not served.

Effect on Liability.—In *Willis v. Willis*, 42 W. Va. 522, it was held that no change in the liability of the parties to a negotiable instrument was made by a statute permitting all parties liable on such an instrument to be sued jointly; and in *Kelsey v. Bradbury*, 21 Barb. (N. Y.) 531, it was held that a similar statute did not make such parties joint debtors, but merely gave a joint remedy against them, and that, therefore, if one of such defendants pays a judgment recovered against them, he still has a remedy against his codefendants, the same as he would have in the absence of such statute.

Primary and Secondary Liability.—Under *Mississippi* Annot. Code, § 3576, an action cannot be maintained on a bill of exchange or promissory note which has been indorsed, against any one secondarily liable thereon, without joining in the action the persons residing in the state who are primarily liable. *Crump v. Wooten*, 41 Miss. 611.

But this provision is for the benefit of those secondarily liable, and the persons primarily liable cannot object to the nonjoinder of those secondarily liable. *Hamilton v. Catchings*, 58 Miss. 92.

2. See *Kimball v. Connor*, 3 Kan. 415; *Crump v. Wooten*, 41 Miss. 611;

Moore v. Knox, 46 Miss. 602; *Stiles v. Inman*, 55 Miss. 469; *Gwin v. Mandeville*, 9 Smed. & M. (Miss.) 320; *Lillard v. Planters' Bank*, 3 How. (Miss.) 78.

How Objection Raised.—Under a statute requiring all resident parties to a negotiable instrument to be sued together, if it appears on the face of the declaration that any such party has been omitted, the fault may be taken advantage of by demurrer, but if it does not so appear it can only be taken advantage of by plea in abatement. The objection that all resident parties are not joined cannot be raised after trial and judgment. *Stiles v. Inman*, 55 Miss. 469.

Conversion of Note.—In *Gregory v. Stetson*, 133 U. S. 579, and *Gregory v. Swift*, 39 Fed. Rep. 708, it was held that where an action is brought for the conversion of a note in violation of a contract, by which it had been agreed that the note should be held "subject to the joint order and direction" of certain named attorneys of the persons claiming such note, the other claimant and his attorneys are necessary parties.

3. See *Abercrombie v. Knox*, 3 Ala. 728; *Walker v. Walker*, 7 Ark. 542; *Morrison v. Fishel*, 64 Ind. 177; *Payne v. Albany City Nat. Bank*, 3 Ind. App. 214; *Page v. Snow*, 18 Mo. 126; *Crutcher v. Bedford*, 8 Humph. (Tenn.) 405; *Burdette v. Bartlett*, 95 U. S. 637; *Rules of Practice*, 58 Conn. 561.

One Satisfaction.—Only one satisfaction can be had by the holder of a bill of exchange, though he may be entitled to sue any or all the parties to it. *Abercrombie v. Knox*, 3 Ala. 728.

Cause of Action Must Be Complete.—Where the cause of action against one party to a negotiable instrument is not complete until after suit is brought against another, such person cannot be joined as a defendant before the steps which are necessary to perfect his liability have been taken. *Rules of Practice*, 58 Conn. 561.

One Suit at a Term.—In *Morrison v.*

The statutes in the jurisdiction where the suit is brought should be consulted.

b. TWO OR MORE MAKERS—(1) *Joint Makers*.—Joint makers of a promissory note may of course be joined as defendants in an action thereon.¹ In some states, however, the joinder of the joint makers is compulsory,² while in others statutes permit an action on a joint negotiable instrument to be brought against any one or more of the joint makers.³

(2) *Persons Severally Liable*.—In some states there are statutes permitting the joinder, in actions on negotiable instruments, of persons whose liability is several.⁴

Fishel, 64 Ind. 177, it was held that under the *Indiana* statutes then in force, though the holder of a negotiable note might sue one or more of the parties liable to him thereon, he could bring but one suit on such instrument at the same term of court.

1. *Castle v. Candee*, 16 Conn. 223; *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, which was a case under a statute permitting the joinder of a husband and wife in an action on a note executed by them jointly; *Heywood v. Wingate*, 14 N. H. 73; *Mitchell v. Ostrom*, 2 Hill (N. Y.) 520; *Bright v. Carpenter*, 9 Ohio 139; *Gale v. Van Arman*, 18 Ohio 336; *Oldham v. Hunt*, 4 Humph. (Tenn.) 332; *Merchants, etc., Bank v. Evans*, 9 W. Va. 373.

Partners.—In *Kinsman v. Castleman*, 1 T. B. Mon. (Ky.) 210, it was held that in an action by petition and summons, on a note signed with the name of a firm all the partners might be joined as defendants.

Partner Who Is a Copayee.—In *Morris v. Hillery*, 7 How. (Miss.) 61, it was held that a partner in a firm executing a note who is also a member of the payee firm could not, under the *Mississippi* statute making all promissory notes joint and several, be joined as a defendant when he was joined as a plaintiff.

Stranger Indorsing in Blank.—Where a stranger to a promissory note indorses it in blank at the time of making it, the payee of the note may sue him with the maker as a joint maker of the note, and he is entitled to the privileges of a surety. *Castle v. Candee*, 16 Conn. 223; *Bright v. Carpenter*, 9 Ohio 139.

Stranger Guaranteeing Payment.—Where a stranger to a note payable in cash, at the time of the execution wrote upon the back and signed these

words: "I guarantee the fulfilment of the within contract;" it was held that the instrument, with its indorsement, was a joint contract, and that the parties might be sued jointly upon it. *Gale v. Van Arman*, 18 Ohio 336.

Sealing by One Only.—In *Oldham v. Hunt*, 4 Humph. (Tenn.) 332, it was held that at common law a joint action of debt would lie against the joint makers of an instrument for the payment of money, though one of them annexed his seal to it and the other did not.

Payee One of Makers.—In *Heywood v. Wingate*, 14 N. H. 73, it was held that the payee of a promissory note signed by himself and others, could not maintain an action thereon against such joint makers, though an indorsee of such payee might join all the makers as defendants.

2. See the statutes of the various states; and for a full discussion of joinder of parties defendant where the contract is joint, see article PARTIES.

3. *Willis v. Neal*, 39 Ala. 464; *Whittemhall v. Korber*, 12 Kan. 618; *Crump v. Wooten*, 41 Miss. 611; *Thompson v. Planters' Bank*, 2 Smed. & M. (Miss.) 476. See generally article PARTIES.

4. *Loulatot v. Calkins*, 120 Cal. 688; *Burgoyne v. Ohio L. Ins., etc., Co.*, 5 Ohio St. 586; *Fuller v. Morse*, 4 Gray (Mass.) 294; *Wilde v. Haycraft*, 2 Duv. (Ky.) 309, where it was held that a joint action might be maintained against the several promisors in a contract for the payment by each of one hundred dollars; but in *M'Bean v. Todd*, 2 Bibb (Ky.) 320, in an action upon a note by several, for a sum to be paid in specific and unequal proportions, it was held that the promisors could not be joined as defendants; and in *Chipman v. Morrill*, 20 Cal. 131, it was held that a surety paying a debt

(3) *Joint and Several Makers* — One or All. — On a joint and several note, the rule in most states is that an action thereon may be against any one of such makers severally, or against them all jointly.¹

for which several persons were liable in distinct proportions as principals, could not maintain a joint action against them for the amount thus paid. And see generally article PARTIES.

No Change in Rules of Evidence. — "The provision in section 3 of Stat. 1852, c. 312, by which parties severally liable on contracts, including all parties to bills of exchange and promissory notes, may be joined in one action, does not, in any respect, change the rules of evidence or the competency of witnesses on the trial of such actions." Fuller v. Morse, 4 Gray (Mass.) 294.

1. *Alabama.* — Miller v. Sneads, Minor (Ala.) 27.

California. — Chase v. Evoy, 58 Cal. 348.

Illinois. — Marine Bank v. Ferry, 40 Ill. 255; Stevens v. Catlin, 152 Ill. 56; Ritchie v. Gibbs, 7 Ill. App. 149; Merchants' Nat. Bank v. Maple, 65 Ill. App. 484; Glines v. Ellars, 73 Ill. App. 553.

Indiana. — Callahan v. Mitchell, 29 Ind. 418; Maiden v. Webster, 30 Ind. 317; Groves v. Stephenson, 5 Blackf. (Ind.) 584.

Maine. — Turner v. Whitmore, 63 Me. 526; Harwood v. Roberts, 5 Me. 441; Bangor Bank v. Treat, 6 Me. 207.

Maryland. — Merrick v. Bank of Metropolis, 8 Gill (Md.) 59.

Mississippi. — Crump v. Wooten, 41 Miss. 611; Fairchild v. Grand Gulf Bank, 5 How. (Miss.) 597.

New York. — Hill v. Alvord, 19 Hun (N. Y.) 77; Ely v. Clute, 19 Hun (N. Y.) 35; Parker v. Jackson, 16 Barb. (N. Y.) 33. But see Van Tine v. Crane, 1 Wend. (N. Y.) 524.

Tennessee. — Sims v. McNeil, 10 Humph. (Tenn.) 500; Gratz v. Stump, Cooke (Tenn.) 494. This case was an action against a partner under a statute making all joint obligations joint and several.

Texas. — Poston v. Williams, 8 Tex. 281; Keys v. Cleburne Bldg., etc., Assoc., (Tex. Civ. App. 1893) 25 S. W. Rep. 810.

Wisconsin. — Decker v. Trilling, 24 Wis. 610. But see, as to the former practice in Wisconsin, Clapp v. Preston, 15 Wis. 543.

England. — March v. Ward, Peake N. P. (ed. 1795) 130.

But see Gale v. Myers, 4 Houst. (Del.) 546; Biery v. Haines, 5 Whart. (Pa.) 563, in which case it was held that a joint action could not be maintained on an instrument in the form of a promissory note, signed by three persons, and sealed by one of them.

Note by a Firm and an Individual. — Where a joint and several note is executed by a firm and another person not a member of the firm, the firm is considered as one maker and may be sued without joining the other, but one partner cannot be sued alone. Van Tine v. Crane, 1 Wend. (N. Y.) 524.

"I Promise" — Signed by Two. — A note expressed in the first person singular, thus, "I promise," signed by two or more makers, being a joint and several note, will sustain an action against one or all of such signers. Maiden v. Webster, 30 Ind. 317; Groves v. Stephenson, 5 Blackf. (Ind.) 584; Hill v. Alvord, 19 Hun (N. Y.) 77; Ely v. Clute, 19 Hun (N. Y.) 35; March v. Ward, Peake N. P. (ed. 1795) 130.

Consolidation. — In Poston v. Williams, 8 Tex. 281, an order consolidating separate suits against two joint and several promisors, where the suits were pending in the same court, and were consolidated on the motion of the defendants, it was held that such consolidation could not be relied upon as error by one of the defendants.

Separate Actions at Same Time. — The holder of a note executed by several persons may prosecute his action by attachment against nonresidents, and by summons against those who can be served personally with process, at the same time; the Tennessee Act of 1813, c. 67, which prohibits the prosecution of several actions against parties jointly and severally liable on instruments for the payment of money, not embracing such a case. Sims v. McNeil, 10 Humph. (Tenn.) 500.

Several Judgment. — Under a statutory provision allowing a several judgment whenever a several suit might have been brought, it has been held that an action against persons jointly and severally liable upon a promissory note was a several action within the provi-

Statutory Provisions. — In some states there are statutes providing that promissory notes, joint in form, shall be joint and several, and under such statutes actions may be maintained on instruments coming within their terms, as on instruments joint and several without such statutes.¹ So in some states actions on joint and several notes may be maintained against two or more makers of such instruments, though such number be less than all the signers.²

(4) *Discontinuance as to One or More Defendants.* — The general rules upon this matter are applicable to actions upon bills and notes. See for a discussion of this subject, articles DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 856 *et seq.*; JUDGMENTS, vol. 11, p. 847 *et seq.*

c. MAKER AND SURETY. — In actions on promissory notes it is proper to join as defendants the maker and a surety. The contract of each is to pay the same,³ but it seems that the payee

sions of such statute. *Parker v. Jackson*, 16 Barb. (N. Y.) 33.

Joint Action and Several Action. — When a contract is joint and several, there are two distinct remedies upon it; one against all jointly, and the other against each severally. The pendency of an action against all on the joint liability in no wise affects the right of action against each on the several liability, and cannot be pleaded in abatement of such several suit by one of the promisors. *Turner v. Whitmore*, 63 Me. 526.

One Maker Surety for the Other. — In a suit against one of two makers of a joint and several promissory note, the fact that the defendant is surety for the other promisor is no defense to the action, nor can the proceedings of the plaintiff be delayed by a cross-complaint to bring in the alleged principal. *Callahan v. Mitchell*, 29 Ind. 418.

Partnership Note. — A note which on its face appears to be joint and several, but which in fact is signed by one maker for himself and the other maker, who was his partner, will support an action against them as on a joint and several note. *Sigony v. Richards*, 1 Root (Conn.) 119.

Note of Husband and Wife. — It was said in *Cozens v. House*, Cheves L. (S. Car.) 233, that on a joint and several note executed by a husband and wife, a separate action might be maintained against the husband alone, provided the declaration suggested the relation of the parties, but that a declaration containing no such suggestion would be insufficient on special demurrer.

1. See *Miller v. Sneads*, Minor (Ala.) 27; *Marine Bank v. Ferry*, 40 Ill. 255; *Merchants' Nat. Bank v. Maple*, 65 Ill. App. 484. See also article PARTIES.

2. *Arkansas.* — *Kent v. Wells*, 21 Ark. 411, at least on partnership obligations.

Mississippi. — *Crump v. Wooten*, 41 Miss. 611; *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597.

Texas. — *Keys v. Cleburne Bldg., etc., Assoc.*, (Tex. Civ. App. 1893) 25 S. W. Rep. 810.

Wisconsin. — *Decker v. Trilling*, 24 Wis. 610. But see, as to the former practice in Wisconsin, *Clapp v. Preston*, 15 Wis. 543.

United States. — *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, in which case it was held that if on a commercial partnership note two of the three partners were made defendants, this was no ground of objection, at least at the trial. *Contra*, *Stevens v. Catlin*, 152 Ill. 56; *Ritchie v. Gibbs*, 7 Ill. App. 149; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59; *Harwood v. Roberts*, 5 Me. 441; *Bangor Bank v. Treat*, 6 Me. 207.

Death of One Maker. — When one maker of a joint and several promissory note dies, the other makers may be joined as defendants in an action on such instrument, even in a state where otherwise less than all cannot be sued. *Stevens v. Catlin*, 152 Ill. 56; *Harwood v. Roberts*, 5 Me. 441; *Bangor Bank v. Treat*, 6 Me. 207.

3. *Connecticut.* — *Lemmon v. Strong*, 55 Conn. 443. But see *Rules of Practice*, 58 Conn. 561.

is not bound to join such parties;¹ and it seems that a joint action cannot be maintained by one surety against the maker and other sureties.²

Discontinuance as to One.—Where a joint action is commenced against a maker and surety on a note, the plaintiff cannot discontinue as to the maker, and take judgment against the surety, unless he could have sued the surety alone in the first instance, as where the maker is beyond the jurisdiction of the court.³

Illinois.—*Logan v. Burr*, 3 Ill. App. 458.

Iowa.—*Jones v. Wilson*, 11 Iowa 160.

Kansas.—*Foote v. Sprague*, 13 Kan. 155.

Louisiana.—*Griffing v. Caldwell*, 1 Rob. (La.) 15.

Michigan.—*Reading v. Beardsley*, 41 Mich. 123.

Mississippi.—*Wilkinson v. Flowers*, 37 Miss. 579.

New York.—*Hoyt v. Mead*, 13 Hun (N. Y.) 327; *McVean v. Scott*, 46 Barb. (N. Y.) 379.

Texas.—*Thompson v. Payne*, 21 Tex. 622; *Crawford v. Jones*, 24 Tex. 382; *Barnett v. Tayler*, 30 Tex. 453; *Tooke v. Taylor*, 31 Tex. 1; *Burden v. Cross*, 33 Tex. 685.

Utah.—*Gagan v. Stevens*, 4 Utah 348.

West Virginia.—*Merchants', etc., Bank v. Evans*, 9 W. Va. 373; *Keller v. McHuffman*, 15 W. Va. 64.

And see generally article PRINCIPAL AND SURETY.

A Surety Signing After Maturity may be joined as a defendant with the maker of a promissory note. *Jones v. Wilson*, 11 Iowa 160; *McVean v. Scott*, 46 Barb. (N. Y.) 379.

Instrument Sealed by One.—In *Keller v. McHuffman*, 15 W. Va. 64, it was held that on an instrument promising to pay money, signed and sealed by one person, and signed by another as security, a joint action might be maintained against the persons so signing.

Surety Liable for a Different Amount.—In *Cummings v. Little*, 45 Me. 183, it was held that where the holder of a promissory note had surrendered collateral security of a less value than the note to the principal, without the assent of the sureties, and so had made the principal and surety liable to him in different amounts, he could not maintain a joint action on the note against them.

Persons Not Co-sureties.—In *Ritchie*

v. Gibbs, 7 Ill. App. 149, it was held that two persons were improperly joined as defendants where one of them had signed the note originally as a surety, and the other had signed as a surety at a subsequent time, in consideration of an extension of the time of payment, it being held that they were never jointly liable, as it seems that the first surety was released by the extension of the time of payment.

1. *Griffing v. Caldwell*, 1 Rob. (La.) 15; *Smith v. Scott*, 3 Rob. (La.) 258; *Head v. Cleburne Bldg., etc., Assoc.*, (Tex. Civ. App. 1893) 25 S. W. Rep. 810.

Objection by Defendant.—Where a surety on a joint and several note is sued alone, it was held that he could not object to the nonjoinder of a co-maker. *Head v. Cleburne Bldg., etc., Assoc.*, (Tex. Civ. App. 1893) 25 S. W. Rep. 810.

Principal Insolvent or Out of Jurisdiction.—In *Thompson v. Payne*, 21 Tex. 622, it was held that under the statutes of *Texas* a surety or guarantor could not be sued unless the principal was joined as a defendant, except when such principal was notoriously insolvent or beyond the jurisdiction of the court.

2. *Warner v. Price*, 3 Wend. (N. Y.) 398; *Lapham v. Barnes*, 2 Vt. 213.

3. *Crawford v. Jones*, 24 Tex. 382; *Barnett v. Tayler*, 30 Tex. 454; *Tooke v. Taylor*, 31 Tex. 1; *Burden v. Cross*, 33 Tex. 685. But see *Moore v. Knox*, 46 Miss. 602.

In *Wilkinson v. Flowers*, 37 Miss. 579, it was held that there might be a dismissal as to the principal, if the sureties were joint makers and not indorsers.

Husband and Wife.—In *Reading v. Beardsley*, 41 Mich. 123, an action on a note against a man and his wife, the wife having signed as surety, and the statute of limitations having run as to her, it was held proper to permit a discontinuance as to the wife and the

d. MAKER AND GUARANTOR. — Independent of statute, the maker and guarantor of a promissory note cannot be joined as defendants in an action thereon. This is so because a contract of guaranty is not a primary obligation to pay, but is an undertaking that the debtor shall pay. The guarantor is not a promisor with the maker, as is the case with a surety.¹ In a number of states, however, statutes have been enacted permitting such joinder.²

entry of judgment against the husband.

Judgment Against One Surety. — Where the principal and two sureties were sued jointly upon a promissory note, service being had upon both the sureties, it was held error to render judgment against one of the sureties alone, there being no default or other action of the court taken as to his cosurety. *Logan v. Burr*, 3 Ill. App. 458.

1. *Arkansas.* — *Preston v. Davis*, 8 Ark. 167.

Illinois. — *Clark v. Morgan*, 13 Ill. App. 597; *Columbian Hard Wood Lumber Co. v. Langley*, 51 Ill. App. 100.

Indiana. — *Cole v. Merchants' Bank*, 60 Ind. 350; *Richwine v. Scovill*, 54 Ind. 150; *Dickinson v. Colter*, 45 Ind. 445.

Kentucky. — *Marshall v. Peck*, 1 Dana (Ky.) 609.

Missouri. — *Graham v. Ringo*, 67 Mo. 324.

Nebraska. — *Mowery v. Mast*, 9 Neb. 445.

New York. — *Hier v. Staples*, 51 N. Y. 136; *De Ridder v. Schermerhorn*, 10 Barb. (N. Y.) 638; *Harris v. Eldridge*, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 278; *Allen v. Fosgat*, 11 How. Pr. (N. Y. Supreme Ct.) 218; *Miller v. Gaston*, 2 Hill (N. Y.) 188; *Barton v. Spies*, 5 Hun (N. Y.) 60.

Tennessee. — *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Wisconsin. — *Stewart v. Glenn*, 5 Wis. 14; *Borden v. Gilbert*, 13 Wis. 670.

Compare *Gale v. Van Arman*, 18 Ohio 336.

Joining Several Guarantors. — In *Clark v. Morgan*, 13 Ill. App. 597, it was held that several guarantors of a promissory note might be joined as defendants, but that the principal could not be joined in such action, because his contract was distinct from that of the guarantors.

Foreclosure of Mortgage. — A person who guarantees the collection of a note

secured by a mortgage is not a proper party defendant in an action to foreclose the mortgage, and in such case a deficiency judgment cannot be rendered against him. *Borden v. Gilbert*, 13 Wis. 670.

A Person Transferring a Note Without Indorsement was, in *Eakin v. Burger*, 1 Sneed (Tenn.) 417, held liable as a guarantor, and therefore improperly joined in an action with the maker.

Guarantor Liable as Indorser. — In *Luqueer v. Prosser*, 1 Hill (N. Y.) 256, 4 Hill (N. Y.) 420, a person who guaranteed the payment of a note, and waived notice of nonpayment, was held properly joined as defendant with the makers, on the ground that his engagement was really that of an indorser.

How Objection Raised. — The objection that a guarantor is improperly joined as a defendant with a maker of a promissory note should be raised by demurrer (*Cole v. Merchants' Bank*, 60 Ind. 350; *compare* *Harris v. Eldridge*, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 278), or by answer. But if there is a failure to raise the objection, it cannot be insisted upon at the trial. *Hier v. Staples*, 51 N. Y. 136.

2. *Connecticut.* — *Lemmon v. Strong*, 55 Conn. 443. And see *Rules of Practice*, 58 Conn. 561.

Iowa. — *Peddicord v. Whittam*, 9 Iowa 471; *Marvin v. Adamson*, 11 Iowa 371; *Mix v. Fairchild*, 12 Iowa 351; *Tucker v. Shiner*, 24 Iowa 334; *Stout v. Noteman*, 30 Iowa 414.

Kansas. — *Hendrix v. Fuller*, 7 Kan. 331.

Michigan. — *Reading v. Beardsley*, 41 Mich. 123; *Phelps v. Church*, 65 Mich. 231.

Minnesota. — *Hammel v. Beardsley*, 31 Minn. 314.

Nevada. — *Van Doren v. Tjader*, 1 Nev. 380.

Ohio. — *Kautzman v. Weirick*, 26 Ohio St. 330.

Texas. — *Thompson v. Payne*, 21 Tex. 622; *Tooke v. Taylor*, 31 Tex. 1.

e. MAKER, DRAWER OR ACCEPTOR, AND INDORSER OR ASSIGNOR — (1) *Whether Joinder Proper.* — It is the general rule that an indorser of a note or bill of exchange may properly be joined as a defendant in an action thereon against the maker of such note, or the drawer or acceptor of such bill. This rule is generally established by statute.¹ But it seems that this rule per-

Utah. — *Gagan v. Stevens*, 4 Utah 348.

Guaranty by a Separate Instrument. — Under the *Connecticut* statute a guarantor is properly joined as a defendant in an action on a negotiable instrument, whether the guaranty be by the same or a separate instrument. *Lemon v. Strong*, 55 Conn. 443. See also *Gagan v. Stevens*, 4 Utah 348.

In *Griffin v. Grundy County*, 10 Iowa 226, it was held improper to join as defendants the maker of a county warrant, and a person guaranteeing its payment by a separate instrument.

Different Counts Necessary. — It was held in *Tucker v. Shiner*, 24 Iowa 334, that although an assignor who guaranteed the payment of a non-negotiable note might be joined as a party defendant with the maker, yet the contracts of the maker and such guarantor were different, and therefore they should be stated in separate counts and not united in a single count.

Guarantor Liable as Maker. — Where a person signs a note as guarantor at the time it is executed by the principal, he may be sued jointly with the maker, if he is liable as a joint maker. *Leonard v. Sweetzer*, 16 Ohio 1.

Assignment of Note Payable in Cotton. — In *Cochran v. Strong*, 44 Ga. 636, it was held that one who transfers a note payable in cotton, by indorsing his name thereon, with the words "for value received," did not become liable as an indorser or guarantor of such instrument, and hence could not be joined as defendant in an action against the maker.

Discontinuance. — In *Phelps v. Church*, 65 Mich. 231, it was held that under the statutes of *Michigan*, in an action against the maker and guarantor of a note, the action might properly be discontinued as to the guarantor without preventing a judgment against the maker. But in *Moore v. Janes*, 6 Tex. 227, it was held that in such an action there could not be a discontinuance as to the maker unless it was shown that he was not within the jurisdiction of

the court. Compare *Miller v. Gaston*, 2 Hill (N. Y.) 188.

1. *Alabama.* — *Phillips v. Jordon*, 3 Stew. (Ala.) 38; *Moffet v. Wooldridge*, 3 Stew. (Ala.) 324; *Chapman v. Arrington*, 3 Stew. (Ala.) 480. *Contra*, *Smith v. Cobb*, 1 Stew. (Ala.) 62.

Arkansas. — *Nevill v. Hancock*, 15 Ark. 511; *Taylor v. Coolidge*, 17 Ark. 454; *Killian v. Ashley*, 24 Ark. 511.

California. — *Eastman v. Turman*, 24 Cal. 379; *Loustalot v. Calkins*, 120 Cal. 688.

Colorado. — *Hamill v. Ward*, 14 Colo. 277; *Cooper v. German Nat. Bank*, 9 Colo. App. 169.

Connecticut. — *Rules of Practice*, 58 Conn. 561.

District of Columbia. — *Young v. Warner*, 6 App. Cas. (D. C.) 433; *Keyser v. Fendall*, 5 Mackey (D. C.) 47.

Georgia. — *Beckwith v. Carleton*, 14 Ga. 693; *Vinson v. Platt*, 21 Ga. 135; *Lamar v. Cottle*, 27 Ga. 263; *Davis v. Fulton Bank*, 31 Ga. 69; *Cochran v. Strong*, 44 Ga. 636; *McGuire v. Waggoner*, 59 Ga. 591; *Ware v. City Bank*, 59 Ga. 840. But see *Bartlett v. Byers*, 35 Ga. 142, in which case it was held that one indorsing a note to be liable "in the second instance" could not be joined in an action against the maker, but the court in this case was doubtful as to the correctness of its decision. And compare *Cox v. Mechanics' Sav. Bank*, 28 Ga. 529.

Indiana. — *Swift v. Ellsworth*, 10 Ind. 205; *Mix v. State Bank*, 13 Ind. 521; *Norvell v. Hittle*, 23 Ind. 346; *Newcome v. Dunham*, 27 Ind. 285; *Erwin v. Scotten*, 40 Ind. 389; *Keiser v. Yandes*, 45 Ind. 174; *Pate v. Aurora First Nat. Bank*, 63 Ind. 254; *Couch v. Thornton First Nat. Bank*, 64 Ind. 92; *Overshiner v. Martin*, 87 Ind. 189; *Dillon v. State Bank*, 6 Blackf. (Ind.) 5; *Pierce v. Eustis*, 6 Blackf. (Ind.) 159; *Goodlet v. Britton*, 6 Blackf. (Ind.) 500; *Lodge v. State Bank*, 6 Blackf. (Ind.) 557; *Britton v. Wheeler*, 8 Blackf. (Ind.) 31; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531.

mitting a joinder applies only to instruments governed by the law merchant, and therefore it is improper to join as defendants

Iowa. — Stout v. Noteman, 30 Iowa 414.

Kentucky. — Farmers', etc., Bank v. Turner, 2 Litt. (Ky.) 16; Crisson v. Williamson, 1 A. K. Marsh. (Ky.) 454; Pendleton v. State Bank, 2 J. J. Marsh. (Ky.) 148; Johnson v. State Bank, 5 T. B. Mon. (Ky.) 120; Noel v. State Bank, 7 T. B. Mon. (Ky.) 400; Tennessee Bank v. Smith, 9 B. Mon. (Ky.) 609.

Michigan. — Storey v. Bird, 8 Mich. 316; Maynard v. Penniman, 10 Mich. 153; Church v. Edson, 39 Mich. 113; Reading v. Beardsley, 41 Mich. 123; Green v. Burrows, 47 Mich. 70.

Mississippi. — Smith v. Crutcher, 27 Miss. 455; Duncan v. M'Neill, 31 Miss. 704; Crump v. Wooten, 41 Miss. 611; Pool v. Hill, 44 Miss. 306; Dromgoole v. Farmers', etc., Bank, 2 How. (U. S.) 241; Fairchild v. Grand Gulf Bank, 5 How. (Miss.) 597; Bullit v. Thatcher, 5 How. (Miss.) 689; Agricultural Bank v. Harris, 2 Smed. & M. (Miss.) 463; Thompson v. Planters' Bank, 2 Smed. & M. (Miss.) 476; Boush v. Smith, 2 Smed. & M. (Miss.) 512; Kirk v. Seawell, 2 Smed. & M. (Miss.) 571; Besancon v. Shirley, 9 Smed. & M. (Miss.) 457.

Missouri. — Goode v. Jones, 9 Mo. 876; Holland v. Hunton, 15 Mo. 475; Samstag v. Conley, 64 Mo. 476.

New York. — Eaton v. Alger, 47 N. Y. 345; Chenango Bank v. Curtiss, 19 Johns. (N. Y.) 326; Austin v. Figueira, 7 Paige (N. Y.) 56; Barton v. Speis, 5 Hun (N. Y.) 60; Butler v. Rawson, 1 Den. (N. Y.) 105; Churchill v. Trapp, 3 Abb. Pr. (N. Y. Supreme Ct.) 306; White v. Low, 7 Barb. (N. Y.) 204; De Ridder v. Schermerhorn, 10 Barb. (N. Y.) 638; Kelsey v. Bradbury, 21 Barb. (N. Y.) 531; McKnight v. Baker, 1 How. Pr. (N. Y. Supreme Ct.) 201; Sherman v. Gregory, 42 How. Pr. (N. Y. Supreme Ct.) 481; Fleischmann v. Stern, 61 How. Pr. (N. Y. Supreme Ct.) 124; Luqueer v. Prosser, 1 Hill (N. Y.) 256, 4 Hill (N. Y.) 420; Aeby v. Rapelyea, 1 Hill (N. Y.) 371; National Bank v. Norton, 1 Hill (N. Y.) 572; Miller v. Gaston, 2 Hill (N. Y.) 188; Pletts v. Johnson, 3 Hill (N. Y.) 112; Anonymous, 4 Hill (N. Y.) 19; Paine v. Chase, 4 Hill (N. Y.) 563; Steuben County Bank v. Stephens, 14 Wend. (N. Y.) 243; Fuller v. Van Schaick, 18 Wend. (N. Y.) 547; Livingston County

Bank v. Ellis, 18 Wend. (N. Y.) 562; Clark v. Parker, 19 Wend. (N. Y.) 125; People v. New York, C. Pl. 19 Wend. (N. Y.) 118; Scott v. Standart, 19 Wend. (N. Y.) 642; Genesee Bank v. Field, 19 Wend. (N. Y.) 643. *Compare* Austin v. Bemiss, 8 Johns. (N. Y.) 356.

Ohio. — Lewis v. Kentucky Bank, 12 Ohio 132; Buckingham v. McCracken, 2 Ohio St. 287; Clinton Bank v. Hart, 19 Ohio 372; Kautzman v. Weirick, 26 Ohio St. 330; Ohio Valley Nat. Bank v. Ronsheim, (Cinc. Super. Ct.) 31 Ohio L. J. 99.

Tennessee. — Watson v. Hoge, 7 Yerg. (Tenn.) 344; Planters' Bank v. Tappan, 2 Humph. (Tenn.) 98; Crutcher v. Bedford, 8 Humph. (Tenn.) 405; State Bank v. Cowan, 11 Humph. (Tenn.) 126; Holland v. Harris, 2 Sneed (Tenn.) 68; Lawson v. Watson, 8 Baxt. (Tenn.) 72.

Texas. — Scott v. Dewees, 2 Tex. 153; Look v. Henderson, 4 Tex. 303; Ryburn v. Nail, 4 Tex. 305; Moore v. Janes, 6 Tex. 227; Jackson v. Marshall, 6 Tex. 324; Pool v. Pickett, 8 Tex. 122; Tooke v. Taylor, 31 Tex. 1; Raymond v. Holmes, 11 Tex. 54; Campbell v. Beckwith, 17 Tex. 439; Thompson v. Payne, 21 Tex. 622; Hopkins v. Keith, 27 Tex. 91; Barnett v. Tayler, 30 Tex. 454; Aldridge v. Mardoff, 32 Tex. 204; Brooks v. Breeding, 32 Tex. 752; Davidson v. Peticolas, 34 Tex. 27; Binge v. Smith, Dall. (Tex.) 616. And see Colorado Nat. Bank v. Scott, (Tex. 1891) 16 S. W. Rep. 997.

Utah. — Smith v. McEvoy, 8 Utah 58.

Virginia. — Walters v. Farmers' Bank, 76 Va. 12; Mann v. Sutton, 4 Rand. (Va.) 253.

West Virginia. — Huntington Bank v. Hysell, 22 W. Va. 142.

Wisconsin. — Van Ness v. Corkins, 12 Wis. 188.

United States. — Burdette v. Bartlett, 95 U. S. 637; Fullerton v. U. S. Bank, 1 Pet. (U. S.) 604.

England. — Alfred v. Watkins, 1 Edm. Sel. Cas. (N. Y.) 369.

Compare Register v. Casperson, 3 Harr. (Del.) 289; Webster v. Barnett, 17 Fla. 272; Harvard Pub. Co. v. Benjamin, 84 Md. 333; Halley v. Jackson, 48 Md. 254; Fawcett v. Fell, 77 Pa. St. 308. And see Forstall v. Farmers' Union Commercial Assoc., 47 La. Ann. 105, where it was held improper to join

in one action the maker or makers of a non-negotiable instrument and a person who has indorsed his name on such instrument.¹

the maker and pledgor of a note in an action by the pledgee to recover the debt which the note was pledged to secure.

Bill of Exchange — Law Merchant. — It was held in *Pierce v. Eustis*, 6 Blackf. (Ind.) 159, that under the statute of that state making it "lawful for the holder of any note negotiable by the law merchant, to institute one suit against all the parties to such note who may be liable at common law to the holder," the indorsee of a bill of exchange could not maintain a joint action against drawer, acceptor, and indorser of the bill, on the ground that bills of exchange were not embraced within the act.

Indorser Liable Before Suit Against Maker. — In *Couch v. Thornton First Nat. Bank*, 64 Ind. 92, it was held that an indorser might be joined as defendant in an action against a maker, when such indorser would be liable without suit having been brought first against the maker, but that otherwise such joinder was improper.

Collateral Obligation. — Where a party makes an indorsement on a note in these words: "I sign the within as security," which indorsement is made after the execution of the note, the obligation is collateral, and the party cannot be joined in an action against the maker. *Goode v. Jones*, 9 Mo. 876.

Note of Married Woman. — An indorser on a note of a married woman, charging her separate estate, may be joined as a party defendant in an action against her in equity. *Walters v. Farmers' Bank*, 76 Va. 12.

Single Bill under Seal. — It was held in *Mann v. Sutton*, 4 Rand. (Va.) 253, that a joint action could not be maintained against the makers and indorsers of a single bill under seal, since such instrument was a specialty, and not a note, though it was made negotiable and payable at a bank.

Guaranty of Payment by Payee. — Where the payee of a note payable to order indorses a guaranty of payment thereon, he becomes an indorser, so that he may be joined in an action against the maker under the *Michigan* statute. *Green v. Burrows*, 47 Mich. 70. And see *Martin v. Fales*, 24 N. H. 242.

An Indorser in Blank Before Delivery may be joined as a defendant with the payee, who subsequently indorses the note, on the ground that such indorser in blank is liable as a maker. *Killian v. Ashley*, 24 Ark. 511.

Name of Indorser Forged. — It was held in *Ohio Valley Nat. Bank v. Ronsheim*, (Cinc. Super. Ct.) 31 Ohio L. J. 99, that a person whose name had been forged as indorser of a note, and who, upon discovery of the forgery, promised to pay the note, could not be joined as a defendant in an action against the maker.

Indorser After Judgment. — A person who indorses a note after a judgment has been obtained thereon and assigned cannot be joined as a defendant in an action on the judgment. *Wooten v. Maulsby*, 69 N. Car. 462.

In Justice's Court. — In *Craft v. Smith*, 35 N. J. L. 302, it was held that the maker and indorser of a promissory note could not be joined as defendants in an action in a justice's court, but such a joinder was subsequently authorized by the New Jersey Act of March, 1877.

Foreclosure of Mortgage. — In *Smith v. McEvoy*, 8 Utah 58, it was held that an indorser might be joined in an action against the maker of a note, where the plaintiff sought the foreclosure of a mortgage securing the note.

Separate Judgments. — In the *District of Columbia* separate judgments may be entered against the maker and indorser of a promissory note in a joint action against them. *Young v. Warner*, 6 App. Cas. (D. C.) 433.

After Recovery of Separate Judgments against the maker and indorser of a promissory note, they may be joined as defendants in a bill to compel the payment of such notes and judgments remaining unsatisfied. *Austin v. Figueira*, 7 Paige (N. Y.) 56.

Right of Indorser Not Served to Appear. — In *McKnight v. Baker*, 1 How. Pr. (N. Y. Supreme Ct.) 201, it was held that where the maker and indorser of a note were joined as defendants, but the indorser was not served, he had no right to appear in the case.

1. *Mix v. State Bank*, 13 Ind. 521; *Samstag v. Conley*, 64 Mo. 476; *Huntington Bank v. Hysell*, 22 W. Va. 142.

A promissory note which is non-

(2) *Whether Joinder Necessary.* — The general rule is that the indorser of a negotiable instrument need not be joined as a defendant in an action against the maker, drawer, or acceptor. The statutes permitting such joinder do not generally make it compulsory.¹ This is especially the case where the payee is not the real, but only a nominal, party to the instrument, never having had any real interest therein.² And of course such a joinder will not be required at the request of one of such parties when sued alone.³ But in some states such joinder is made com-

negotiable because payable at an unincorporated bank will not support a joint action against the maker and indorser of such instrument. *Huntington Bank v. Hysell*, 22 W. Va. 142.

Facts Excusing Prior Suit Against Maker. — In *Mix v. State Bank*, 13 Ind. 521, where it was held that as a general rule a joint suit could not be maintained against the maker and assignor of a promissory note not governed by the law merchant, but that facts which would excuse a prior suit against the maker before resorting to the assignor might justify the joinder of the assignor as a defendant with the maker.

1. *Alabama.* — *Williams v. Jones*, 79 Ala. 119; *McGhee v. Importers', etc.*, Nat. Bank, 93 Ala. 192.

Arkansas. — *Ruddell v. Walker*, 7 Ark. 457.

Indiana. — *Barcus v. Evans*, 14 Ind. 381; *Alexander v. Gaar*, 15 Ind. 89; *Morehouse v. Potter*, 15 Ind. 477; *Connard v. Christie*, 16 Ind. 427; *Treadway v. Cobb*, 18 Ind. 36; *Bondurant v. Bladen*, 19 Ind. 160; *Strong v. Downing*, 34 Ind. 300; *Erwin v. Scotten*, 40 Ind. 389; *Keller v. Williams*, 49 Ind. 504; *Riley v. Schwacker*, 50 Ind. 592; *Cole v. Merchants' Bank*, 60 Ind. 350; *Reed v. Finton*, 63 Ind. 288; *Morrison v. Fishel*, 64 Ind. 177; *Abshire v. Corey*, 113 Ind. 484; *Craig School Tp. v. Scott*, 124 Ind. 72.

Kentucky. — *Crissom v. Williamson*, 1 A. K. Marsh. (Ky.) 454; *Leacock v. Hall*, 13 B. Mon. (Ky.) 211; *Guy v. Butler*, 6 Bush (Ky.) 509.

Louisiana. — *Farmers' Bank v. Stevens*, 11 La. Ann. 189.

New York. — *Austin v. Figueira*, 7 Paige (N. Y.) 56.

North Carolina. — *Virginia Nat. Bank v. Carr*, 121 N. Car. 113.

Texas. — *San Antonio, etc., R. Co. v. Cockrill*, 72 Tex. 613; *Brown v. Thompson*, 79 Tex. 58.

Wisconsin. — *Hilton v. Waring*, 7

Wis. 492; *Van Ness v. Corkins*, 12 Wis. 188; *Curtis v. Mohr*, 18 Wis. 615.

United States. — *Keary v. Farmers', etc., Bank*, 16 Pet. (U. S.) 89.

A statute (Mississippi Act of 1837), requiring the plaintiff in actions on promissory notes to join the maker and indorsers is repugnant to section 11 of the Federal Judiciary Act of 1789, under which the holder may sue his immediate indorsers severally, if he is a citizen of another state, and is therefore not binding on the federal courts. *Keary v. Farmers', etc., Bank*, 16 Pet. (U. S.) 89; *McAfee v. Doremus*, 5 How. (U. S.) 53.

Action Against Maker and Guarantors. — In *Cole v. Merchants' Bank*, 60 Ind. 350, it was held that the payee, who was also an indorser, need not be joined in an action on a note against the maker and guarantors.

Indorser for Accommodation. — Persons who indorsed a note for the accommodation of the maker may sue thereon without joining the maker. *Virginia Nat. Bank v. Carr*, 121 N. Car. 113.

Action Against Indorser Alone. — The makers of a promissory note are not necessary parties defendant to an action against the indorser, and the holder may sue him alone. *McGhee v. Importers', etc., Nat. Bank*, 93 Ala. 192.

After Recovery of Separate Judgments. — In *Austin v. Figueira*, 7 Paige (N. Y.) 56, it was held that the drawer of a bill of exchange need not be joined in an action against the indorser to secure satisfaction of a separate judgment recovered against him, the latter having also recovered a separate judgment against such drawer.

2. *Rhyan v. Dunnigan*, 76 Ind. 178; *Smith v. Walker*, 7 Ind. App. 614.

3. *Cooper v. German Nat. Bank*, 9 Colo. App. 169; *McGrath v. Hoopes*, 26 Miss. 496; *Bartholow Banking-house v. St. Joseph Lead Co.*, 12 Mo. App. 587; *Southern Bldg., etc., Assoc. v.*

pulsory,¹ though some of these statutes make an exception as to persons not residents of the state.²

Assignment or Indorsement.—In some states when a negotiable instrument is transferred by assignment the assignor must be joined in an action against the maker, but when the transfer is by indorsement the indorser need not be joined.³

Skinner, (Tex. Civ. App. 1897) 42 S. W. Rep. 320; *Shuey v. Adair*, 18 Wash. 188.

Reason of Rule.—It was held in *McGrath v. Hoopes*, 26 Miss. 496, that an indorser would not be joined as a defendant in an action against the maker of a note at the request of such maker, since such joinder would be to the disadvantage of the maker rather than otherwise, as it would make him liable to additional costs. But this case *overruled* *Wells v. Patterson*, 7 How. (Miss.) 32, where the contrary was held.

Defendant Setting Up Fraud.—In *Pruitt v. Jones*, 14 Tex. Civ. App. 84, the maker of a purchase money note was permitted to bring in the payee of such note as codefendant, where he claimed that he had been induced to execute the note by the fraudulent representations of such payee.

1. *Brunson v. Lea*, 5 Smed. & M. (Miss.) 149; *Rappleye v. Hill*, 4 How. (Miss.) 295; *Wilkinson v. Tiffany*, 5 How. (Miss.) 411; *Chenango Bank v. Curtiss*, 19 Johns. (N. Y.) 326. But see *McGrath v. Hoopes*, 26 Miss. 496.

In Michigan.—In *Fay v. Jenks*, 78 Mich. 312, it was held that an action could not be maintained against the indorsers alone, where they had indorsed the note before its delivery to the payee.

Effect of These Statutes.—A statute requiring the makers and indorsers of promissory notes to be sued in the same action does not affect the rights of the parties to the contract, but only modifies the remedy. *Rappleye v. Hill*, 4 How. (Miss.) 295.

Simultaneous Action.—In *Binge v. Smith*, Dall. (Tex.) 616, it was held that the indorser and the drawer or maker of a negotiable instrument should be joined in the same action, where both are sued simultaneously, though it was said that the practice at common law was otherwise.

Plea in Abatement.—Under a statute requiring the maker and indorsers of a note to be joined, the maker when sued alone may plead in abatement

that the indorsers are not sued, but if there be two indorsers not sued, and he plead in abatement that one is a resident, and say nothing as to the other, the plea will be good, for in that case it will be presumed that the other is a nonresident. *Stevenson v. Walton*, 2 Smed. & M. (Miss.) 262.

In Justice's Court.—In *Reed v. Finton*, 63 Ind. 288, it was held that in an action before a justice of the peace the payee must be made a party defendant to an action against the maker, unless he had transferred the note to the plaintiff by indorsement rather than assignment.

2. *Smith v. Crutcher*, 27 Miss. 455; *Stevenson v. Walton*, 2 Smed. & M. (Miss.) 262; *Agricultural Bank v. Harris*, 2 Smed. & M. (Miss.) 463; *Thompson v. Planters' Bank*, 2 Smed. & M. (Miss.) 476; *Lillard v. Planters' Bank*, 3 How. (Miss.) 78; *Bullit v. Thatcher*, 5 How. (Miss.) 639; *Colver v. Wheeler*, 11 Ohio Cir. Ct. Rep. 604, 5 Ohio Cir. Dec. 278; *Thompson v. Payne*, 21 Tex. 622.

The makers of a note are included in the *Mississippi* statute requiring all the drawers and indorsers of bills of exchange and promissory notes resident in the state to be sued in one joint action. *Stevenson v. Walton*, 2 Smed. & M. (Miss.) 262; *Agricultural Bank v. Harris*, 2 Smed. & M. (Miss.) 463; *Wells v. Patterson*, 7 How. (Miss.) 32.

In *Agricultural Bank v. Harris*, 2 Smed. & M. (Miss.) 463, it was held that the fact that the maker had previously been sued, and judgment obtained against him, was no excuse for not joining him in a subsequent action against the indorsers. But in *Thompson v. Planters' Bank*, 2 Smed. & M. (Miss.) 476, it was held that this statute did not apply to the makers of a note which had never been indorsed.

3. *Indiana.*—*Barcus v. Evans*, 14 Ind. 381; *Alexander v. Gaar*, 15 Ind. 89; *Connard v. Christie*, 16 Ind. 427; *Treadway v. Cobb*, 18 Ind. 36; *Strong v. Downing*, 34 Ind. 300; *Keller v. Williams*, 49 Ind. 504; *Clough v. Thomas*, 53 Ind. 24; *Clough v. Miller*,

(3) *Discontinuance as to One or More Defendants.* — In a joint action against the indorsers, and the maker, drawer, or acceptor of a negotiable instrument, the general rule is that there can be no discontinuance as to such maker, drawer, or acceptor, without also causing a discontinuance as to the indorser.¹ But in some

53 Ind. 28; *Reed v. Finton*, 63 Ind. 288, where the rule was applied in an action before a justice of the peace; *Abshire v. Corey*, 113 Ind. 484. *Contra*, where the note was payable to bearer, *Riley v. Schawacker*, 50 Ind. 592.

Kentucky. — *Perry v. Seitz*, 2 Duv. (Ky.) 122. And see *Curd v. Lewis*, 1 Dana (Ky.) 354. *Contra*, in an action by bill and attachment against the maker, *Clark v. Smith*, 7 B. Mon. (Ky.) 274, where the defense is payment with notice before the assignment; *True v. Triplett*, 4 Metc. (Ky.) 57; *Craig v. Whips*, 1 Dana (Ky.) 375, in which case usury was also pleaded.

Ohio. — *Myers v. Miller*, 2 West L. M. (Ohio) 420.

Contra. — *Ruddell v. Walker*, 7 Ark. 457.

1. *Alabama.* — *Phillips v. Jordan*, 3 Stew. (Ala.) 38.

Indiana. — *Lodge v. State Bank*, 6 Blackf. (Ind.) 557; *Britton v. Wheeler*, 8 Blackf. (Ind.) 31; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531.

Michigan. — *Maynard v. Penniman*, 10 Mich. 153; *Fay v. Jenks*, 78 Mich. 312.

Mississippi. — *Smith v. Crutcher*, 27 Miss. 455; *Wilkinson v. Flowers*, 37 Miss. 579; *Boush v. Smith*, 2 Smed. & M. (Miss.) 512; *Wilkinson v. Tiffany*, 5 How. (Miss.) 411; *Brunson v. Lea*, 5 Smed. & M. (Miss.) 149. But see *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597.

New York. — *Miller v. M'Cagg*, 4 Hill (N. Y.) 35. But see *Scott v. Standart*, 19 Wend. (N. Y.) 642; *Anonymous*, 4 Hill (N. Y.) 19; *Fuller v. Van Schaick*, 18 Wend. (N. Y.) 547.

Tennessee. — *Holland v. Harris*, 2 Sneed (Tenn.) 68.

Texas. — *Scott v. Dewees*, 2 Tex. 163; *Look v. Henderson*, 4 Tex. 303; *Campbell v. Beckwith*, 17 Tex. 439; *Hopkins v. Keith*, 27 Tex. 91; *Barnett v. Taylor*, 30 Tex. 454; *Tooke v. Taylor*, 31 Tex. 1.

Compare *McAfee v. Doremus*, 5 How. (U. S.) 53; *Buckingham v. McCracken*, 2 Ohio St. 287.

Proving Insolvency of Maker. — In

Couch v. Thorntown First Nat. Bank, 64 Ind. 92, it was held that although the plaintiff had a right to dismiss his action against the maker in a joint action against the maker and indorser of a promissory note, yet where the indorser had pleaded the general denial, such a dismissal would not relieve the plaintiff from the necessity of showing that the maker was insolvent, in order to hold the indorser liable.

Severance on Maker's Default. — Where the maker fails to answer in an action against himself and the indorser of a promissory note, the plaintiff may enter a judgment of severance, and thereafter the case stands as to the indorser as though he had been sued alone. *Fleischmann v. Stern*, 61 How. Pr. (N. Y. Supreme Ct.) 124.

Want of Service. — In *Hopkins v. Keith*, 27 Tex. 91, it was held that want of service on one of the makers of a note would not authorize the plaintiff to dismiss as to him, and take judgment by default against the indorser and the other maker, who were joined with him as defendants; and in *Look v. Henderson*, 4 Tex. 303, it was held that such a judgment was improper where no showing was made that the maker not served was insolvent or a nonresident. *Compare* *Phillips v. Jordan*, 3 Stew. (Ala.) 38.

Indorser Failing to Answer. — Under a statute providing that judgment cannot be rendered against indorsers unless it is at the same time rendered against the maker, with certain exceptions, where the maker answers, but the indorsers do not, judgment cannot be taken against the indorsers without further proceedings against the maker. *Campbell v. Beckwith*, 17 Tex. 439.

Matter Showing Personal Discharge. — pleaded by one defendant in an action against the maker and indorser of a note, does not authorize the plaintiff to dismiss the action as to that defendant and proceed to judgment against the other. *Britton v. Wheeler*, 8 Blackf. (Ind.) 31.

Indorsement for Principal by Agent. — The dismissal of an action as to the indorser causes a dismissal also as to

states the rule is otherwise, when the makers are nonresidents;¹ and there seems to be no objection to dismissing the suit as to the indorser, and proceeding to judgment against the maker.²

f. DRAWER AND ACCEPTOR. — At common law the holder of a bill of exchange could not unite in the same action the drawer and acceptor of such bill. But this rule has been generally changed by statute permitting the drawer and acceptor to be joined,³ but such joinder, although permitted, is not necessary.⁴

the agent of such indorser, who is joined as a codefendant in an action against such persons and the maker. *Albany Furniture Co. v. Merchants Nat. Bank*, 17 Ind. App. 531. The indorsement in this case was: "Shanklin & Co., per Gilpin."

1. *Duncan v. M'Neill*, 31 Miss. 704; *Pool v. Hill*, 44 Miss. 306; *Smith v. Crutcher*, 27 Miss. 455; *Moore v. Janes*, 6 Tex. 227.

2. *Nevill v. Hancock*, 15 Ark. 511; *Hamill v. Ward*, 14 Colo. 277; *Kirk v. Seawell*, 2 Smed. & M. (Miss.) 571; *People v. New York C. P.*, 19 Wend. (N. Y.) 118. But see *Moffet v. Woolbridge*, 3 Stew. (Ala.) 324.

Failure of Proof Against Indorser. — Where suit is instituted against the maker and indorser of a note, jointly, and the plaintiff fails to make out his case against the indorser, for want of proof of demand and notice, such failure does not inure to the benefit of the maker. *Nevill v. Hancock*, 15 Ark. 511.

Effect of Former Action. — An action previously brought against the indorser, or the maker or drawer of a negotiable instrument, is no bar to a subsequent action against the other party. *Hamill v. Ward*, 14 Colo. 277; *Porter v. Ingraham*, 10 Mass. 88; *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 14. But see *Gilmore v. Carr*, 2 Mass. 171; *Rodgers v. Hunter*, 8 Smed. & M. (Miss.) 640.

3. *Georgia*. — *Davis v. Baker*, 71 Ga. 33; *Ells v. Bone*, 71 Ga. 466. And see *Vinson v. Platt*, 21 Ga. 135; *Cox v. Mechanics' Sav. Bank*, 28 Ga. 529.

Kentucky. — *Crisson v. Williamson*, 1 A. K. Marsh. (Ky.) 454.

Massachusetts. — *Blakely v. Grant*, 6 Mass. 386.

Michigan. — *Reading v. Beardsley*, 41 Mich. 123.

Mississippi. — *Gwin v. Mandeville*, 9 Smed. & M. (Miss.) 320; *McGrath v. Hoopes*, 26 Miss. 496.

New York. — *Barton v. Spies*, 5 Hun

(N. Y.) 60; *Butler v. Rawson*, 1 Den. (N. Y.) 105; *De Ridder v. Schermerhorn*, 10 Barb. (N. Y.) 638; *Halleran v. Field*, 23 Wend. (N. Y.) 38.

Ohio. — *Green v. Burnet*, 1 Handy (Ohio) 285.

Pennsylvania. — *Boggs v. Lancaster Bank*, 7 W. & S. (Pa.) 331.

It was held in *Pierce v. Eustis*, 6 Blackf. (Ind.) 159, that the statute of that state making it "lawful for the holder of any note negotiable by the law merchant to institute one suit against all the parties to such note who may be liable at common law to the holder," did not apply to a bill of exchange, so as to authorize a joint suit against the drawer, acceptor, and indorser of the bill.

In *Colorado*, prior to 1887, it was not misjoinder to include the maker and acceptor of an order as parties defendant in an action before a justice. *Hughes v. Fisher*, 10 Colo. 383.

4. *Alabama*. — *Williams v. Jones*, 79 Ala. 119.

Georgia. — *Ware v. City Bank*, 59 Ga. 840; *Davis v. Baker*, 71 Ga. 33; *Richardson v. White*, R. M. Charlt. (Ga.) 53.

Mississippi. — *McGrath v. Hoopes*, 26 Miss. 496. But see *Gwin v. Mandeville*, 9 Smed. & M. (Miss.) 320, where it was held that the acceptor of a bill of exchange was included in the terms of the Mississippi statute requiring the holder of an indorsed bill to sue all parties thereto living and resident in the state.

Ohio. — *Green v. Burnet*, 1 Handy (Ohio) 285.

Pennsylvania. — *Boggs v. Lancaster Bank*, 7 W. & S. (Pa.) 331.

No Stay of Execution. — Where the acceptor of a bill, though a surety, is sued alone, he cannot, upon motion, after judgment, obtain a stay of execution and require the plaintiff to make the principals parties, so that they may first be proceeded against by execution. *Green v. Burnet*, 1 Handy (Ohio) 285.

Discontinuance. — It seems that where the drawer and acceptor of a bill of exchange are joined as defendants in one action, the plaintiff may discontinue as to one of the defendants and proceed to judgment against the other.¹

g. INDORSERS — Successive Indorsers. — In some states successive indorsers of a negotiable instrument may be joined as defendants in an action thereon.² But where such joinder is permitted it is held not to be compulsory.³

Joint Indorsers. — In some jurisdictions the holder of a negotiable instrument must make all joint indorsers defendants.⁴

Discontinuance. — It seems that in an action against two or more indorsers of a note, it is competent for the plaintiff to discontinue as to one not served, and proceed against the others.⁵

h. INDORSER AND GUARANTOR. — It has been held that a

Suit Against Drawer Alone. — It was held in *Richardson v. White*, R. M. Charl. (Ga.) 53, that the holder of a bill of exchange might maintain an action against the drawer thereof, without previously suing the acceptor. To the same effect see *Ware v. City Bank*, 59 Ga. 840.

1. *Reading v. Beardsley*, 41 Mich. 123; *Christian v. O'Neal*, 46 Miss. 670.

Action Against Party Not Joined. — In *Ells v. Bone*, 71 Ga. 466, where judgment was recovered against the acceptor and one of the drawers of a bill of exchange, it was held that such judgment did not bar a subsequent action against the other drawer, who was not served in the first case, on account of his absence from the state.

2. *Indiana*. — *Marshall v. Pyeatt*, 13 Ind. 255; *Goodlet v. Britton*, 6 Blackf. (Ind.) 500; *Ewing v. Sills*, 1 Ind. 125, holding that successive indorsers could be joined only when the instrument was negotiable.

New York. — *Bradford v. Corey*, 5 Barb. (N. Y.) 461.

North Carolina. — *Johnson v. Hooker*, 2 Jones L. (N. Car.) 29.

Tennessee. — *Crutcher v. Bedford*, 8 Humph. (Tenn.) 405; *Watson v. Hoge*, 7 Yerg. (Tenn.) 344.

Texas. — *Brooks v. Breeding*, 32 Tex. 752; *Davidson v. Peticolas*, 34 Tex. 27; *Jones v. Ritter*, 32 Tex. 717, overruling *Rhine v. Hart*, 27 Tex. 94. Compare *Givens v. Western Bank*, 2 Ala. 397; *Brown v. Knowler*, 2 Ill. 469; *Wolf v. Hostetter*, 182 Pa. St. 292, 40 W. N. C. (Pa.) 517, affirming 13 Lanc. L. Rev. (Pa.) 201.

3. *Duncan v. M'Neill*, 31 Miss. 704; *Virginia Nat. Bank v. Carr*, 121 N.

Car. 113; *San Antonio, etc., R. Co. v. Cockrill*, 72 Tex. 613. But see *Dillon v. State Bank*, 6 Blackf. (Ind.) 5; *Goodlet v. Britton*, 6 Blackf. (Ind.) 500; *Riddle v. Mandeville*, 5 Cranch (U. S.) 322.

Action for Conversion. — In *Stafford v. Blum*, 7 Tex. Civ. App. 283, it was held that an assignor was a proper party defendant in an action by the assignee of promissory notes against one who had collected them, and had failed to pay over the proceeds to the plaintiff, when such assignee set up in defense offsets against the plaintiff's assignor.

All Living Indorsers. — In *Dillon v. State Bank*, 6 Blackf. (Ind.) 5, and *Goodlet v. Britton*, 6 Blackf. (Ind.) 500, it was held that all living indorsers must be joined as defendants under the *Indiana* statute.

4. *Erwin v. Scotten*, 40 Ind. 389; *Foster v. Collner*, 107 Pa. St. 305. But see *Deloach v. Dixon*, Hempst. (U. S.) 428, where it was held that the statutes of *Arkansas* authorized the plaintiff to sue any or all the joint indorsers of a promissory note.

5. *Smith v. Robinson*, 11 Ala. 270. And see *Watson v. Hoge*, 7 Yerg. (Tenn.) 344. But in *Foster v. Collner*, 107 Pa. St. 305, it was held that in an action on a joint note against two indorsers and the payees jointly, there could be no recovery against one of the indorsers singly, although the indorsement by the other was forged.

Second Action After Discontinuance. — In *Johnson v. Hooker*, 2 Jones L. (N. Car.) 29, it was held that an action might be maintained against an indorser, although in a previous action against such person and another in-

joint action cannot be maintained against an indorser and a guarantor of a negotiable instrument, as their contracts are several,¹ and in another case, that such a joinder was at least unnecessary.²

2. **SURVIVOR AND PERSONAL REPRESENTATIVE OF DECEASED PARTY — Whether Joinder Proper.** — The personal representatives of deceased parties to a negotiable instrument cannot be joined as defendants in an action against the surviving parties to such instrument,³ at least in an action at law;⁴ though in some states a contrary rule now obtains under statutory provisions.⁵

Death Pending Action. — In some states it is held that on the death of one of the parties defendant in an action on a negotiable instrument while the suit is pending, the action must be continued against the survivors alone,⁶ but in other states the contrary is held,⁷ and in such states it is proper to revive the action against the representatives of the deceased party.⁸

dorser his name had been stricken out of the writ; but in *Erwin v. Scoten*, 40 Ind. 389, the contrary was held.

1. *Killian v. Ashley*, 24 Ark. 511. See also *supra*, *d. Maker and Guarantor*.

2. *Cozzens v. Chicago Hydraulic Press Brick Co.*, 166 Ill. 213. Compare *Central Trust Co. v. New York Equipment Co.*, 87 Hun (N. Y.) 421.

3. *Mattison v. Childs*, 5 Colo. 78; *Stevens v. Catlin*, 152 Ill. 56; *Barlow v. Scott*, 12 Iowa 63.

4. *Ballance v. Samuel*, 4 Ill. 380; *Osgood v. Spencer*, 2 Har. & G. (Md.) 133; *Maples v. Geller*, 1 Nev. 238; *Binge v. Smith, Dall.* (Tex.) 616; *Chandler v. Hill*, 2 Hen. & M. (Va.) 124.

5. *California*. — *Bostwick v. McEvoy*, 62 Cal. 496; *Stockton Bank v. Howland*, 42 Cal. 129.

Indiana. — *St. John v. Hardwick*, 11 Ind. 251; *Hays v. Crutcher*, 54 Ind. 260; *Bray v. Black*, 57 Ind. 417.

Mississippi. — *Steen v. Finley*, 25 Miss. 535; *Bradford v. Curlee*, 41 Miss. 558, in which case it was held that any error in joining the executor of a deceased obligor and the survivor would be cured by a verdict, when there had been no objection to the joinder. But see *Poole v. McLeod*, 1 Smed. & M. (Miss.) 391.

New York. — *Eaton v. Alger*, 47 N. Y. 345, *affirming* 57 Barb. (N. Y.) 179, distinguished in *Hays v. Hathorn*, 74 N. Y. 486; *Ricart v. Townsend*, 6 How. Pr. (N. Y. Supreme Ct.) 460.

In the following cases it was held that the personal representative cannot be joined as a defendant in an action

against a surviving co-maker, unless the survivor is insolvent. *Voorhis v. Child*, 17 N. Y. 354; *Voorhis v. Baxter*, 18 Barb. (N. Y.) 592, 1 Abb. Pr. (N. Y.) 43; *Churchill v. Trapp*, 3 Abb. Pr. (N. Y. Supreme Ct.) 306; *Bentz v. Thurber*, 1 Thomp. & C. (N. Y.) 645.

Ohio. — *Burgoyne v. Ohio L. Ins., etc., Co.*, 5 Ohio St. 586.

Form of Judgment Against Executor or Administrator. — When the personal representative of a deceased party is joined as a defendant with surviving parties to a negotiable instrument, the judgment rendered against him should be *de bonis testatoris*. *Bostwick v. McEvoy*, 62 Cal. 496; *Stockton Bank v. Howland*, 42 Cal. 129. And see *Churchill v. Trapp*, 3 Abb. Pr. (N. Y. Supreme Ct.) 306.

Defendant in Two Capacities. — In *Morehouse v. Ballou*, 16 Barb. (N. Y.) 289, it was held improper to sue the surviving maker of a joint and several note, as such survivor, and as one of the executors of the deceased maker, in an action in which his co-sureties were also parties defendant.

6. *Gayle v. Agee*, 4 Port. (Ala.) 507; *Bruton v. Gregory*, 8 Ark. 177; *McVean v. Scott*, 46 Barb. (N. Y.) 379; *Wiley v. Pinson*, 23 Tex. 486.

7. *Colt v. Learned*, 133 Mass. 409; *Henderson v. Talbert*, 5 Smed. & M. (Miss.) 109; *Smith v. Crutcher*, 27 Miss. 455; *Holland v. Harris*, 2 Sneed (Tenn.) 68.

8. *Smith v. Crutcher*, 27 Miss. 455; *Henderson v. Talbert*, 5 Smed. & M. (Miss.) 109.

Whether Joinder Necessary. — Where the joinder of surviving parties and the personal representatives of deceased ones is permitted, it is nevertheless held not to be necessary.¹

Action Against Personal Representative Alone. — In some cases it has been held permissible where there were several parties to a negotiable instrument to sue the personal representative of a deceased party as a sole defendant,² but in other cases it has been held that this can be done only when the survivor or survivors are insolvent.³

Representatives of Maker and Indorser may be joined as defendants in an action on a negotiable instrument, when both of those parties are deceased.⁴

j. PERSON REFUSING TO JOIN AS PLAINTIFF. — Where a person who would properly be a coplaintiff in an action on a negotiable instrument refuses to join as such, he may be made a defendant.⁵

k. PERSON NOT A PARTY TO INSTRUMENT. — Persons not parties to the instrument cannot be joined as defendants in an action

1. *Indiana*. — *Klussman v. Copeland*, 18 Ind. 306; *Coulter v. Clark*, 2 Ind. App. 512. *Contra*, *St. John v. Hardwick*, 11 Ind. 251; *Bray v. Black*, 57 Ind. 417.

Kentucky. — *Farmers', etc., Bank v. Turner*, 2 Litt. (Ky.) 16.

Louisiana. — *Matter of O'Flaherty*, 7 La. Ann. 640.

Texas. — *Scott v. Dewees*, 2 Tex. 153; *Walker v. Collins*, 22 Tex. 189; *Foster v. Champlin*, 29 Tex. 22; *Womack v. Shelton*, 31 Tex. 592; *Aldridge v. Mardoff*, 32 Tex. 204; *Binge v. Smith, Dall.* (Tex.) 616.

Indorser and Representatives of Maker. — A statute prohibiting the entering of judgment against an indorser of a note unless judgment is also rendered against the maker, has been held not to require the plaintiff to make the administrator of a maker who dies while an action is pending against him and the indorser, a party defendant, as such death abates the action as to the maker, although his estate remains liable for the debt. *Aldridge v. Mardoff*, 32 Tex. 204; *Scott v. Dewees*, 2 Tex. 153.

Right of Representative to Appear. — It was held in *Womack v. Shelton*, 31 Tex. 592, that the personal representative of a deceased maker of a promissory note had a right to appear with the survivors sued thereon, and have the validity of the note adjudicated.

2. *Gayle v. Agee*, 4 Port. (Ala.) 507; *Woodhouse v. Lee*, 6 Smed. & M.

(Miss.) 161; *Maples v. Geller*, 1 Nev. 238; *Thompson v. Johnson*, 40 N. J. L. 220.

3. *Leake, etc., Orphan House v. Lawrence*, 11 Paige (N. Y.) 81; *Bentz v. Thurber*, 1 Thomp. & C. (N. Y.) 645.

Dismissing Complaint as to Survivor. — In *Mattison v. Childs*, 5 Colo. 78, it was held improper to proceed against the executor of a deceased maker of a joint note, without dismissing the complaint as to the surviving maker.

4. *Keyser v. Fendall*, 5 Mackey (D. C.) 47; *Duerson v. Alsop*, 27 Gratt. (Va.) 229.

Maker and Administrator Who Is Payee. — In *Dancy v. Smith*, 68 N. Car. 179, it was held proper to make an administrator *pendente lite* to whom a note was given a party defendant in an action by a subsequent administrator to recover the amount of the note from the maker.

Maker's Heirs and Executors cannot properly be joined as defendants in an action to charge the realty of such deceased maker with the amount of a promissory note. *Emerick v. White*, 12 Phila. (Pa.) 189, 34 Leg. Int. (Pa.) 115.

5. *Central City First Nat. Bank v. Hummel*, 14 Colo. 259; *McNamee v. Carpenter*, 56 Iowa 276; *Hoskins v. McGirl*, 12 Mont. 563; *Hopkins v. Lane*, 4 Thomp. & C. (N. Y.) 311. But see *Drake v. New York Iron Mine*, (Supreme Ct.) 21 N. Y. Supp. 491; *Morse v. Hovey*, 9 Paige (N. Y.) 197.

thereon;¹ and of course the nonjoinder of such persons cannot be successfully set up by the defendant.²

IX. DECLARATION AND COMPLAINT — 1. Jurisdiction and Venue — Jurisdiction. — If the court in which an action on a negotiable instrument is brought is one of limited jurisdiction, the declaration must contain averments which show that the action is one within the jurisdiction of such court, as that a sufficient amount is involved,³ or, in actions in the federal courts, that the citizenship of the parties to the instrument is such that the court has jurisdiction.⁴ So, when an action is brought in equity, the pleading must contain averments which show the plaintiff's right to resort to that court.⁵

Venue. — In an action on negotiable instruments, it is proper to allege the venue under a *videlicet*.⁶

1. *Heaton v. Lynch*, 11 Ind. App. 408; *Lovelace v. Doran*, (Supreme Ct.) 15 N. Y. Supp. 279; *Oxford First Nat. Bank v. Turner*, (Supreme Ct.) 24 N. Y. Supp. 793; *U. S. Bank v. Lyman*, 20 Vt. 666; *Emly v. Lye*, 15 East 7. But see *Sullivan v. Sullivan Mfg. Co.*, 14 S. Car. 494, where it was held that directors of a corporation were properly joined as defendants in an action to enforce the statutory liability of such directors upon a note executed by the corporation.

Joint Liability for Consideration. — A note which appears on the face of it to be the separate note of A only, cannot be declared on as the joint note of A and B, though given to secure a debt for which A and B were jointly liable. *Emly v. Lye*, 15 East 7.

Person Receiving Part of Proceeds. — The payee of a note cannot be compelled to join as a party in a suit against the maker, a person who receives a part of the proceeds of the note and agrees to pay such note. *Heaton v. Lynch*, 11 Ind. App. 408.

2. *Newcome v. Dunham*, 27 Ind. 285; *Craig School Tp. v. Scott*, 124 Ind. 72; *Hinkle v. Hinkle*, (Ind. App. 1898) 50 N. E. Rep. 829; *Hackett v. Schiele*, 19 La. Ann. 67; *Snelling v. Howard*, 7 Robt. (N. Y.) 400.

Part Owners of Steamboat. — In an action upon a promissory note given for supplies furnished to a steamboat, it is not necessary to join co-owners of the steamboat who were not parties with the persons giving the note. *Snelling v. Howard*, 7 Robt. (N. Y.) 400.

3. *Thomas v. Miller*, Walk. (Miss.) 324.

4. *Commonwealth Bank v. Wister*, 2

Pet. (U. S.) 318; *M'Micken v. Webb*, 11 Pet. (U. S.) 25; *Smith v. Clapp*, 15 Pet. (U. S.) 125; *Morgan v. Gay*, 19 Wall. (U. S.) 81; *Turner v. Bank of North America*, 4 Dall. (U. S.) 8; *Bradford v. Jenks*, 2 McLean (U. S.) 130. See also *supra*, II. 3. *United States Courts*.

How Objection Raised. — When, in an action in a federal court on a negotiable instrument, want of jurisdiction appears on the face of the pleading, the objection should be taken by demurrer, and when it does not so appear, then by plea. *Varner v. West*, 1 Woods (U. S.) 493.

5. *Brush v. Kinsley*, 14 Ohio 22; *Chillicothe Bank v. Yoe*, 4 Ohio 125. But see *Maples v. Geller*, 1 Nev. 238.

Action by Assignee of Non-negotiable Note. — Where the assignee of a non-negotiable note has a right to sue thereon in equity, and he would have no such right if the instrument were negotiable, his plea must contain an allegation that the note is non-negotiable. *Brush v. Kinsley*, 14 Ohio 22.

6. *Semon v. Hill*, 7 Ark. 70; *Swinney v. Burnside*, 17 Ark. 38. See in general article VENUE.

Place of Execution Not Shown. — In declaring upon an instrument, according to its legal effect, which does not disclose upon its face the place of its execution, it is no variance to lay the venue in the county where the suit is brought, without a *videlicet*. *Semon v. Hill*, 7 Ark. 70.

Inference from Venue. — Where the venue in an action on a bill of exchange is stated in the margin of the declaration, and no special venue is otherwise disclosed, the place of draw-

2. What Law Governs. — Pleadings and evidence are governed by the laws of the place where the suit is brought,¹ but the *lex loci contractus* furnishes the rule of decision and governs the construction of and liability on a note,² if pleaded, but it must be pleaded for this purpose, otherwise the *lex fori* will control.³

3. Execution and Delivery — *a.* NECESSITY AND SUFFICIENCY OF ALLEGATIONS OF EXECUTION, INDORSEMENT, ETC. — **Promissory Note.** — In an action against the maker of a promissory note, the making or execution of the instrument must be alleged,⁴ and

ing will be inferred to be that stated in the margin. *Moore v. Bradford*, 3 Ala. 550.

1. *Bond v. Bragg*, 17 Ill. 69; *Chumazero v. Gilbert*, 24 Ill. 293, 651; *Smith v. Whitaker*, 23 Ill. 367.

A declaration upon an instrument negotiable where the action is brought need not show negotiability at the place where it was executed. *Hakes v. National State Bank*, 164 Ill. 273.

2. *Bond v. Bragg*, 17 Ill. 69; *Mendenhall v. Gately*, 18 Ind. 149.

3. *Shaw v. Wood*, 8 Ind. 518; *Brown v. Bunn*, 16 Ind. 406; *Mendenhall v. Gately*, 18 Ind. 149; *Wilson v. Clark*, 11 Ind. 387; *Roots v. Merriwether*, 8 Bush (Ky.) 401; *Cooke v. Addicks*, 5 Pa. Dist. Rep. 389; *Yale v. Ward*, 30 Tex. 20.

4. *Colorado*. — *Manning v. Haas*, 5 Colo. 37.

Connecticut. — *Lord v. Russell*, 64 Conn. 86.

Illinois. — *Zimmerman v. Wead*, 18 Ill. 305.

Indiana. — *Smith v. Carley*, 8 Ind. 451; *Koons v. McWhinney*, 30 Ind. 74; *Meeker v. Shanks*, 112 Ind. 207; *Douthitt v. Mohr*, 116 Ind. 482; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 95.

Kentucky. — *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036; *Bell v. Mansfield*, 12 Ky. L. Rep. 89, (Ky. 1890) 13 S. W. Rep. 838.

Missouri. — *Slevin v. Reppy*, 46 Mo. 606.

Montana. — *Schuttler v. King*, 13 Mont. 227.

New York. — *Cohu v. Husson*, 113 N. Y. 662, 23 N. Y. St. Rep. 505, affirming (C. Pl.) 6 N. Y. St. Rep. 292; *Price v. McClave*, 5 Duer (N. Y.) 670, 6 Duer (N. Y.) 544, affirming 3 Abb. Pr. (N. Y.) 253; *Conkling v. Gandall*, 1 Keyes (N. Y.) 228; *Butchers', etc., Bank v. Jacobson*, 9 Bosw. (N. Y.) 595, 15 Abb. Pr. (N. Y.) 218, 24 How. Pr. (N. Y.) 204; *Marshall v. Rockwood*, 12 How. Pr. (N.

Y. Supreme Ct.) 452; *St. John v. Beers*, 24 How. Pr. (N. Y. Supreme Ct.) 377; *Delafield v. Kinney*, 24 Wend. (N. Y.) 345; *Vogle v. Kirby*, 15 Civ. Pro. Rep. (N. Y. City Ct.) 332; *Wright v. Deering*, 2 Misc. Rep. (N. Y. C. Pl.) 296; *Oxford First Nat. Bank v. Turner*, (Supreme Ct.) 24 N. Y. Supp. 793.

Nebraska. — *Collingwood v. Merchants' Bank*, 15 Neb. 120, *distinguishing* *Gage v. Roberts*, 12 Neb. 276.

Texas. — *Jennings v. Moss*, 4 Tex. 452; *Jackson v. Marshall*, 6 Tex. 324; *Ross v. Breeding*, 13 Tex. 16; *Gray v. Osborne*, 24 Tex. 157; *Thigpen v. Mundine*, 24 Tex. 282; *Fortune v. Kerr*, 25 Tex. Supp. 309; *Sneed v. Moodie*, 24 Tex. 159; *Barnard v. Moseley*, 28 Tex. 543; *Parr v. Nolen*, 28 Tex. 798; *Gilder v. McIntyre*, 29 Tex. 89; *Belcher v. Wilson*, 31 Tex. 139; *Unger v. Anderson*, 37 Tex. 550; *Graves v. Drane*, 66 Tex. 658; *Behrens v. Dignowitty*, 4 Tex. Civ. App. 201; *Ramsey v. Drennan*, (Tex. Civ. App. 1898) 44 S. W. Rep. 587.

What Strictness Necessary. — It was held in *Zimmerman v. Wead*, 18 Ill. 305, that the strictness required in pleading at common law was not necessary in the averments in a declaration on a note, as to its making.

Information and Belief. — In an action by the assignee of a note the plaintiff properly states the making of the note on his information and belief. Being payable to another person and assigned to him, he could properly only state the making of the note on his information and belief. *St. John v. Beers*, 24 How. Pr. (N. Y. Supreme Ct.) 377.

Execution Admitted. — It was held in *Cummings v. Gutridge*, 17 Mo. 469, that where the defendant admitted the execution of the note sued on, a copy of which was attached to the petition, he could not take advantage of any variance between such copy and the note when introduced in evidence, as his admission of the execution made

special fund an allegation that there were such funds on hand is necessary.¹

Alleging Indorsement. — In an action against an indorser it is necessary to aver that he indorsed the instrument sued on.² But it has been held that a declaration setting out the instrument sued on, or one to which a copy of such instrument and indorsement is attached, is sufficient to excuse an allegation that the defendant indorsed it.³ In an action against an indorser, it is not necessary to allege that he is liable as such under the statute of Anne, or a similar act.⁴ It has been held that an indorser should be described as such,⁵ and it is improper to declare against him as

Co., 3 Ohio Dec. (Reprint) 304, it was held that such an allegation was necessary in an action on a check, and that the petition was demurrable for want of such allegation.

1. *Moody v. Newmark*, 121 Cal. 446; *Garrett v. Marshall*, 1 Tex. App. Civ. Cas., § 565. But in *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650, it was held in an action against a county upon county warrants, that a petition which alleged that the county had absolutely refused to pay such warrants, and that other warrants, of a similar class, and later date and registration, had been paid, need not also allege that the county treasurer had funds with which to pay the warrants sued on.

2. *Bartlett v. Leathers*, 84 Me. 241; *Gfroehner v. McCarty*, 2 Abb. N. Cas. (Brooklyn City Ct.) 76; *Mechanics' Banking Assoc. v. Spring Valley Shot, etc.*, Co., 25 Barb. (N. Y.) 419, reversing 13 How. Pr. (N. Y.) 227; *Price v. McClave*, 6 Duer (N. Y.) 544; *Jackson v. Marshall*, 6 Tex. 324; *Hodges v. Adams*, 19 Vt. 74.

Action Against Corporation. — In an action against a corporation, as indorser of a promissory note, if the complaint alleges that the note was indorsed by the defendants, that is sufficient, as it implies that the note was lawfully indorsed by them, and the burden is thrown on the defendants to show that it was not lawfully done. It need not be averred, in the complaint, that the note was indorsed by the defendants in the course of their legitimate business. *Mechanics' Banking Assoc. v. Spring Valley Shot, etc.*, Co., 25 Barb. (N. Y.) 419, reversing 13 How. Pr. (N. Y.) 227.

Action Against Married Woman. — In an action against a married woman as indorser, an allegation that she had a

separate estate, and that, by indorsing the note as alleged, she intended to and did charge her separate estate with the payment thereof, and that the consideration of the note went for the benefit of her separate estate, is sufficient. *Gfroehner v. McCarty*, 2 Abb. N. Cas. (Brooklyn City Ct.) 76.

Note in Maker's Hands. — The law presumes that a note in the maker's hands indorsed by the payee has been paid, and for one to whom the maker has discounted it to recover of the indorser it must be alleged that it was indorsed for the maker's accommodation. A verdict will not cure this defect. *Callahan v. Louisville First Nat. Bank*, 78 Ky. 604.

3. *Drumm v. Bradfute*, 18 La. Ann. 680; *Price v. McClave*, 6 Duer (N. Y.) 544, in which case it was held that it was a sufficient averment that the payee indorsed the note sued on, when the word "indorsed" was prefixed to the signature of the payee, affirming *Price v. McClave*, 5 Duer (N. Y.) 670, 3 Abb. Pr. (N. Y.) 253, wherein it was held that the attaching of a copy does not excuse an allegation of indorsement.

4. *Snedecker v. Test*, Tappan (Ohio) 144; *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 326.

5. *Ware v. City Bank*, 59 Ga. 840. And see *Smith v. Ball*, 10 Jur. 946.

Assignor. — An assignor of a negotiable instrument cannot be declared against as an indorser. *Stix v. Matthews*, 75 Mo. 96, which was an action on a non-negotiable instrument, against one who became liable as an assignor by indorsing it; and in *Weaver v. Beard*, 21 Mo. 155, it was held that in an action on such an instrument by an assignee against a remote assignor, the petition under the practice act abolishing distinctions be-

though he were the maker¹ or guarantor of the instrument sued on.²

Power to Execute. — In a declaration on a negotiable instrument, it is not necessary to allege that the defendant had power to execute such instrument,³ nor need the competency of the drawer to make the bill in suit be averred in an action against an indorser of such bill.⁴

Stamping. — A declaration need not aver that the instrument sued on was duly stamped, as an averment of the execution and delivery implies that the instrument was in the form and condition required by law.⁵

In Writing. — The declaration in an action on a negotiable instrument need not allege that it was made or accepted in writing.⁶

(2) **Signing — Necessity of Alleging.** — It should appear that the instrument sued on was signed by the defendant.⁷

tween law and equity must set up the same facts that would formerly have been necessary in a bill in equity.

1. *De Lashmutt v. Everson*, 7 Oregon 213; *Gwinnell v. Herbert*, 5 Ad. & El. 436, 31 E. C. L. 373, 6 N. & M. 723, 2 H. & W. 194; *Burmester v. Hogarth*, 11 M. & W. 97, 12 L. J. Exch. 178.

Fraud and Want of Consideration. — Where the holder of a negotiable promissory note, who bought it before maturity, with notice that it was obtained from the maker by fraud or want of consideration, brings suit against the maker, and alleges in the complaint that he bought the note from the payee, and this allegation is admitted in the answer, such holder will not be allowed to prove on the trial that he received it from a prior holder without such notice of fraud or want of consideration. *De Lashmutt v. Everson*, 7 Oregon 213.

2. *Cottrell v. Conklin*, 4 Duer (N. Y.) 50.

3. *Carrier v. Cameron*, 31 Mich. 373; *Montague v. Church School Dist. No. 3*, 34 N. J. L. 218; *Beal v. Alexander*, 6 Tex. 531; *Veeder v. Lima*, 11 Wis. 419.

Ultra Vires. — In declaring on a promissory note executed by a corporation, it is not necessary to aver that the defendant, in making such note, acted within its power. It is sufficient for the latter to declare upon the instrument as the act of the defendant, and if it be *ultra vires* he will fail upon the trial of the cause. *Montague v. Church School Dist. No. 3*, 34 N. J. L. 218.

Capacity of Partnership. — An indorsee's count upon a promissory note

against copartnership makers need not specially allege the firm's capacity to make notes or set forth facts wherefrom such capacity may be implied. *Carrier v. Cameron*, 31 Mich. 373.

Notes Executed by an Infant. — In *Latham v. Kolb*, 76 Ga. 291, it was held that a declaration on notes executed by a minor was demurrable where the minority of such maker appeared on the face of the declaration, and there was no averment that the notes were given for necessities.

4. *Beal v. Alexander*, 6 Tex. 531.

5. *Smith v. Hunter*, 33 Ind. 106; *Smith v. Jordan*, 13 Minn. 264; *Cabbott v. Radford*, 17 Minn. 330; *Campbell v. Wilcox*, 10 Wall. (U. S.) 421. And see to the same effect *Knight v. Fox*, 1 Morr. (Iowa) 305, where the instrument sued on bore an English revenue stamp.

6. *Stephens v. Spokane*, 11 Wash. 41, which was an action on a city warrant required by municipal ordinance to be in writing, it being held that under a general allegation of the making of the warrant, a warrant properly executed in writing was admissible in evidence; *Whilden v. Merchants'*, etc., Nat. Bank, 64 Ala. 1; *Lowville Bank v. Edwards*, 11 How. Pr. (N. Y. Supreme Ct.) 216; *Ereskine v. Murray*, 2 Ld. Raym. 1542. But see *Rousch v. Duff*, 35 Mo. 312.

Guaranty. — A declaration on a guaranty within the purview of the statute of frauds need not aver that the guaranty was in writing, or that the undertaking guaranteed was made with the formalities required by the statute. *Dayton v. Williams*, 2 Dougl. (Mich.) 31.

7. *Walbridge v. Arnold*, 21 Conn.

Equivalent Allegations. — An averment that the defendant signed the instrument is not necessary where it is stated that he made,¹ executed,² or gave it.³

By Whom Signed. — Under an allegation that the defendant personally signed the instrument, it may be shown in evidence that it was in fact signed by another for him, without causing a variance;⁴ and so, on a partnership obligation signed by one of the firm, the declaration may state that it was signed by the defendants.⁵

Instrument Executed by an Agent. (See also article PRINCIPAL AND AGENT.) — In an action on an instrument executed by an agent, the declaration need not notice the agency, and may aver that

424; *Mechanics' Bank v. Donnell*, 35 Mo. 373; *Stephens v. Spokane*, 11 Wash. 41; *Regnault v. Hunter*, 4 W. Va. 257. But see *DeLafield v. Kinney*, 24 Wend. (N. Y.) 345, where it was held that it was not necessary to allege in a declaration on bank bills issued under the general banking law, that they were signed by the president or cashier of the bank, and that it was enough to allege in general terms that the association made the contract.

Signing by Mark. — In *Walbridge v. Arnold*, 21 Conn. 424, it was held that evidence that one of the makers signed the note in suit with his mark, was admissible under a declaration that the defendants under their hands executed it.

Debt on Bill of Exchange. — Under a statute providing that an action of debt would lie on a bill of exchange where the acceptance is signed by the party who is to be charged, or his agent, a declaration on such a bill must allege the signing as required by the statute. *Regnault v. Hunter*, 4 W. Va. 257.

Immaterial Averment as to Signing. — It was held in *Jaqua v. Woodbury*, 3 Ind. App. 289, that an allegation in the second count of a complaint that the defendants executed their note, "using the names and styles aforesaid," referring to the first count, was immaterial, and would not vitiate the second count, though the allegations as to the signing in the first count may have been improper.

Sealing by Corporation. — It was held in *Hamilton v. Newcastle, etc.*, R. Co., 9 Ind. 359, that in an action on a promissory note against a corporation, it need not be alleged that the corporate seal was attached, where there was no provision in the charter requir-

ing such acts of the corporation to be evidenced by its seal.

1. *Sawyer v. Warner*, 15 Barb. (N. Y.) 282; *Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Childress v. Emory*, 8 Wheat. (U. S.) 642; *Ereskine v. Murray*, 2 Ld. Raym. 1542.

2. *Ricketts v. Harvey*, 78 Ind. 152; *Keesling v. Watson*, 91 Ind. 580.

3. *Barnard v. Moseley*, 28 Tex. 543.

4. *Baldwin v. Stebbins*, Minor (Ala.) 180; *Phelps v. Riley*, 3 Conn. 266; *Slevin v. Reppy*, 46 Mo. 606; *Helmsley v. Loader*, 2 Campb. 450.

5. *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Porter v. Cumings*, 7 Wend. (N. Y.) 172; *Manhattan Co. v. Ledyard*, 1 Cai. (N. Y.) 192, Col. & C. Cas. (N. Y.) 226; *Gratz v. Stump*, Cooke (Tenn.) 494. Compare *Jones v. Mars*, 2 Campb. 305.

"Own Proper Hands Subscribed." — In *Pease v. Morgan*, 7 Johns. (N. Y.) 468, where the declaration alleged that the defendants made the note, "their own proper hands and names being thereunto subscribed," and the proof showed that one of the defendants subscribed the note with the firm name of the defendants, it was held a fatal variance.

In Declaring on an Indorsement made by a member of a firm on behalf of the firm, it is sufficient to set it forth generally as an indorsement by the firm. *Manhattan Co. v. Ledyard*, Col. & C. Cas. (N. Y.) 226, 1 Cai. (N. Y.) 192.

Note of Firm and Individual. — In a suit against three persons, two of whom were alleged to be partners, a promissory note signed by one in his proper name and by the second in the firm name, may be given in evidence in support of a count alleging a note made by the defendants, their own proper hands being thereunto sub-

the defendant executed the instrument himself,¹ or the defendant may be alleged to have made the instrument by his agent.²

Authority of Agent. — Where it is alleged that the instrument sued on was executed by an agent of the defendant, the authority of that agent to make such instrument should be alleged.³

scribed. *Porter v. Cumings*, 7 Wend. (N. Y.) 172.

1. *Fraser v. Spofford*, 5 Blackf. (Ind.) 207; *Sanders v. Anderson*, 21 Mo. 402; *Moore v. McClure*, 8 Hun (N. Y.) 557; *Helmley v. Loader*, 2 Campb. 450; *Heys v. Heseltine*, 2 Campb. 604. And see *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 16, and *Slack v. Greenville First Nat. Bank*, (Ky. 1893) 44 S. W. Rep. 354, as to an indorsement by an agent.

Acceptance of Bill. — An averment in a declaration that A B & Co. accepted a bill of exchange according to the usage and custom of merchants, is supported by evidence that the bill was accepted by C D, their authorized agent, thus: "For A B & Co., C D." *Heys v. Heseltine*, 2 Campb. 604.

2. *Graham v. Eiszner*, 28 Ill. App. 269; *Abeel v. Harrington*, 18 Kan. 243; *National Bank v. Van Derwerker*, 74 N. Y. 234, *affirming, in effect*, *National Bank v. Lasher*, 1 Thomp. & C. (N. Y.) 313; *Tarver v. Garlington*, 27 S. Car. 107; *Sherman v. Comstock*, 2 McLean (U. S.) 19; *Childress v. Emory*, 8 Wheat. (U. S.) 642. But see *Oxford First Nat. Bank v. Turner*, (Supreme Ct.) 24 N. Y. Supp. 793.

Principal Not Named. — On a note executed by an agent, which does not show on its face who is principal, the declaration may allege that the defendant made the note through his agent. *Tarver v. Garlington*, 27 S. Car. 107.

Note of Corporation or Its Officer. — A complaint alleging that the defendant was a joint stock company, that its president made a note, which is set out in full, and that said defendant was justly indebted thereon, sufficiently shows that the debt was a debt of the company, and not of the president personally. *National Bank v. Van Derwerker*, 74 N. Y. 234.

3. *Alabama.* — *Childress v. Miller*, 4 Ala. 447; *Brooks v. Harris*, 12 Ala. 555; *May v. Kelly*, 27 Ala. 497.

New York. — *Oxford First Nat. Bank v. Turner*, (Supreme Ct.) 24 N. Y. Supp. 793. *Contra*, *Moore v. McClure*, 8 Hun (N. Y.) 557.

Texas. — *Lewis v. Alexander*, 51 Tex. 578.

Wisconsin. — *Miller v. Jacobs*, 70 Wis. 122.

Compare *Sherman v. Comstock*, 2 McLean (U. S.) 19.

Captain of Steamboat. — In a complaint under the *Alabama* code against the owner of a steamboat, as acceptor of a bill of exchange drawn by the clerk and accepted by the captain, the authority of the captain to bind the owner by the acceptance must be averred. An averment that the captain was the agent of the owner, and as such accepted for the owner, is not sufficient. *May v. Kelly*, 27 Ala. 497.

Joint Owner of a Steamboat. — An allegation in the declaration that the note on which the suit was brought "was made by B. acting for himself, and as joint owner with W. of the boat," is not an allegation that B. had authority, as the agent of W., to execute the note in his name, so as to make the note evidence under the *Alabama* statute, when not contradicted by sworn plea. *Brooks v. Harris*, 12 Ala. 555.

Authority Sufficiently Shown. — In *Lewis v. Alexander*, 51 Tex. 578, a petition on a note alleged that "on, etc., one A. was the agent and employee of said firm of B. & Co., and as said agent, and in its name, and for its use and benefit, and for value, made, executed, and delivered to plaintiff the said promissory note," was held to sufficiently show that A. had authority to bind the firm as its agent.

School Order. — A complaint upon an order, drawn by a township school district board upon the town treasurer, should show that the persons who signed the same were the proper officers of that board. The court cannot take judicial notice that they are such. *Miller v. Jacobs*, 70 Wis. 122.

Officer of Corporation. — A complaint upon a promissory note purporting to be executed by a corporation, which gives a copy of the note and alleges the plaintiff's ownership, nonpayment, and the amount due, was, in *Strunk v. Smith*, 36 Wis. 631, held sufficient, under the *Wisconsin* statute (Rev. Stat., c. 125, § 24), providing that it shall be sufficient to give a copy of the instrument, and state that there is due

Action Against Agent. — It is proper to allege in a petition that the party "made his note and thereby promised to pay," although the note appears on its face to have been executed by the defendant as agent for another person.¹

(3) **Designation of Names.** (See also article NAMES, *ante*, p. 270.)
— Name Used in Signing. — The defendant may be sued on a negotiable instrument by the name which he has used in signing it.²

True Name. — Or the defendant may be designated by his true name, and an allegation made that he executed the instrument sued on by the name signed thereto.³

thereon from the adverse party a specified sum, although the complaint does not allege the authority of the officer who executed it.

What is necessarily understood or implied in a pleading, forms as much a part of it as if expressed. Thus, an averment that a draft was accepted by the treasurer of a corporation implies that he had authority to accept. *Partidge v. Badger*, 25 Barb. (N. Y.) 146.

Warrant Signed by Acting Mayor. — Although a city charter requires that warrants be signed by the mayor and clerk of the city, a complaint upon a city warrant signed by an acting mayor is not demurrable for failing to allege the proceedings of the council by which the acting mayor came to occupy such position, as such facts are matters of evidence and not of pleading. *Stephens v. Spokane*, 11 Wash. 41.

Filling Blanks. — The ratification of an unauthorized filling out of a note signed in blank may be shown in an action on such note, without being specially pleaded. *Bremner v. Fields*, (Tex. Civ. App. 1896) 34 S. W. Rep. 447.

1. *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531; *McMartin v. Adams*, 16 Mo. 268. Compare *Lawton v. Swihart*, 10 Ind. 562. And see *Rossiter v. Marsh*, 4 Conn. 196, where it was held that if a note signed by A be declared on as the act and deed of B, the variance would be fatal, or that if a note signed by A individually be declared on as "executed for and in behalf of B, by his agent A," the variance would be fatal.

2. *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476; *Comer v. Jackson*, 50 Ala. 384; *Kemp v. McCormick*, 1 Mont. 420; *Bigelow v. Chatterton*, 51 Fed. Rep. 614, 10 U. S. App. 267.

Plea in Abatement. — A defendant sued on a note by the name with which he signed it, cannot plead an alleged

misnomer in abatement, unless he denies the execution of the note. *Comer v. Jackson*, 50 Ala. 384.

3. *California.* — *Humboldt Sav., etc., Soc. v. Burnham*, 111 Cal. 343.

Colorado. — *Peddie v. Donnelly*, 1 Colo. 421.

Connecticut. — *Salomon v. Hopkins*, 61 Conn. 47.

Illinois. — *Becker v. German Mut. F. Ins. Co.*, 68 Ill. 412; *Duncan v. McAfee*, 3 Ill. 559.

Indiana. — *Gaskin v. Wells*, 15 Ind. 253.

New Hampshire. — *Grafton Bank v. Flanders*, 4 N. H. 239.

Vermont. — *Miner v. Downer*, 20 Vt. 461.

Wisconsin. — *Jewett v. Whalen*, 11 Wis. 124.

England. — *Levy v. Webb*, 9 Q. B. 427, 58 E. C. L. 427.

Different Spelling. — In *Gaskin v. Wells*, 15 Ind. 253, it was held that the plaintiff correctly declared on the note in suit, when he alleged that it was made by Cephas Gaskin, by the name of Cephas Gasten.

Adopting a Name. — The plaintiff may show that a defendant whose name does not appear upon the instrument in suit adopted as his own the name signed thereto. *Salomon v. Hopkins*, 61 Conn. 47.

Unauthorized Signing. — Where one person signs the name of another to a negotiable instrument, without any authority to do so, he may be sued thereon under an allegation that he executed the instrument by the name which he wrongfully signed. *Grafton Bank v. Flanders*, 4 N. H. 239.

Wrong Firm Name. — A declaration on a promissory note has been held good which alleged that the three defendants, who were partners under the name of S. & W. Downer & Co., signed the note in suit by the name of Downer

An Addition to the maker's name which has no legal effect need not be noticed.¹

Christian Name or Initials. — The defendant, in an action on a negotiable instrument, should be described by his Christian name, in addition to the surname.² By the common law it was insufficient to describe the defendant by the initials of his Christian name only, but it was necessary to set out the Christian name in full,³ unless it was shown that the party was so described in the instrument itself.⁴

Variance. — When, in an action on a negotiable instrument, the

& Dana, and that such signing was a mistake. *Miner v. Downer*, 20 Vt. 461. But see *Miner v. Downer*, 19 Vt. 14.

"Alias." — In *Duncan v. McAfee*, 3 Ill. 559, an averment, in a suit by petition and summons, that the note sued on was executed by "J. M. Duncan *alias* James M. Duncan," was held sufficient.

Allegations as to Name Unnecessary. — In *See v. Cox*, 16 Mo. 166, it was held that it was not necessary to allege by what name a defendant bound himself, and that it was sufficient to state his obligation generally, leaving the particular manner of it to proof.

1. *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597. So also as to the payee. *Riggs v. Andrews*, 8 Ala. 628; *Graham v. Fahnestock*, 5 Gill (Md.) 215.

See, as to the general rule in such cases, article NAMES, *ante*, p. 270.

Maker and Payee Same Name. — Where the payor and payee of a note are of the same name, it must be presumed, in behalf of an assignee of the note, that they are different persons. The legal presumption is in favor of the validity of the contract. In such case it is not necessary for the plaintiff to aver that the defendant and payee are different persons. The fact that they are the same person is matter of defense properly coming from the other side. *Cooper v. Poston*, 1 Duv. (Ky.) 92. In this case the court said: "This averment is dispensed with, not because the law presumes that fact *prima facie*, but because the plaintiff's cause of action is founded not upon that fact, but upon the fact that the defendant executed the note. As a general rule the plaintiff is required only to state facts which constitute *prima facie* a cause of action and need not anticipate matters of defense."

2. *Cotes v. Campbell*, 3 Cal. 191;

Schroeder v. Turner, 68 Md. 506. See also article NAMES, *ante*, p. 270.

"One M'Kinley," etc. — In *Cotes v. Campbell*, 3 Cal. 191, it was held that a note by "H. B. M'Kinley and C. Campbell & Co." was not admissible under a declaration on a note made by "one M'Kinley and one Campbell."

Individual Signing a Partnership Name. — Where a person who does business under a firm name is sued upon a note signed by such firm name, he must be declared against by his proper Christian name and surname. *Schroeder v. Turner*, 68 Md. 506.

3. *Levy v. Webb*, 9 Q. B. 427, 58 E. C. L. 427; *Nash v. Calder*, 5 C. B. 177, 57 E. C. L. 177; *Kinnersley v. Knott*, 7 C. B. 980, 62 E. C. L. 980. But see *Braithwaite v. Harrison*, 1 D. & L. 210, 7 Jur. 898, which was decided under the statute of 3 & 4 Wm. IV., c. 42, § 12, providing that in actions upon bills of exchange or promissory notes, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

Vowel or Consonant. — In *Kinnersley v. Knott*, 7 C. B. 980, 62 E. C. L. 980, in a count upon a bill of exchange, the defendant was described as "John M. Knott," and the description was held insufficient on demurrer, the court holding that where, in describing a party in a pleading, a single letter is used instead of a Christian name, it will be intended that this is a full Christian name, if it is a vowel, but not if it is a consonant.

4. *Esdaile v. Maclean*, 15 M. & W.

defendant is declared against by his true name, with no allegation as to the name by which he signed the instrument, a difference between the two names will not constitute a fatal variance, unless it is material.¹

Abbreviation.—A negotiable instrument signed with an abbreviation of the defendant's name, may be given in evidence under a declaration setting out the name in full.²

Initials and Full Name.—There is no variance in declaring on an instrument as executed by the defendant in his full name, when it is in fact executed by him by the use of his initials only.³ But

277. And see *Bond v. Wilkinson*, 5 Blackf. (Ind.) 264, where the payee was held properly described by his initials only as in the note sued on, without stating his Christian name.

1. *Dew v. Garner*, 7 Port. (Ala.) 503; *Maloney v. Smith*, 3 Ky. L. Rep. 695; *Schroeder v. Turner*, 68 Md. 506; *Slocum v. McBride*, 17 Ohio 607; *McKinney v. Peters*, Dall. (Tex.) 545. See also article NAMES, *ante*, p. 270.

Name Illegible.—There can be no variance between the allegations and proof in an action on a promissory note to which the signature is illegible, when the party does not attempt to describe such signature in the declaration. *Dew v. Garner*, 7 Port. (Ala.) 503.

"Executor of," etc.—Where a person signs a note, adding as an appendage to his name the words "Ex'r of," etc., this imposes no obligation on the plaintiff in a suit on the note so to describe him in his petition. *McKinney v. Peters*, Dall. (Tex.) 545.

Addition of "& Co."—It was held in *Schroeder v. Turner*, 68 Md. 506, that a note signed by the name of one of the defendants, with the words "& Co." added, was admissible in evidence under a complaint against a husband and wife, for the reason that the addition of those words did not raise any presumption of the existence of a partnership.

In German.—In a suit against William Becker, the declaration alleged that the defendant made, etc., the note sued on, without any explanation as to the name used, and the note offered in evidence was signed "Wilhelm Becker," in the German language, and it was held that the two names were different, both in orthography and sound, and that the variance was material. *Becker v. German Mut. F. Ins. Co.*, 68 Ill. 412.

On Demurrer.—The defendant cannot object to the petition for misnomer on demurrer, and must put the question in issue by proper allegations. *Slocum v. McBride*, 17 Ohio 607. In this case it was held that, for anything that appeared on the pleadings, the defendant's name might have been "J. A. Collins, &c."

After Judgment.—Whether the name of the defendant is identical with the signature to the note sued on, is a question which cannot be raised after judgment. *Maloney v. Smith*, 3 Ky. L. Rep. 695.

2. *State Bank v. Peel*, 11 Ark. 750; *Linn v. Buckingham*, 2 Ill. 451; *Kemp v. McCormick*, 1 Mont. 420; *Wood v. Bulkley*, 13 Johns. (N. Y.) 486. But see, as to description of payee, *Rives v. Marrs*, 25 Ill. 316; *Curtis v. Marrs*, 29 Ill. 508. In these cases a bill payable to Bart Whalon was described as payable to Bartholomew Whalon. See also article NAMES, *ante*, p. 270.

"Wm." for "William."—In an action upon a promissory note against the maker, a declaration described the note as made by William Linn. The note produced in evidence was signed "Wm. Linn," and it was held that there was no variance. *Linn v. Buckingham*, 2 Ill. 451.

"Jno." for "John."—A note signed "Jno." is admissible in evidence under a declaration describing it as signed by "John." *State Bank v. Peel*, 11 Ark. 750.

3. *Alabama.*—*Chandler v. Hudson*, 8 Ala. 366; *Cantley v. Hopkins*, 5 Stew. & P. (Ala.) 58.

Illinois.—*Pickering v. Pulsifer*, 9 Ill. 79. See also *Ross v. Clawson*, 47 Ill. 402, where such a variance in the description of the paper was held immaterial.

Indiana.—*Louden v. Walpole*, 1 Ind. 319; *Hunt v. Raymond*, 11 Ind. 215;

it has been held that a difference in the initials between the note declared on and the one introduced in evidence, would be fatal,¹ though the contrary has also been held.²

Wrong Spelling. — A mere mistake in the spelling of the defendant's name does not cause a material variance.³

b. DELIVERY — Necessity of Alleging. — The declaration or complaint on a negotiable instrument should allege the delivery of such instrument.⁴

West v. Hayes, 104 Ind. 30; *Lasselle v. Hewson*, 5 Blackf. (Ind.) 161.

Missouri. — *Orme v. Shephard*, 7 Mo. 606.

United States. — *Bigelow v. Chatterton*, 51 Fed. Rep. 614, 10 U. S. App. 267.

Compare Hall v. Bennett, 2 Greene (Iowa) 466. And see article NAMES, *ante*, p. 270.

1. *Hereford v. Lake*, 15 La. Ann. 693; *Shipman v. Fulcord*, 42 Tex. 248. But see *Clafflin v. Griffin*, 8 Bosw. (N. Y.) 689, where a variance as to the initials of the drawer of a bill was held immaterial in an action against the acceptor.

2. *Chesnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123; *McDonough v. Heyman*, 38 Mich. 334; *Orme v. Shephard*, 7 Mo. 606, which apparently overruled *King v. Clark*, 7 Mo. 269.

No Prejudice. — In *McDonough v. Heyman*, 38 Mich. 334, it was held that where a variance between the declaration and proof of the middle initial of the maker of a draft could not have prejudiced any one, it would not be noticed.

Committee of Corporation. — Where the declaration, in an action on a note against a corporation, alleged that the note was made by the defendants by their committee, J. A. A. and two others, and the note produced was signed by J. S. A. and such two others, who were the committee of the corporation for that purpose, it was held that there was no variance. *Chesnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123.

3. It has been held that there is no variance between "*Hearn*" and "*Hearne*," *Coster v. Thomason*, 19 Ala. 717; "*Home Company*" and "*House Company*," *Cozzens v. Chicago Hydraulic-Press Brick Co.*, 166 Ill. 213; "*Josier*" and "*Josiah*," *Schooler v. Asherst*, 1 Litt. (Ky.) 216; "*Breux*" and "*Braud*" or "*Brand*," *Anselm v. Braud*, 6 La. 142; "*Trobridge*" and "*Trowbridge*," *Buhl v. Trowbridge*, 42 Mich. 44; "*Logan*" and "*Ligan*," *Holt*

v. Salmon, Rice L. (S. Car.) 91; "*Margarethe*" and "*Margaret*," *Bosley v. Pease*, (Tex. Civ. App. 1893) 22 S. W. Rep. 516; "*Ankenman*" and "*Ankerman*," *Bosley v. Pease*, (Tex. Civ. App. 1893) 22 S. W. Rep. 516. But that there was a variance between "*Joshua*" and "*Johua*," *Boren v. State Bank*, 8 Ark. 500.

4. *Arkansas.* — *Mitchell v. Conley*, 13 Ark. 414.

California. — *Hook v. White*, 36 Cal. 299; *Smith v. Waite*, 103 Cal. 372.

Illinois. — *Chester, etc., Coal, etc., Co. v. Lickiss*, 72 Ill. 521.

Indiana. — *Keesling v. Watson*, 91 Ind. 580; *Douthit v. Mohr*, 116 Ind. 482.

Kentucky. — *Rudd v. Cohgan*, 4 Ky. L. Rep. 997; *Bell v. Mansfield*, 12 Ky. L. Rep. 89, (Ky. 1890) 13 S. W. Rep. 838.

Minnesota. — *Topping v. Clay*, 65 Minn. 346.

Missouri. — *Meyer v. Fette*, 31 Mo. 423; *Fay v. Richmond*, 18 Mo. App. 355.

Montana. — *Schuttler v. King*, 13 Mont. 228.

New York. — *Purdy v. Vermilya*, 8 N. Y. 346; *Chappell v. Bissell*, 10 How. Pr. (N. Y. Supreme Ct.) 274; *Marshall v. Rockwood*, 12 How. Pr. (N. Y. Supreme Ct.) 452; *Peets v. Bratt*, 6 Barb. (N. Y.) 662; *Sawyer v. Warner*, 15 Barb. (N. Y.) 282; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Burrall v. DeGroot*, 5 Duer (N. Y.) 379; *Conkling v. Gandall*, 1 Keyes (N. Y.) 228. *Compare Auerbach v. Peetsch*, (C. Pl.) 44 N. Y. St. Rep. 493; *Hahn v. Hull*, 4 E. D. Smith (N. Y.) 664.

Ohio. — *Doane v. Dunlap*, Tappan (Ohio) 145.

Pennsylvania. — *Waverly First Nat. Bank v. Furman*, 4 Pa. Super. Ct. Rep. 415.

Texas. — *Jennings v. Moss*, 4 Tex. 452; *Blount v. Ralston*, 20 Tex. 132; *Malone v. Craig*, 22 Tex. 609; *Gray v. Osborne*, 24 Tex. 157; *Thigpen v.*

Equivalent Allegations.—It is not necessary to allege that the instrument sued on was delivered, when the declaration contains an averment that the defendant by his note promised, etc.,¹ that the defendant made the instrument,² that he executed it,³ or that

Murdine, 24 Tex. 282; *Barnard v. Moseley*, 28 Tex. 543; *Moody v. Bengé*, 28 Tex. 545; *Colbertson v. Beeson*, 30 Tex. 76; *Graves v. Drane*, 66 Tex. 658; *Loungeway v. Hale*, 73 Tex. 495.

Vermont.—*Binney v. Plumley*, 5 Vt. 500.

West Virginia.—*Spencer Bank v. Simmons*, 43 W. Va. 79.

Wisconsin.—*Burbank v. French*, 12 Wis. 376; *Wochoska v. Wochoska*, 45 Wis. 423.

England.—*Churchill v. Gardner*, 7 T. R. 592.

Contra.—*Brown v. Hemphill*, 9 Port. (Ala.) 206.

But see *Lord v. Russell*, 64 Conn. 86, where it was held that an allegation of delivery was not necessary if the declaration followed the proper form given in the practice act.

Action Against Drawer.—It is not necessary in an action against a drawer for non-acceptance of a bill of exchange to aver the delivery of the bill. *Devereux v. Morrissey*, 17 Ir. C. L. Rep. 785.

Redelivery.—A bill of exchange drawn by A. payable to the order of A., is payable to A., and it is sufficient to allege that A. delivered the bill to the defendant, which he accepted, and by reason of the premises, and according to the custom of merchants, became liable to pay the contents to A., without alleging a redelivery by the defendant, for it was held that if a redelivery, or something tantamount to show the assent of the drawee to charge himself, would be necessary to an acceptance, the defendant, by demurring, admitted the acceptance, and so impliedly admitted a redelivery. *Smith v. M'Clure*, 5 East 476.

Delivery to Defendant.—Where the declaration alleges that the note in suit was delivered to the defendant instead of to the plaintiff, it is clearly a clerical error, and not available on appeal. *Allen v. Claunch*, 7 Ala. 788. Compare *Haynes v. Covington*, 9 Smed. & M. (Miss.) 470, where it was alleged that the note was delivered to the plaintiff (a transferet) instead of to the payee.

After Judgment by Default.—A dec-

laration which fails to allege delivery will not support a judgment by default. *Loungeway v. Hale*, 73 Tex. 495.

1. *Bell v. Mansfield*, 12 Ky. L. Rep. 89, (Ky. 1890) 13 S. W. Rep. 838; *Topping v. Clay*, 65 Minn. 346; *Fay v. Richmond*, 18 Mo. App. 355; *Peets v. Bratt*, 6 Barb. (N. Y.) 662; *Binney v. Plumley*, 5 Vt. 500.

2. *Arkansas*.—*Mitchell v. Conley*, 13 Ark. 414.

California.—*Smith v. Waite*, 103 Cal. 372.

Illinois.—*Chester, etc., Coal, etc., Co. v. Lickiss*, 72 Ill. 521.

Kentucky.—*Rudd v. Cohgan*, 4 Ky. L. Rep. 997.

Montana.—*Schuttler v. King*, 13 Mont. 228.

New York.—*Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Sawyer v. Warner*, 15 Barb. (N. Y.) 282; *Chappell v. Bissell*, 10 How. Pr. (N. Y. Supreme Ct.) 274; *Odell v. Clyde*, 23 Misc. Rep. (N. Y. Supreme Ct.) 734.

Texas.—*Blount v. Ralston*, 20 Tex. 132.

Wisconsin.—*Burbank v. French*, 12 Wis. 376; *Wochoska v. Wochoska*, 45 Wis. 423.

England.—*Churchill v. Gardner* 7 T. R. 592.

"Did Make and Execute."—An averment in a complaint on a note and mortgage that the defendant "did make and execute" the note, whereby he promised to pay the plaintiff, etc., by necessary inference alleges a due delivery thereof, and that inference is not rebutted by a further statement that the note was left in the possession of the maker; and a finding that the averment is true is a sufficient finding of a due delivery. *Wochoska v. Wochoska*, 45 Wis. 423.

On General Demurrer.—A declaration which alleges that the defendant "duly made" the note in suit implies a delivery and is sufficient at least against a general demurrer. *Smith v. Waite*, 103 Cal. 372.

3. *California*.—*Hook v. White*, 36 Cal. 299.

Indiana.—*Keesling v. Watson*, 91 Ind. 580; *Douthit v. Mohr*, 116 Ind.

he gave the note,¹ and when a copy of the note sued on is attached, it has been held sufficient if the declaration alleged that the amount of the note was due from the defendant.² It has also been held, where the plaintiff declared on the money counts, and annexed a copy of a bill, with notice that it was his cause of action, that the delivery was sufficiently averred by implication.³

Redelivery of Acceptance. — In an action by the drawer of a bill of exchange payable to his own order against the acceptor, it is not necessary to allege a redelivery of the bill by the defendant after acceptance,⁴ but it has been held that the petition must show a demand for its return, where it was alleged that the defendant retained the bill in his possession.⁵

Acceptance by Two. — When a bill of exchange is accepted by two persons, one of whom is incompetent, it may be declared upon as accepted by the other person alone.⁶

Action on Promise to Accept. — When the payee brings his action on a promise by the defendant to accept a bill of exchange, he may expressly aver such promise and its breach,⁷ or he may declare upon it as an ordinary acceptance.⁸

c. IRREGULAR INDORSEMENT BEFORE DELIVERY TO PAYEE. — Where the person sued on an instrument has become liable to the payee by an irregular indorsement on such instrument before its delivery to such payee, the declaration may count against him as a maker.⁹ On the other hand, declarations against such persons have been held sufficient which merely stated the facts out of which the defendant's liability as maker arose.¹⁰

482; *Smith v. Thurston*, 8 Ind. App. 105.

Kentucky. — *Rudd v. Cohgan*, 4 Ky. L. Rep. 997.

Missouri. — *Meyer v. Fette*, 31 Mo. 423.

Montana. — *Schuttler v. King*, 13 Mont. 228.

New York. — *Chappell v. Bissell*, 10 How. Pr. (N. Y. Supreme Ct.) 274; *Conkling v. Gandall*, 1 Keyes (N. Y.) 228.

Ohio. — *Doane v. Dunlap*, Tappan (Ohio) 145.

Texas. — *Loungeway v. Hale*, 73 Tex. 495.

West Virginia. — *Spencer Bank v. Simmons*, 43 W. Va. 79.

"Indorsed" Includes Delivery. — An allegation that the defendant "indorsed" the instrument sued on implies that he delivered it so that the indorsement was complete. *Chester, etc., Coal, etc., Co. v. Lickiss*, 72 Ill. 521; *Spencer Bank v. Simmons*, 43 W. Va. 79; *Griswold v. Lavery*, 3 Duer (N. Y.) 690; *Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Lowville Bank v.*

Edwards, 11 How. Pr. (N. Y. Supreme Ct.) 216.

1. *Barnard v. Moseley*, 28 Tex. 543.

2. *Marshall v. Rockwood*, 12 How. Pr. (N. Y. Supreme Ct.) 452.

3. *Purdy v. Vermilya*, 8 N. Y. 346.

4. *Smith v. M'Clure*, 5 East 476; *Woodlawn v. Purvis*, 108 Ala. 511.

5. *Rousch v. Duff*, 35 Mo. 312.

6. *Burgess v. Merrill*, 4 Taunt. 468, in which case the action was upon a bill accepted by two persons, one of whom was an infant.

7. *Franklin Bank v. Lynch*, 52 Md. 270; *Barney v. Worthington*, 37 N. Y. 112, 4 Abb. Pr. N. S. (N. Y.) 205.

8. *Smith v. Clark*, 12 Iowa 32; *Ontario Bank v. Worthington*, 12 Wend. (N. Y.) 593.

9. *Killian v. Ashley*, 24 Ark. 511; *Lincoln v. Hinzey*, 51 Ill. 435. But see *State Bank v. Haden*, 35 Mo. 358, where the petition was held insufficient because it showed that the defendant was in fact an indorser, and not a maker.

10. *Florida.* — *McCallum v. Driggs*, 35 Fla. 277. See also *Melton v. Brown*, 25 Fla. 461.

Presumption that Defendant Is Second Indorser. — In other cases it has been held necessary, in actions against an irregular indorser, to make allegations which will overcome the presumption that such person signed the instrument as second indorser.¹

d. JOINT LIABILITY — PARTNERSHIP — Right Against All. — Where two or more persons are joined as defendants in an action

Minnesota. — *Stein v. Passmore*, 25 Minn. 256.

New York. — *Smith v. Smith*, 37 N. Y. Super. Ct. 203; *Lynch v. Levy*, 11 Hun (N. Y.) 145, *distinguishing* *Woodruff v. Leonard*, 1 Hun (N. Y.) 632; *New York Security, etc., Co. v. Storm*, 81 Hun (N. Y.) 33; *Gfroehner v. McCarty*, 2 Abb. N. Cas. (Brooklyn City Ct.) 76; *Smith v. Storm*, 6 Misc. Rep. (N. Y.) 627, (City Ct.) 27 N. Y. Supp. 143; *Schwarzansky v. Averill*, 7 Daly (N. Y.) 254; *Paine v. Noelke*, 43 N. Y. Super. Ct. 176.

Wisconsin. — *Cady v. Shepard*, 12 Wis. 639; *Davis v. Barron*, 13 Wis. 227; *Houghton v. Ely*, 26 Wis. 181; *Gorman v. Ketchum*, 33 Wis. 427; *Frederick v. Winans*, 51 Wis. 472.

United States. — *Rey v. Simpson*, 22 How. (U. S.) 341. This case was decided under a statute of Minnesota requiring a statement of the facts constituting the cause of action.

Non-negotiable Note. — In *New York Security, etc., Co. v. Storm*, 81 Hun (N. Y.) 33, it was held that allegations in a complaint on a non-negotiable promissory note, in an action against an indorser, that such defendant wrote his name upon the back of the note in order to secure payment to the plaintiff and for the purpose of becoming liable to the plaintiff for such payment, and that thereby he did become liable to the plaintiff, were sufficient. *Compare* *Gorman v. Ketchum*, 33 Wis. 427; *Houghton v. Ely*, 26 Wis. 181.

Indorsement Without Recourse. — In *Waterbury v. Sinclair*, 7 Abb. Pr. (N. Y. Supreme Ct.) 399, it was held that the only way in which the payee of a note could maintain an action against an irregular indorser was to indorse it as without recourse, and then take the indorsement of such person as the source of his title. This case *disapproved* *Moore v. Cross*, 23 Barb. (N. Y.) 534.

Law of Another State. — In *Cooke v. Addicks*, 5 Pa. Dist. Rep. 389, it was held that in an action in *Pennsylvania* on an irregular indorsement made in *New Jersey*, which according to the law

of that state was a valid contract, it was necessary to make averments showing the law of *New Jersey*, and that the note was executed so as to be governed by that law.

1. *Kentucky.* — *Kellogg v. Dunn*, 2 Metc. (Ky.) 215.

New York. — *Woodruff v. Leonard*, 1 Hun (N. Y.) 632, 4 *Thomp. & C.* (N. Y.) 208; *Cawley v. Costello*, 15 Hun (N. Y.) 303; *Hahn v. Hull*, 4 E. D. Smith (N. Y.) 664; *Mitchell v. Spaulding*, (City Ct.) 11 N. Y. St. Rep. 283; *Edison General Electric Co. v. Zebbley*, 72 Hun (N. Y.) 166; *Waterbury v. Sinclair*, 16 How. Pr. (N. Y. Supreme Ct.) 329; *Draper v. Chase Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 79; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 151; *Woodruff v. Leonard*, 4 *Thomp. & C.* (N. Y.) 208. And see *McMoran v. Lange*, 25 N. Y. App. Div. 11, *construing* the *New York* statute of 1897 (Laws, c. 612, § 114), relating to indorsements before delivery by a person not otherwise a party.

Ohio. — *Irwin v. Shaffer*, 9 Ohio St. 43.

Oregon. — *Deering v. Creighton*, 19 Oregon 118.

In Complaint, Not in Reply. — In *Deering v. Creighton*, 19 Oregon 118, it was held that in an action against an irregular indorser, on a complaint attempting to charge him as a joint maker, the facts showing such liability should be stated in the complaint, and not in the reply.

Liability to Pay. — In order to maintain an action on a promissory note by the payee against an indorser, the complaint must show that the defendant indorsed the note with the intention of becoming liable to the plaintiff thereof, and this allegation, if denied, must be proved, or else the legal presumption that the payee is the first indorser is not overcome. *Mitchell v. Spaulding*, (City Ct.) 11 N. Y. St. Rep. 283.

Acting on Faith of Indorsement. — In *Hahn v. Hull*, 4 E. D. Smith (N. Y.) 664, it was held necessary, in an action attempting to charge an indorser as a maker, to allege that the plaintiff ad-

on a negotiable instrument, a right to recover against all the defendants should be shown.¹

Averment that All Are Sued. — Under statutes requiring all the parties to be joined as defendants in an action on a negotiable instrument, if less than all are sued it is not necessary to aver that those not sued are within the terms of exceptions enumerated in the statute.²

Action Against Maker and Indorser. — When the maker and indorser are sued in the same action, it is not necessary to state separate causes of action against them.³

Action on Joint and Several Instrument. — In an action on a joint and several negotiable instrument, it is sufficient to declare upon it as a joint instrument,⁴ or as a several instrument, at least when

vanced money or property, or gave credit, upon the faith of such indorsement, in order to rebut the presumption that the defendant was liable only as a second indorser.

1. *Arkansas.* — *Boren v. State Bank*, 8 Ark. 500.

Indiana. — *Eaton v. Burns*, 31 Ind. 390; *Goodlet v. Britton*, 6 Blackf. (Ind.) 500.

New Hampshire. — *Hopkins v. Farwell*, 32 N. H. 425.

New York. — *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Paine v. Noelke*, 43 N. Y. Super Ct. 176, *affirming* 53 How. Pr. (N. Y.) 273.

Texas. — *Trimble v. Miller*, 24 Tex. 214; *Covington v. Burleson*, 28 Tex. 368.

Signed by Part Only. — A note signed by two only of the three persons declared against as joint makers is a variance, and cannot be read in evidence. *Boren v. State Bank*, 8 Ark. 500.

When One Defendant Is Defaulted. — Proof of a note binding upon A only will not sustain an action against A and B, in which A defends, although B is defaulted. *Hopkins v. Farwell*, 32 N. H. 425.

Infancy, Insolvency, or Death. — In *Robertson v. Smith*, 18 Johns. (N. Y.) 459, it was held necessary, in an action of assumpsit against joint defendants, to show a subsisting liability on the part of all the defendants, except in cases of infancy, death, or the discharge of one of the defendants under a bankruptcy or insolvent act.

Husband and Wife. — In *Trimble v. Miller*, 24 Tex. 214, and *Covington v. Burleson*, 28 Tex. 368, it was held that in an action against a husband and wife, on a joint note, unless the petition

discloses that the debt was contracted for the benefit of the wife's separate estate, or some other fact which would authorize a judgment against her, the petition was insufficient, and a judgment thereon would be reversed.

2. *Lillard v. Planters' Bank*, 3 How. (Miss.) 78.

Demurrer or Plea in Abatement. — Where some of the drawers or indorsers of a bill or note are not sued, it is unnecessary for the plaintiff to aver that such are dead or nonresident. If a plea in abatement be filed, setting up the nonjoinder, it must aver their residence, and it must be sworn to. But if it appear affirmatively in the declaration that they are alive and resident in the state, objection may be taken by demurrer. *Lillard v. Planters' Bank*, 3 How. (Miss.) 78.

3. *Chenango Bank v. Curtiss*, 19 Johns. (N. Y.) 326; *Smith v. McEvoy*, 8 Utah 58. *Compare* *Burroughs v. Wilson*, 59 Ind. 536.

As Joint Makers. — Under an act which provides that all the parties to notes discounted at a certain bank shall be jointly sued, a declaration against the maker and indorser jointly, as if they were joint makers, was held good. *Chenango Bank v. Curtiss*, 19 Johns. (N. Y.) 326.

4. *Knott v. Swannell*, 91 Ill. 25; *Rees v. Abbott*, 2 Cowp. 832. And see *Sigony v. Richards*, 1 Root (Conn.) 119; *Salomon v. Hopkins*, 61 Conn. 47.

Jointly "or" Severally. — A declaration alleging that the defendant and another made their note, by which they jointly "or" severally promised to pay, was held good in *Rees v. Abbott*, 2 Cowp. 832.

Form Not Specified. — A joint and sev-

objection is not taken until after judgment.¹

Action on Joint Instrument. — A joint instrument may be declared upon as made by the defendant individually.²

eral note is admissible in evidence under allegations that defendants made and delivered to plaintiff their note in writing, whereby they promised to pay, etc., without stating the form of such note. *Rees v. Clark*, (Tex. Civ. App. 1897) 39 S. W. Rep. 160.

Signed by One Only. — In an action against two, upon a note which on the face of it is joint and several, and so declared upon, it is not a material variance that upon oyer it appears to be signed by one only for himself and partner. *Sigony v. Richards*, 1 Root (Conn.) 119.

1. *Biddeford First Nat. Bank v. McKenney*, 67 Me. 272; *Long v. Campbell*, 37 W. Va. 665. And see *Bogert v. Vermilya*, 10 N. Y. 447.

2. *Alabama*. — *Miller v. Sneads*, Minor (Ala.) 27.

Illinois. — *Rock Valley Paper Co. v. Nixon*, 84 Ill. 11.

Indiana. — *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285; *Anderson v. Hamilton*, 6 Blackf. (Ind.) 94.

Kentucky. — *Kendall v. Kennedy*, 8 Ky. L. Rep. 532.

Maine. — *Hapgood v. Watson*, 65 Me. 510; *Biddeford First Nat. Bank v. McKenney*, 67 Me. 272. But see *Atkins v. Brown*, 59 Me. 90.

Minnesota. — *Nichols v. Dedrick*, 61 Minn. 513.

Missouri. — *Muldrow v. Caldwell*, 7 Mo. 563.

New York. — *Cooperstown Bank v. Woods*, 28 N. Y. 545.

Washington. — *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349.

England. — *Bulbeck v. Jones*, 5 Jur. N. S. 1317.

Individual Name for Firm. — Where the complaint described a note as made by Orrin North, and that offered in evidence appeared to have been made by a firm, consisting of two persons, doing business under the name of Orrin North, it was held that there was no variance. *Cooperstown Bank v. Woods*, 28 N. Y. 545.

Note Signed with Firm Name. — In *Fant v. Gadberry*, 5 Rich. L. (S. Car.) 10, in an action on a note signed by one person with a firm name, it was held that a declaration on such instrument

as the individual note of the defendant, with an allegation that there was no such firm as that purporting to be indicated by the signature, was insufficient, and that the note was a material variance from the allegations of the petition.

Disregarding Indorsement. — Where the plaintiff declares upon a note as the individual note of the defendant, there is no variance if the instrument introduced in evidence has on its back certain irregular indorsements, which would make the indorsers liable as co-makers. *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349.

Maker One Payee. — On the principle that in declaring on written instruments it is sufficient to set out their legal effect, it was held that where M. and others executed a note payable to M. or order, and afterwards indorsed the note to C., such instrument was the promissory note of M., and that C. might declare in debt against M. alone as maker of the note. *Muldrow v. Caldwell*, 7 Mo. 563.

Defendant Not Misled. — In *Nichols v. Dedrick*, 61 Minn. 513, it was held sufficient, in declaring on a promissory note executed by two persons, to allege that it was executed by the defendant alone, unless it was shown that the defendant had been misled.

Surety Declared Against as Principal. — In *State Bank v. Hubbard*, 4 Ark. 419, it was held improper to declare upon a note executed by the defendant as surety and by another person as principal, as if executed by the defendant alone as principal.

"Defendant" Instead of "Defendants." — The description of the defendant party, in a declaration upon a promissory note signed by two persons, as of the singular number, "defendant," is not good cause for special demurrer, where it is clearly discernible from the declaration as a whole that both of the persons sued are intended to be described as promisors. *Penley v. Record*, 66 Me. 414.

Joint or Several Indorsers. — Where a declaration alleged separate contracts of indorsement by the defendants, but concluded with the averment that they "owe the plaintiff the amount of said

Partnership of Makers. — In an action on an instrument executed by partners, it is not necessary to allege the existence of such partnership,¹ nor need the declaration or complaint allege the kind

note," it was held that this was not an allegation of a joint liability, and that a note showing a separate liability was admissible under such an allegation. *Foster v. Leach*, 160 Mass. 418.

Joint Payees. — Where the declaration was upon a note payable to B., one of the executors of F., and the note introduced in evidence was payable to B. and his co-executor, the variance was held fatal in *Faulkner v. Faulkner*, 73 Mo. 327.

1. *Arkansas.* — *Swinney v. Burnside*, 17 Ark. 38; *Bumpass v. Taggart*, 26 Ark. 398.

Indiana. — *Pollock v. Glazier*, 20 Ind. 262; *Maiden v. Webster*, 30 Ind. 317; *Napier v. Mayhew*, 35 Ind. 276.

Michigan. — *Danaher v. Hitchcock*, 34 Mich. 516.

Mississippi. — *Nutt v. Hunt*, 4 Smed. & M. (Miss.) 702.

Missouri. — *Stephens v. Frampton*, 23 Mo. 263; *Lessing v. Sulzbacher*, 35 Mo. 445; *Schmidt v. Schmaelter*, 45 Mo. 502; *Stix v. Mathews*, 63 Mo. 371.

New York. — *Mack v. Spencer*, 4 Wend. (N. Y.) 411.

Compare *Meacham v. Batchelder*, 3 Chand. (Wis.) 316, 3 Pin. (Wis.) 281. And see in general article PARTNERSHIP.

Signed with Firm Name. — It is not necessary to allege that the defendants are partners, when the action is brought on a note signed with the firm name. An allegation that the defendants named in the declaration made the note is sufficient. *Bumpass v. Taggart*, 26 Ark. 398; *Pollock v. Glazier*, 20 Ind. 262. But see *Neteler v. Culies*, 18 Ill. 188, where it was held in an action against Israel A. Hurd, William C. Hurd, and John H. Neteler, as joint makers of a promissory note, that a note offered as evidence, signed "Hurds & Neteler," without special averments, will not authorize a judgment. There should have been an averment that the defendants named executed the note "by the style of Hurds & Neteler" or some equivalent allegation.

Declaration Not Demurrable. — Where a declaration on the common counts against two defendants has a promissory note appended, purporting to be

signed in a firm name, it is not demurrable for a failure to aver that defendants are partners. *Danaher v. Hitchcock*, 34 Mich. 516.

Execution in Issue. — Evidence that the makers of a joint and several note, purporting to be made by two, were partners at the time of its execution, and that it was given by one in the names of both, in the business of the partnership, is admissible, in proof of its execution put in issue by the other maker in a suit against him on the note, though the note does not purport to be given by or in the name of a firm, and the complaint contains no allegation of such partnership. *Maiden v. Webster*, 30 Ind. 317.

Members of Firm. — It was held in *Lessing v. Sulzbacher*, 35 Mo. 445, that the petition on a note executed in a firm name should show who constituted the firm, but that an allegation that the defendants were partners was not necessary. See also *Farmers' Bank v. Bayless*, 35 Mo. 428.

Where the action is against indorsers of a note executed by a partnership, it is not necessary to give the names of the several partners. It is sufficient to allege that the instrument was executed by the firm in the firm name. *Shane v. Lowry*, 48 Ind. 205; *Phipps v. Addison*, 7 Blackf. (Ind.) 375; *Bacon v. Cook*, 1 Sandf. (N. Y.) 77. *Compare* *Anable v. Conklin*, 25 N. Y. 470.

Note of Firm and Another Person. — Where three persons were sued as the makers of a promissory note, and the proof showed that a firm, of which two of the defendants were members, by its partnership name, together with the other defendant, who was not a partner, actually made the note, it was held that the defect in the description did not amount to a variance, and that an amendment after judgment would be sufficient to protect defendants against a second action on the same instrument. *Schmidt v. Schmaelter*, 45 Mo. 502.

No Real Firm. — A bill drawn "pay to our order," signed in the name of two persons "& Co.," and accepted, may be declared upon by the indorsees as a bill drawn by an aggregate firm, and if it is proved that the alleged firm consists of only one person it is not a

of a firm,¹ or the name and style thereof.²

4. Consideration — a. NECESSITY OF ALLEGING — Negotiable Instrument. — In an action on a negotiable instrument the consideration for which the instrument was given need not be alleged.³

variance. *Bass v. Clive*, 4 M. & S. 13, 4 Campb. 78.

Name Not Appearing in Instrument. — In *Reiter v. Fruh*, 150 Pa. St. 623, 30 W. N. C. (Pa.) 231, it was held that on a note made by a firm and signed with a firm name, in which the name of one of the defendants sued did not appear, the declaration was sufficient to charge him, although he was not connected with the instrument except by setting out his name in the caption and describing the defendants as partners.

1. *Hodge v. Eastin*, 5 Martin N. S. (La.) 57; *Derbigny v. Mondelli*, 15 La. 496; *National Ins. Co. v. Bowman*, 60 Mo. 252.

For Business Purposes. — In a suit on a promissory note given by co-partners, the allegation that the makers were co-partners, and signed their names as such, is sufficient without the further allegation that they were co-partners for business purposes, or were known as such. *National Ins. Co. v. Bowman*, 60 Mo. 252.

2. *Swinney v. Burnside*, 17 Ark. 38; *Lucas v. Baldwin*, 97 Ind. 471. *Compare Napier v. Mayhew*, 35 Ind. 276; *Neteler v. Culies*, 18 Ill. 188.

3. *Alabama*. — *Thompson v. Hall*, 16 Ala. 204; *Click v. McAfee*, 7 Port. (Ala.) 62; *Phillips v. Scoggins*, 1 Stew. & P. (Ala.) 28; *Allen v. Dickson*, *Minor* (Ala.) 119.

Arkansas. — *Matlock v. Purefoy*, 18 Ark. 492.

California. — *McCarty v. Beach*, 10 Cal. 462; *Wills v. Kempt*, 17 Cal. 99; *Winters v. Rush*, 34 Cal. 136; *Williams v. Hall*, 79 Cal. 606; *Poirier v. Gravel*, 88 Cal. 79; *Henke v. Eureka Endowment Assoc.*, 100 Cal. 432; *Younglove v. Cunningham*, (Cal. 1896) 43 Pac. Rep. 755.

Colorado. — *Travelers' Ins. Co. v. Denver*, 11 Colo. 434.

District of Columbia. — *Johnson v. Wright*, 2 App. Cas. (D. C.) 216.

Idaho. — *Brumback v. Oldham*, 1 Idaho 709.

Illinois. — *Mason v. Buckmaster*, 1 Ill. 27; *Hulme v. Renwick*, 16 Ill. 371; *Bilderback v. Burlingame*, 27 Ill. 338, *overruling Bradley v. Morris*, 4 Ill. 182; *Gaddy v. McCleave*, 59 Ill. 182.

Indiana. — *Hamilton v. Newcastle*, etc., R. Co., 9 Ind. 359; *Leach v. Rhodes*, 49 Ind. 291; *Durland v. Pitcairn*, 51 Ind. 426; *Keesling v. Watson*, 91 Ind. 582; *Findley v. Cooley*, 1 Blackf. (Ind.) 262; *Arnold v. Brown*, 3 Blackf. (Ind.) 273; *Nichols v. Woodruff*, 8 Blackf. (Ind.) 493; *Spurgeon v. Swain*, 13 Ind. App. 188.

Iowa. — *Towsley v. Olds*, 6 Iowa 528; *Henderson v. Booth*, 11 Iowa 212.

Kentucky. — *M'Curdy v. Dudley*, 1 A. K. Marsh. (Ky.) 288; *Brown v. Hall*, 2 A. K. Marsh. (Ky.) 600; *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44; *Mullikin v. Mullikin*, 15 Ky. L. Rep. 609.

Massachusetts. — *Cochran v. Duty*, 8 Allen (Mass.) 324; *Stone v. White*, 8 Gray (Mass.) 589.

Minnesota. — *Pinney v. King*, 21 Minn. 514; *Adams v. Adams*, 25 Minn. 72; *Frank v. Irgens*, 27 Minn. 43.

Mississippi. — *Berthe v. Biggs*, 1 How. (Miss.) 195.

Missouri. — *Rector v. Fornier*, 1 Mo. 204; *Muldrow v. Caldwell*, 7 Mo. 563; *Caples v. Branham*, 20 Mo. 244; *Taylor v. Newman*, 77 Mo. 257.

New York. — *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Goshen*, etc., *Turnpike Road Co. v. Hurin*, 9 Johns. (N. Y.) 217; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238; *Troy Bank v. Topping*, 13 Wend. (N. Y.) 557; *Paine v. Noelke*, 43 N. Y. Super. Ct. 176; *Guggenheim v. Goldberger*, 7 Misc. Rep. (N. Y. City Ct.) 740, 27 N. Y. Supp. 422; *Hoxie v. Cushman*, 7 N. Y. Leg. Obs. 149.

North Carolina. — *Angier v. Howard*, 94 N. Car. 27.

Ohio. — *Dugan v. Campbell*, 1 Ohio 115; *Richmond v. Patterson*, 3 Ohio 369; *Leonard v. Sweetzer*, 16 Ohio 1.

South Carolina. — *Hubble v. Fogartie*, 3 Rich. L. (S. Car.) 413; *Charleston Bank v. Chambers*, 11 Rich. L. (S. Car.) 657.

Texas. — *Perry v. Rice*, 10 Tex. 367; *Jones v. Holliday*, 11 Tex. 412; *Henderson v. Glass*, 16 Tex. 559.

Vermont. — *Dewey v. Washburn*, 12 Vt. 580.

Virginia. — *Peasley v. Boatwright*, 2 Leigh (Va.) 195.

Non-negotiable Note. — But in actions on non-negotiable instruments for the payment of money, a consideration should be alleged. This follows from the rule that negotiable instruments enjoy the privilege of having a consideration presumed, at least when they

West Virginia. — McClain v. Lowther, 35 W. Va. 297; Cheuvront v. Bee, (W. Va. 1897) 28 S. E. Rep. 751 (in an action of debt).

Wisconsin. — Strunk v. Smith, 36 Wis. 631.

United States. — Wilson v. Codman, 3 Cranch (U. S.) 193.

England. — Carter v. Palmer, 12 Mod. 380.

Surplusage. — When, in declaring on a bill of exchange or promissory note, the consideration is unnecessarily averred, such allegation is surplusage. Berthe v. Biggs, 1 How. (Miss.) 195; Clarke v. Marlow, 20 Mont. 249.

When Consideration Denied. — When the defendant denies a consideration, and introduces evidence tending to show a want of consideration, the plaintiff may prove that the instrument sued on was given in payment of the debt of a third person, although there is no allegation as to the consideration in the declaration. Cochran v. Duty, 8 Allen (Mass.) 324.

Custom of Merchants. — In Dewey v. Washburn, 12 Vt. 580, it was said by Redfield, J.: "A promissory note or bill of exchange has long been considered an instrument in the nature of a specialty, importing on its face a consideration, and which, according to the custom of merchants, might be declared upon, without setting forth any consideration for the promise in the instrument. But any reference to the custom, in the declaration, is unnecessary."

Recital in Note. — In an action on a promissory note which recited that it was "given for a right to clarify cider, ale, etc.," but the pleader, in declaring on the note according to its legal effect, omitted any such description, but otherwise described it correctly, it was held that there was no variance between the note and the declaration. It was not necessary that the declaration should set forth the particular consideration for which the note was given, although mentioned in the note. Gaddy v. McCleave, 59 Ill. 182.

Action by Payee Against Drawer. — It was held in Brown v. Hall, 2 A. K. Marsh. (Ky.) 600, that in an action by

a payee of a bill of exchange against the drawer, it was not necessary to allege consideration, whether the action was in debt or assumpsit.

To Pay Debt of Another Person. — In an action upon a note given to pay the debt of a third person, if there is no consideration for the promise expressed in the note one should be averred in the declaration, and the want of such averment is fatal. Connolly v. Cottle, 1 Ill. 364.

At Defendant's Request. — Where the consideration of the defendant's promise is laid as past and executed, it must appear that the act constituting the consideration was done at the defendant's request. But where it was averred that the defendant, in consideration that the plaintiff then lent and advanced money to the makers of a note, indorsed the note, it was held that it sufficiently appeared that the plaintiff, the makers of the note, and the defendant were together at the time of the transaction, and that all that was done must have been concurrently done and with the assent of all, and that it was not necessary in such a case to aver that the money was advanced at the request of the defendant. Rhodes v. Seymour, 36 Conn. 1.

Consideration Not Paid or Performed. — Where the instrument sued on raises a presumption that the consideration has not been paid, as where it is stated that the consideration was a lot of ground "to be conveyed," the declaration should aver the payment or performance of the consideration. Brown v. Ready, 14 Ky. L. Rep. 583, (Ky. 1893) 20 S. W. Rep. 1036; Considerant v. Brisbane, 14 How. Pr. (N. Y. Super. Ct.) 487.

Note for Purchase Price of Land. — "But we are aware of no case here or elsewhere in which it has been held that, in declaring upon a promissory note given for the purchase money for land, it is incumbent on the plaintiff to set forth the consideration of the note and aver performance of his agreement to convey? But if no note or other security is given, and the agreement consists of dependent covenants in an action for the purchase money, the

have passed into the hands of indorsees in the usual course of trade, but instruments not negotiable enjoy no such privilege.¹

plaintiff must aver and prove a conveyance, or at least a readiness to convey." *Perry v. Rice*, 10 Tex. 367.

Several Notes Due on Default as to One. — A complaint on several promissory notes, only one of which is due, but payment of all of which is claimed under an agreement in writing, made contemporaneously with the notes, that in case of any default in the payment of the notes the whole amount should forthwith become due and payable, is sufficiently definite and certain if it alleges the making of the notes in consideration of an indebtedness to their amount, and the making of the agreement, without stating when, where, or how the indebtedness arose. *Brown v. Southern Michigan R. Co.*, 6 Abb. Pr. (N. Y. Supreme Ct.) 237.

Recovery of Consideration. — Where a note is improperly executed by an officer of a municipal corporation, and a recovery is sought, not on the instrument, but on the consideration, the real consideration must be set out, and it must be shown that it was received by the defendant. *Stanton v. Shipley*, 27 Fed. Rep. 498.

1. *Connecticut.* — *Hall v. Crandall*, Kirby (Conn.) 402.

Kentucky. — *Pryor v. Linsey*, 3 Bibb (Ky.) 76.

Maine. — *Bourne v. Ward*, 51 Me. 191.

Massachusetts. — *Hemmenway v. Hickes*, 4 Pick. (Mass.) 497.

New York. — *Prindle v. Caruthers*, 15 N. Y. 425; *Walrad v. Petrie*, 4 Wend. (N. Y.) 575; *Spear v. Downing*, 22 How. Pr. (N. Y. Supreme Ct.) 30, 34 Barb. (N. Y.) 522; *Prindle v. Caruthers*, 15 N. Y. 430; *De Forest v. Frary*, 6 Cow. (N. Y.) 151; *Lansing v. M'Killip*, 3 Cai. (N. Y.) 286.

Pennsylvania. — *Shee v. Megargee*, 4 Phila. (Pa.) 7, 17 Leg. Int. (Pa.) 20. *Contra, compare Withers v. Dearie*, 21 Leg. Int. (Pa.) 300.

South Carolina. — *Douglass v. Davie*, 2 McCord L. (S. Car.) 218; *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

Tennessee. — *Brown v. Parks*, 8 Humph. (Tenn.) 204; *Read v. Wheeler*, 2 Yerg. (Tenn.) 50; *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24.

Texas. — *Summers v. Sanders*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1038.

Order on Particular Fund. — An order

drawn on a particular fund will not uphold an action by the holder against the drawer without an averment of a consideration. *Pryor v. Linsey*, 3 Bibb (Ky.) 76.

Order for Soldier's Bounty. — In *Hall v. Crandall*, Kirby (Conn.) 402, which was an action on an order for the payment of a soldier's bounty, it was held that the averment of a consideration was necessary, the order not constituting a bill of exchange.

No Consideration Implied. — Where the instrument sued on is one which does not imply a consideration, the consideration must be alleged. *Spear v. Downing*, 34 Barb. (N. Y.) 522, 22 How. Pr. (N. Y.) 30; *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

A Note Payable to A or B cannot be declared on as a promissory note, and the declaration on such instrument must allege a consideration, but if it purports on its face to be for value received, a setting out of the note by its terms is a sufficient averment of consideration. *Walrad v. Petrie*, 4 Wend. (N. Y.) 575.

Reissued Warrant. — Where a note is in fact paid, but by a subsequent agreement between the maker and payee it is to be held by the latter for a balance of account due him, in an action on such note it must be declared upon as reissued, for a new consideration. *Koons v. McWhinney*, 30 Ind. 74.

City Warrant. — A city warrant is negotiable, and allegation of consideration is not necessary. *Travelers' Ins. Co. v. Denver*, 11 Colo. 434.

Statute as to Instrument in Writing. — The *Alabama* statute of 1811 made every writing which was the foundation of an action evidence of a consideration, and dispensed with the averment of consideration in any such action. *Thompson v. Hall*, 16 Ala. 204; *Click v. McAfee*, 7 Port. (Ala.) 62; *Allen v. Dickson*, Minor (Ala.) 119.

Note for Annual Payments. — A note for the payment of a certain sum annually until certain deeds should be executed was held under the statute of *Indiana*, like a promissory note under the statute of *Anne*, a debt *per se*, and might be declared on without the averment of any consideration. *Arnold v. Brown*, 3 Blackf. (Ind.) 273.

Sealed Note. — No consideration need

Instrument Payable on Contingency. — Where the instrument sued on is payable on a contingency, it is not negotiable, and in an action thereon the consideration should be stated.¹

Instrument Payable in Property. — Where an instrument is payable in property, a consideration should be alleged in declaring thereon.²

Surety. — In an action against a person who has become surety upon the instrument sued on by an agreement separate from the one by which the maker of the instrument became liable, a consideration for such subsequent promise by the surety must be alleged.³

Guaranty. — It has been held that in an action against a guarantor of a negotiable instrument the consideration for the guaranty must be alleged,⁴ but in some cases it is held that when the guaranty is a part of the original contract to which the instrument owes its inception, no consideration need be alleged.⁵

b. "FOR VALUE RECEIVED." — Where consideration is

be shown for a sealed note. *Angier v. Howard*, 94 N. Car. 27.

Husband's Acknowledgment of Wife's Note. — The written acknowledgment by a husband, of a note executed by his wife, though the note may originally have been void in itself, becomes, by such acknowledgment, under the statute of *Alabama*, the note of the husband, and it is not necessary to set out in the declaration any consideration moving to the husband for such acknowledgment. *Phillips v. Scoggins*, 1 Stew. & P. (Ala.) 28.

Subscription to Stock. — It was held in *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238, that an agreement signed by a number of persons, to take the amount of stock set opposite their names, was a promissory note, although the words "bearer" or "order" did not appear, and that no consideration need be averred in declaring on it.

1. *Prindle v. Caruthers*, 15 N. Y. 425; *Union Turnpike Road Co. v. Jenkins*, Col. & C. Cas. (N. Y.) 264; *Stamps v. Graves*, 4 Hawks (N. Car.) 102; *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24. Compare *Nichols v. Woodruff*, 8 Blackf. (Ind.) 493; *Dugan v. Campbell*, 1 Ohio 115.

Contingent on Death. — "The instrument on which the complaint is founded is not a promissory note, because it was not payable at all events. If neither Henry Caruthers nor his wife had survived till the first day of April succeeding the making of the instrument, nothing would ever have

been payable upon it. It is necessary, therefore, that the promise should from the complaint appear to have been made upon consideration." *Prindle v. Caruthers*, 15 N. Y. 425.

Payable on Decision of a Suit. — A note which is made payable when a certain suit is decided, not being a negotiable note, must be declared on with an averment of a consideration. *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24.

2. *Kentucky.* — *Letcher v. Taylor*, 2 Bibb (Ky.) 585; *Voorhies v. Benham*, 2 Bibb (Ky.) 572; *Griggsby v. Smedley*, 2 Bibb (Ky.) 572, note; *Hart v. Coram*, 3 Bibb (Ky.) 26.

New York. — *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Landau v. Levy*, 1 Abb. Pr. (N. Y. Super. Ct.) 376.

South Carolina. — *Gains v. Kendrick*, 2 Mill (S. Car.) 339.

Tennessee. — *Brown v. Parks*, 8 Humph. (Tenn.) 294.

Contra. — *Bilderback v. Burlingame*, 27 Ill. 338 [overruling *Bradley v. Morris*, 4 Ill. 182]; *Brooks v. Page*, 1 D. Chip. (Vt.) 340.

3. *Stone v. White*, 8 Gray (Mass.) 589; *Mechanics' Bank v. Donnell*, 35 Mo. 373; *Hahn v. Hull*, 2 Abb. Pr. (N. Y. C. Pl.) 352. See in general article PRINCIPAL AND SURETY.

4. *Joslyn v. Collinson*, 26 Ill. 61; *Van Doren v. Tjader*, 1 Nev. 380; *Greene v. Dodge*, 2 Ohio 430; *Garrett v. Butler*, 2 Strobb. L. (S. Car.) 193. Compare *Henderson v. Booth*, 11 Iowa 212.

5. *Joslyn v. Collinson*, 25 Ill. 61; *Leonard v. Sweetzer*, 16 Ohio 1.

admitted by a recital in the instrument that it was given "for value received," there is, of course, no occasion to allege the consideration for which it was given.¹ And this is especially true when the instrument is set out or a copy attached.² Other cases expressly hold that even though the words "for value received" do not appear in the instrument sued on, no allegation of consideration is necessary,³ and this would seem to be the rule in most jurisdictions.⁴ An allegation that the instrument sued on was given "for value received" is a sufficient allegation of a consideration.⁵

Under the Statutes of Missouri a note is not negotiable unless it contains the words "for value received, negotiable and payable with-

1. *Priedman v. Johnson*, 21 Minn. 12; *Benson v. Couchman*, 1 Code Rep. (N. Y. Supreme Ct.) 119; *Williams v. Edwards*, 15 Tex. 41.

Necessity of Proof.—If the plaintiff unnecessarily sets out the consideration in declaring on a note containing the words "for value received," he need not prove the instrument as alleged. *Priedman v. Johnson*, 21 Minn. 12.

Non-negotiable Instrument.—In declaring on a promissory note not within the law merchant, the consideration must be averred, although it contains the words "for value received." *Shee v. Megargee*, 4 Phila. (Pa.) 7, 17 Leg. Int. (Pa.) 20.

2. *Indiana*.—*Petree v. Fielder*, 3 Ind. App. 127.

Maine.—*Bourne v. Ward*, 51 Me. 191.

Minnesota.—*Elmquist v. Markoe*, 39 Minn. 494, following *Frank v. Irgens*, 27 Minn. 43.

Missouri.—*Harkness v. Jones*, 71 Mo. App. 289.

New York.—*Meyer v. Hibsher*, 47 N. Y. 265; *Walrad v. Petrie*, 4 Wend. (N. Y.) 575; *Mt. Morris Bank v. Lawson*, 7 Misc. Rep. (N. Y. City Ct.) 228. Compare *Wheelright v. Moore*, 1 Hall (N. Y.) 201.

3. *Underhill v. Phillips*, 10 Hun (N. Y.) 591; *Withers v. Dearie*, 21 Leg. Int. (Pa.) 300.

4. See *supra*, a. *Necessity of Alleging*.

5. *Bingham v. Calvert*, 13 Ark. 399; *Thackaray v. Hanson*, 1 Colo. 365; *Campbell v. Worman*, 58 Minn. 561; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Lindsley v. Simonds*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 69.

A Legal Consideration.—An allegation that a business corporation, for value received, made and delivered a promissory note, sufficiently states a valid

contract. It may be presumed, on demurrer, that it was done for a legal consideration, under the general powers common to such corporations. *Lindsley v. Simonds*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 69.

For Cash Borrowed.—A promissory note expressed to be given for cash borrowed may be described in the declaration as given for value received. *Thackaray v. Hanson*, 1 Colo. 365.

Not a Variance.—Where the instrument declared on is alleged to have been given for value received, it is held no variance if an instrument introduced in evidence does not contain the words. *Bingham v. Calvert*, 13 Ark. 399. But see *Saxton v. Johnson*, 10 Johns. (N. Y.) 418, where it was held that under the declaration in that case the words "for value received" had been made a part of the description of the instrument, and so had caused a variance.

And it is no variance if the words "for value received" are contained in the instrument sued on, but are not alleged in the declaration.

Alabama.—*M'Rae v. Raser*, 9 Port. (Ala.) 122.

Arkansas.—*Matlock v. Purefoy*, 18 Ark. 492; *Hawkins v. Dean*, 24 Ark. 189.

Illinois.—*Crittenden v. French*, 21 Ill. 600.

Indiana.—*Chapman v. Ellison*, 7 Blackf. (Ind.) 46.

South Carolina.—*Hubble v. Fogartie*, 3 Rich. L. (S. Car.) 413.

Compare *Rossiter v. Marsh*, 4 Conn. 196.

Value Received by Drawer or Drawee.—A bill of exchange drawn by J. S. to his own order, value received, means value received by the drawee; and if it is alleged in the declaration to be for

out defalcation; " therefore, whenever the plaintiff to make out a cause of action must show that he is suing on a negotiable note, as when he sues as indorsee, he must allege that the note contains these words.¹

c. CONSIDERATION FOR TRANSFER — Indorsement. — In an action on a bill or note which has been indorsed to the holder, no consideration for such indorsement need be alleged,² but where the instrument is payable in property the consideration should be stated,³ and where the action is on an irregular indorsement a statement of the consideration is necessary.⁴

Assignment. — Where the instrument sued on has been assigned and not indorsed, the consideration for the assignment should be alleged.⁵

d. VARIANCE. — When the consideration for the instrument sued on is alleged, it must be stated truly, or there will be a material variance,⁶ but it is held that a variance as to matters of

value received by the said J. S., it is a variance. *Highmore v. Primrose*, 5 M. & S. 65.

1. Mo. Rev. Stat. 1889, § 733; *Jaccard v. Anderson*, 32 Mo. 190; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt*, 35 Mo. 461; *Townsend v. Chas. H. Heer Dry Goods Co.*, 85 Mo. 503; *Hart v. Harrison Wire Co.*, 91 Mo. 414.

Indorser or Assignor. — If the plaintiff in suing an indorser fails to allege that the note contains the words which are essential to negotiability, he fails to show that the defendant is liable as indorser and show only a liability as assignor. *Jaccard v. Anderson*, 32 Mo. 190; *Lindsay v. Parsons*, 34 Mo. 422; *Townsend v. Chas. H. Heer Dry Goods Co.*, 85 Mo. 503.

2. *California.* — *McCann v. Lewis*, 9 Cal. 246.

Illinois. — *Robertson v. Hamet*, 19 Ill. 161.

Kentucky. — *Dodge v. State Bank*, 2 A. K. Marsh. (Ky.) 614; *Krachts v. Obst*, 14 Bush (Ky.) 34.

Missouri. — *Rubelman v. McNichol*, 13 Mo. App. 584.

New York. — *Oishei v. Craven*, 24 N. Y. Civ. Pro. Rep. (Buffalo Super. Ct.) 301; *Benson v. Couchman*, 1 Code Rep. (N. Y. Supreme Ct.) 119. *Contra*, as to irregular indorsement, *Myers v. Crim*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 194.

North Carolina. — *Clayton v. Jones*, 68 N. Car. 497.

Ohio. — *Dumont v. Williamson*, 18 Ohio St. 515.

South Carolina. — *Charleston Bank v. Chambers*, 11 Rich. L. (S. Car.) 657.

Compare Bartlett v. Leathers, 84 Me. 241, which seems to imply that an allegation of consideration is necessary, but the allegation in that case was held sufficient.

3. *Byington v. Geddings*, 2 Ohio 227, in which case the note was payable to Knapp or bearer; the court said: "We consider the promise in the note as made not only to Knapp, but to the person to whom he should deliver it;" therefore a consideration should be alleged as none was implied.

4. *McInnis v. Rabun*, 1 Port. (Ala.) 386; *Robertson v. Phillips*, 1 Tex. App. Civ. Cas., § 477; *Myers v. Crim*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 194.

5. *Farris v. Wells*, 68 Ga. 604; *Elliot v. Threlkeld*, 16 B. Mon. (Ky.) 343; *Krachts v. Obst*, 14 Bush (Ky.) 34, which last case was under a statute providing that "in an action on any assignment of a writing it shall be necessary to aver the consideration." Ky. Gen. Stat. 1894, § 475. To the same effect see *Humphrey v. Hughes*, 79 Ky. 487. *Contra*, *Hanna v. Pegg*, 1 Blackf. (Ind.) 180.

6. *Brewster v. Dana*, 1 Root (Conn.) 266; *Colt v. Root*, 17 Mass. 229; *Lansing v. M'Killip*, 3 Cal. (N. Y.) 286; *Jerome v. Whitney*, 7 Johns. (N. Y.) 321; *Cunningham v. Shaw*, 7 Pa. St. 401; *Garrett v. Butler*, 2 Strobb. L. (S. Car.) 193.

Consideration Unnecessarily Set Out. — If the plaintiff unnecessarily sets out a consideration, or sets it out with unnecessary particularity, he must prove it as alleged. *Jerome v. Whitney*, 7

time connected with the consideration is not fatal.¹

5. Description of Instrument — a. SUFFICIENCY OF DESCRIPTION IN GENERAL — (1) True Description Necessary. — A declaration or complaint on a negotiable instrument should contain a true description thereof,² but substantial accuracy of description is suffi-

Johns. (N. Y.) 321. *Contra*, Friedman v. Johnson, 21 Minn. 12.

Two Considerations. — If two considerations are alleged as the foundation for the promise contained in a note sued on, they must both be proved, or there will be a fatal variance. Lansing v. M'Killip, 3 Cal. (N. Y.) 286; Garrett v. Butler, 2 Sirobh. L. (S. Car.) 193.

1. Nesbit v. Bradford, 6 Ala. 746; Brown v. Pickard, 4 Utah 292.

Time of Delivery of Consideration. — Where the complaint in an action on a note alleges the consideration to have been the delivery of goods to the defendant at the time the note was executed, there is no variance if it is shown that the goods were actually delivered before the execution of the note. Brown v. Pickard, 4 Utah 292.

Time of Forbearance. — In an action on a guaranty of a bill of exchange, where the guaranty is given in consideration of a forbearance, there is no material variance if the time of forbearance as alleged and as proved do not exactly agree. Nesbit v. Bradford, 6 Ala. 746.

2. Catlin v. Gilders, 3 Ala. 536; Jordan v. Ford, 7 Ark. 416; Perkins v. Cushman, 44 Me. 484; Mechanics' Bank v. Donnell, 35 Mo. 373; Church v. Feterow, 2 P. & W. (Pa.) 301; Morris v. Fort, 2 McCord L. (S. Car.) 397; Bledsoe v. Wills, 22 Tex. 650.

What Is Matter of Description. — Where the petition alleged that the note was made and delivered to petitioners "for the use and benefit of E. W.," and the note offered in evidence was, "I promise to pay to E. W. five hundred dollars," etc., it was held that the portion of the petition which stated that the note was made and delivered for the use and benefit of E. W. was not intended as part of the description of the note, but was an averment of a fact *dehors* the note, and could therefore be properly regarded as a descriptive allegation with which the note must correspond. Dibrell v. Ireland, 1 Tex. App. Civ. Cas., § 300.

On General Demurrer. — In Bledsoe v. Wills, 22 Tex. 650, it was held that al-

though a petition which gave merely a conversational description of the note in suit might be good on general demurrer, yet it would not be sufficient if specially excepted to.

Amendment of Description. — The description of the note in suit may be amended to conform to the facts, provided the amendment does not change the cause of action. Drake v. Found. Treasure Min. Co., 53 Fed. Rep. 474. And see Princeton First Nat. Bank v. Cash, (Ky. 1898) 44 S. W. Rep. 381; Farmers' Bank v. Saling, (Oregon 1898) 54 Pac. Rep. 190.

A petition on an altered instrument may be amended so as to permit a recovery on the original consideration. State Sav. Bank v. Shaffer, 9 Neb. 1; Matteson v. Ellsworth, 33 Wis. 488.

Recovery on the Money Counts. — It was held in Henckley v. Hendrickson, 5 McLean (U. S.) 170, that the plaintiff might recover on the money counts contained in his declaration, where the description of the note sued on was insufficient. So also in Jordan v. Ford, 7 Ark. 416.

When Action Not on Instrument. — When a surety sues his principal to recover the amounts he has been compelled to pay by reason of the principal's failure to take up the note, no description of the note is necessary, when the action is not on the note, but on the money counts. Cameron v. Warbritton, 9 Ind. 351.

Alteration of Instrument. — A note which has been altered by consent of the parties may be declared on by setting out a copy of it as altered, without showing how it was originally written. Hall v. Foster, 114 Mass. 18.

And in an action on a note which has been altered since its delivery, if its original tenor is apparent on inspection, it is sufficient to declare upon it in the usual form; and, upon showing that the alteration is a mere spoliation, there is no variance between the allegations and the proof. Drum v. Drum, 133 Mass. 566.

But when the holder of the instrument admits that a material alteration has been made since its delivery, he

cient.¹ When the instrument sued on is made part of the petition, or a copy is annexed, the variance between the instrument introduced in evidence and the one described in plaintiff's pleading is immaterial.²

must allege every fact necessary to show his right of recovery on the altered instrument. *Anderson v. Hale*, 7 Ky. L. Rep. 836.

1. *Alabama*. — *M'Rae v. Raser*, 9 Port. (Ala.) 122.

Florida. — *Harrell v. Durrance*, 9 Fla. 490.

Illinois. — *Crittenden v. French*, 21 Ill. 600; *Teeter v. Poe*, 48 Ill. App. 158.

Maine. — *Collins v. Bradbury*, 64 Me. 37.

Mississippi. — *Hughes v. Grand Gulf Bank*, 2 Smed. & M. (Miss.) 115.

New York. — *Herrick v. Bennett*, 8 Johns. (N. Y.) 374.

Texas. — *Wiebusch v. Taylor*, 64 Tex. 53; *McCeiland v. Smith*, 3 Tex. 210. From the report of this case no variance at all can be discovered.

Instrument in Writing. — Where a petition in an action on county warrants does not declare upon them as instruments in writing, the defendant may demur if the petition shows that the action was barred by the statute of limitations applying to contracts not in writing. *Keller v. Hicks*, 22 Cal. 462.

Drawee of Check. — An allegation that a check was drawn upon the "First National Bank of Lafayette, Indiana," is supported by a check drawn on the "First National Bank" and bearing date at "Lafayette, Indiana." *Culver v. Marks*, 122 Ind. 554.

Witnessed Notes. — Under statutes providing a different period of limitation for witnessed notes, it is not necessary in an action on such a note to allege that it is witnessed. *Ware v. Webb*, 32 Me. 41; *Bragg v. Fletcher*, 20 Vt. 351. But see *Whitlock v. Castro*, 22 Tex. 108.

Specific Exception Necessary. — "We think the allegations were sufficient to admit the note in evidence. If the petition was deemed defective, it should have been excepted to, and, appellants having failed to point out defects in it by exception, no advantage of the supposed defects could be taken by objecting to testimony." *Davie v. Griffith*, (Tex. Civ. App. 1895) 33 S. W. Rep. 390.

Motion for Continuance. — Whether the note is correctly described or not, is a question of fact to be brought out on

the trial, and can have nothing to do with a motion to continue the cause. *Boyle v. Carter*, 24 Ill. 51.

Defendant Misled or Surprised. — Where the defendant is neither misled nor surprised by the difference between the instrument declared on and the one produced in evidence, the variance between the two is not fatal. *Wiebusch v. Taylor*, 64 Tex. 53. And see *Salmon Falls Bank v. Leyser*, 116 Mo. 51.

Aider by Verdict. — Inaccuracy in a description of a note may be cured by evidence, and such a variance is immaterial and amendable after verdict. *Clark v. Trueblood*, 16 Ind. App. 100; *Long v. Campbell*, 37 W. Va. 665.

In *Lauman v. Nichols*, 15 Iowa 161, it was held that after a verdict it would be presumed that a deposition in which the note referred to was set out by a copy different from the note set out in the petition, intended to refer to the same instrument, and that the appellate court might also presume proper evidence had been introduced to show the identity of the instrument.

2. *Indiana*. — *Kunkler v. Turnting*, 10 Ind. 418.

Iowa. — *Walker v. Ayres*, 1 Morr. (Iowa) 200; *Madera v. Jones*, 1 Morr. (Iowa) 204; *Carothers v. Green*, 1 Morr. (Iowa) 429.

Louisiana. — *Weyman v. Cater*, 13 La. 492; *Rio v. Gordon*, 14 La. 418; *Matthews v. Williams*, 25 La. Ann. 585; *Tenney v. Russell*, 1 Rob. (La.) 449; *Ditto v. Barton*, 6 Martin N. S. (La.) 127.

Ohio. — *Brainard v. Rittberger*, 4 Ohio Dec. (Reprint) 432, 2 Cleve. L. Rep. 154.

Texas. — *Deweese v. Lockhart*, 1 Tex. 535; *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650.

Action on Many Warrants. — In *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650, it was held unnecessary to describe in full each of a large number of county warrants which were sued upon in one action, where there was an exhibit attached to the petition showing the essential qualities as to each warrant.

Bill of Particulars. — A variance between the instrument offered in evi-

(2) *Nature of Instrument — Promissory Note.* — When a petition or declaration describes the instrument sued on as a promissory note, it is not a material variance if the instrument produced in evidence does not strictly and technically comply with the description.¹

dence and the bill of particulars attached to the declaration is immaterial, if the instrument is correctly described in the declaration. *Hughes v. Grand Gulf Bank*, 2 Smed. & M. (Miss.) 115.

1. *Colorado.* — *Bishop v. Griffith*, 4 Colo. 68.

Missouri. — *Beach v. Curle*, 15 Mo. 105.

New York. — *Sanders v. Bacon*, 8 Johns. (N. Y.) 485; *Fairchild v. Ogdensburgh*, etc., R. Co., 15 N. Y. 337; *Chase v. Behrman*, 10 Daly (N. Y.) 344, 1 N. Y. City Ct. 352; *Beaudrias v. Walch*, (Supreme Ct.) 17 N. Y. Supp. 716, where it was held that the instrument sued on need not be named.

South Carolina. — *Dowie v. Joyner*, 25 S. Car. 123.

Texas. — *Hamilton v. Black*, Dall. (Tex.) 586.

Compare *Covington First Nat. Bank v. Gaines*, 87 Ky. 597.

Draft by One Corporate Officer on Another. — It was held in *Fairchild v. Ogdensburgh*, etc., R. Co., 15 N. Y. 337, that in an action by the payee of a draft drawn by the president of a corporation on its treasurer, for the payment of the corporation's indebtedness to the payee, the complaint might be framed as on a promissory note of the corporation.

Agreement to Remit Cash and Notes. — In *Dowie v. Joyner*, 25 S. Car. 123, it was held that under a complaint declaring on an instrument called a promissory note, the plaintiff could introduce in evidence a contract in the form of a note, by which the defendant agreed to remit to the payee all notes taken and all cash collected in the sale of certain fertilizers.

"Note or Writing Obligatory." — Where the petition called the instrument sued on a "promissory note or writing obligatory," it was held that such description was sufficient as against an objection that the petition should have declared either on the one or the other. *Hamilton v. Black*, Dall. (Tex.) 586.

Promissory and Negotiable Notes. — It was held in *Beach v. Curle*, 15 Mo. 105, that there was no variance between a

declaration on a note describing it as a promissory note, and one introduced in evidence which is negotiable, as all negotiable notes are promissory.

Consideration Expressed. — An instrument in the ordinary form of a promissory note, except that it contains a clause expressing the consideration, as for the use of a horse-car panel for advertising purposes, may be declared on as "an instrument for the payment of money only," within section 534 of the N. Y. Code of Civil Procedure, since it is in fact a promissory note. *Chase v. Behrman*, 10 Daly (N. Y.) 344, 1 N. Y. City Ct. 352.

Indorsement Showing Consideration. — Where A gave to B a promissory note payable to B or order, and at the same time made an indorsement on the note that it was to be delivered to B in consideration of a judgment against C to be assigned to A by B, it was held that the note was a promissory note within the statute, and might be declared on as such, notwithstanding the indorsement, which was merely to show the consideration. *Sanders v. Bacon*, 8 Johns. (N. Y.) 485.

Misnomer Not Constituting Variance. — It was held in *Bishop v. Griffith*, 4 Colo. 68, that although an instrument containing the following clause: "For reasons well known between the parties, this note is not negotiable," was improperly described as "a promissory note," yet it was nevertheless admissible in evidence under a declaration so describing it.

Agreement or Covenant. — If the pleader misname the instrument sued on, calling it a note instead of a covenant or agreement, the variance will not be fatal. *Smith v. Webb*, 16 Ill. 105.

Forged Indorsement. — In an action for the price of a promissory note sold and delivered, the note may be properly described as a "negotiable promissory note," though the payee's indorsement is forged, if, notwithstanding the forgery, the maker is liable. *Beal v. Roberts*, 113 Mass. 525.

Agreement as to Credits. — In *Hyer v. Norton*, 26 Ind. 269, it was held that a

Non-negotiable Instrument. — Where a declaration or complaint describes the instrument sued on as negotiable, it is not a fatal variance if the note introduced in evidence is not negotiable.¹

Sealed Instrument. — There is, however, a fatal variance between a declaration on a promissory note and a sealed instrument introduced in evidence.²

Payable on a Contingency. — It has been held that a plaintiff might declare upon a note payable upon a contingency, in the same manner as upon a note strictly negotiable.³

complaint insufficiently described the instrument sued on, although a copy was attached, where no mention was made of a condition annexed to the note that credits should be allowed of one-half the amount of the liability of a partnership existing between the maker and payee.

Payable on a Day Certain. — Where the declaration treats the paper sued upon as a promissory note, but it is shown not to be such, the variance is fatal where the declaration is not adapted to the case of any other special contract, as when it is not payable on a day certain. In this case, however, the instrument was payable "on or before" a certain date, and it was held that it was a promissory note. *Mattison v. Marks*, 31 Mich. 421.

1. *Pleasant Hill Bank v. Wills*, 79 Mo. 275; *Odiorne v. Odiorne*, 5 N. H. 315; *Downing v. Backenstoos*, 3 Cai. (N. Y.) 137.

Value Received. — "There is no doubt that the acknowledgment of value received, in a note not negotiable, is *prima facie* evidence of a consideration. *Jerome v. Whitney*, 7 Johns. (N. Y.) 321. This being the case, we do not perceive any sound reason why a declaration upon such a note should not be framed in the same manner as a declaration upon a negotiable note." *Odiorne v. Odiorne*, 5 N. H. 315.

2. *Reed v. Scott*, 30 Ala. 640; *McCrummen v. Campbell*, 82 Ala. 566; *Phillips v. Americus Guano Co.*, 110 Ala. 521; *Hooker v. Gallagher*, 6 Fla. 351; *Helfer v. Alden*, 3 Minn. 332; *Pierce v. Lacy*, 23 Miss. 193. And see *Stull v. Wilcox*, 2 Ohio St. 569, where an unsealed note was held inadmissible under an allegation describing it as a "writing obligatory."

Sufficient Allegation as to Sealing. — In *Conner v. Autrey*, 18 Tex. 427, it was held that an allegation that the note in suit was signed "R. Autrey (Seal)," was a sufficient allegation that the note

was under seal, although the petition called it a promissory note.

Paper Writing. — In *Oldham v. Hunt*, 4 Humph. (Tenn.) 332, it was held that a declaration might properly describe an instrument as a paper writing, and set it forth where it was executed by two persons, one of whom attached his seal and the other did not, so that as to one it was a promissory note, and as to the other a bill single.

Sealed Note. — A promissory note with a seal is a bill obligatory, and should be declared on as such. *Higgins v. Bogan*, 4 Harr. (Del.) 330. And in *Duncan v. McAfee*, 3 Ill. 559, it was held that such an instrument might properly be described as a bond.

Instrument Sealed and Concluding "Witness Our Hands." — Where an instrument in the form of a promissory note concluded with the words, "witness our hands," but scrolls by way of seals were attached to the signatures, it was held that this instrument was properly described in the declaration as a promissory note. *Peasley v. Boatwright*, 2 Leigh (Va.) 195.

3. *Odiorne v. Odiorne*, 5 N. H. 315. But in *Union Turnpike Road Co. v. Jenkins, Col. & C. Cas.* (N. Y.) 264, it was held that such a note must be declared on as a special agreement. And in *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24, this method of declaring was held sufficient where the instrument was set out, the court saying: "The instrument declared on is called in the declaration a promissory note or writing obligatory, which, it is contended, is a fatal variance, as it is neither. It is true, this is not a promissory note or writing obligatory, but we think it makes no difference by what name a written contract may be called, if it be set forth correctly in the declaration; which is done in this case."

Conditional Note. — It was held in *Whitaker v. Smith*, 4 Pick. (Mass.) 83, that a declaration in an action on a

Duebill. — A duebill may be described as a promissory note.¹

An Instrument Payable in Specific Articles may be declared on as a promissory note.²

(3) **Legal Effect.** — The description of a negotiable instrument according to its legal effect is sufficient.³

(4) **Letters, Numbers Devices, and Credits.** — In describing a negotiable instrument in an action thereon, it is not necessary to set out or notice letters, numbers, or devices which do not affect its legal import.⁴

note conditioned to be void on a certain contingency should set out such condition.

1. McDonald v. Yeager, 42 Ind. 388; Russell v. Whipple, 2 Cow. (N. Y.) 536. Compare McKinney v. Harter, 7 Blackf. (Ind.) 385.

2. Peddicord v. Whittam, 9 Iowa 471; Brooks v. Page, 1 D. Chip. (Vt.) 340.

Contra. — Gains v. Kendrick, 2 Mill (S. Car.) 339; Norton v. Allen, 3 A. K. Marsh. (Ky.) 284. In this case it was held that a note for the payment of tobacco at a fixed rate, though not sealed, was a specialty, under the Kentucky Act of 1811, and must be declared on as such.

And see Neale v. Fowler, 31 Md. 155, where it was held that an instrument containing an agreement by the defendant to ship and consign to the plaintiff certain grain, to be sold on commission, and the proceeds to be applied to the payment of certain debts of the defendant to the plaintiff, was not admissible under a declaration describing the instrument as an obligation to pay a certain sum on demand.

Order Payable in Notes. — In Breckinridge v. Rolls, 4 T. B. Mon. (Ky.) 533, it was held that an order payable in certain notes was improperly described as a bill of exchange.

3. **Alabama.** — Johnson v. Johnson, Minor (Ala.) 263; M'Rae v. Raser, 9 Port. (Ala.) 122.

Arkansas. — Matlock v. Purefoy, 18 Ark. 492.

Colorado. — Thackaray v. Hanson, 1 Colo. 367; Bishop v. Griffith, 4 Colo. 68.

Connecticut. — Sherman v. Globe, 4 Conn. 246.

Florida. — Harrell v. Durrance, 9 Fla. 490.

Illinois. — Sappington v. Pulliam, 4 Ill. 385; Crittenden v. French, 21 Ill. 599; Archer v. Claffin, 31 Ill. 306; Mumford v. Tolman, 157 Ill. 258.

Mississippi. — Berthe v. Biggs, 1 How. (Miss.) 195.

Missouri. — Bateson v. Clark, 37 Mo. 31.

New York. — Nourny v. Dubosty, 12 Abb. Pr. (N. Y. Supreme Ct.) 128.

South Carolina. — Morris v. Fort, 2 McCord L. (S. Car.) 397.

Texas. — Dewees v. Lockhart, 1 Tex. 535.

Wisconsin. — Dart v. Sherwood, 7 Wis. 523.

Liability of Others. — It was held in Berthe v. Biggs, 1 How. (Miss.) 195, that it was sufficient to describe the instrument sued on according to its legal effect, and that if the liability of others than the defendant was set out, such allegations might be rejected as surplusage.

Legal Effect Stated. — "In some cases it has been held absolutely necessary to depart from the terms of the contract, and a party has been defeated on the ground of variance, when he has used the precise words of the contract, but misstated its legal operation." Crittenden v. French, 21 Ill. 598.

Described Substantially or Set Out. — Where the instrument in suit is described according to its legal effect it is sufficient if it is described substantially, and if the instrument set out imposes no greater liability on the defendant than the one introduced in evidence; but if it is set out *in hac verba*, the omission or substitution of a word will be fatal, although it does not affect the substance of the contract. M'Rae v. Raser, 9 Port. (Ala.) 122.

Legal Effect Need Not Be Stated. — It was held in Commercial Bank v. Norton, 1 Hill (N. Y.) 504, that the legal effect of the instrument sued on need not be given. In that case a copy was filed with the declaration on the general count.

4. Carey v. Greene, 7 Ga. 79, which was an action on banknotes; Knight v. Fox, 1 Morr. (Iowa) 305, which was an action on a bill of exchange, to which was attached a stamp, apparently

Credits. — In suing on a promissory note, the declaration need not set out the credits which are indorsed on such note.¹

(5) *Memoranda.* — Memoranda indorsed on a negotiable instrument need not be noticed in describing such instrument in a petition declaring on it.²

(6) *Naming Payee.* — In actions on negotiable instruments by another person than the payee, the payee of such instrument should be named, as that is an essential part of the description of the instrument,³ but if such payee is described in the same way he is described in the instrument itself, the description is sufficient.⁴

(7) *Instrument in Foreign Language.* — It seems that on a negotiable instrument written in a foreign language, a declaration

a revenue stamp of the foreign country in which the bill was executed, and it was held that it need not be noticed in describing the bill.

1. *Hendrie v. Rippey*, 9 Iowa 351; *Watts v. Overstreet*, 78 Tex. 571, in which case the credits had been erased, and it was held that there was no variance, although the petition took no notice of such credits.

Deduction for Freight. — In an action by petition and summons on a note for the payment of money, but subject to a deduction for freight, it was held that no averment as to such deduction was essential. *Kalfus v. Watts*, Litt. Sel. Cas. (Ky.) 197.

2. *Archer v. Claflin*, 31 Ill. 306; *Blackstone Nat. Bank v. Lane*, 80 Me. 165; *Rich v. Boyce*, 39 Md. 314; *Smalley v. Bristol*, 1 Mich. 153; *Halfin v. Winkleman*, 83 Tex. 165; *Kennon v. Bailey*, (Tex. Civ. App. 1896) 37 S. W. Rep. 776.

"Without Defalcation or Discount." — The words "without defalcation or discount" indorsed on a promissory note need not be mentioned in declaring on such instrument. *Archer v. Claflin*, 31 Ill. 306.

"Non-transferable." — In *Kennon v. Bailey*, (Tex. Civ. App. 1896) 37 S. W. Rep. 776, it was held that a petition was sufficient which in describing the notes sued on, omitted the word "non-transferable" written on such note, but in this case the notes were attached to the petition as exhibits.

Collateral Security. — It is not a variance, in an action on a promissory note, that the declaration does not mention a memorandum on the note, stating that it was held as collateral security. *Blackstone Nat. Bank v. Lane*, 80 Me. 165. See also *Rich v. Boyce*, 39 Md. 314.

Recitals as to Deed. — In *Halfin v. Winkleman*, 83 Tex. 165, it was held that a petition was sufficient which in describing the note sued on, made mistakes as to the pages on which a deed recited therein was recorded.

Collateral Contract. — A promissory note, having a memorandum indorsed thereon that it is made in accordance with and subject to the terms of a certain letter, does not constitute the whole of the contract between the parties thereto. The letter referred to is an integral part of such contract, and its contents must be alleged and proved in order to recover upon the note. *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419.

3. *White v. Joy*, 13 N. Y. 83, reversing 11 How. Pr. (N. Y. Supreme Ct.) 36; *Cherry v. Ferguson*, 2 McMull. L. (S. Car.) 15. But see *Chicago First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296. See also 7. *d. Averment as to Payee.*

Cured by Answer. — A complaint on a note, not referring to a payee, is bad on demurrer, but if defendant's answer admits it to be a promissory note and objects only to plaintiff's title, the defect is waived. *White v. Joy*, 13 N. Y. 83, reversing 11 How. Pr. (N. Y. Supreme Ct.) 36.

4. *Reynolds v. Roth*, 61 Ark. 317; *Root v. Henry*, 6 Mass. 504; *Edmundson v. Yates*, 25 Tex. 373; *Montpelier Bank v. Russell*, 27 Vt. 719.

By a Partnership. — Where an instrument is payable to a partnership, in an action thereon by a subsequent holder it is not necessary, in describing the instrument, to set out the names of the partners, but it is sufficient to describe them by the firm name. *Root v. Henry*, 6 Mass. 504; *Edmundson v. Yates*, 25 Tex. 373.

will be sufficient which gives a translation, or declares upon it as though executed in English.¹

(8) *Order, Bearer, etc.* — It is not essential in declaring on a negotiable instrument to include the words "or order" or "or bearer," though such words appear in the instrument itself.² But when the suit is by an indorsee it seems that there should be an averment that the instrument is payable "to order" or "to bearer," "because without this allegation it is not clear that the note is negotiable, and if it be not negotiable the plaintiff has no right."³ It is not a material variance to allege that the instrument sued on is payable to the payee "or order," though these words are not on such instrument, where the description is according to the legal effect only.⁴

(9) *Manner of Payment.* — In an action on an instrument for a certain sum payable in a special manner, the manner of payment need not be noticed in a pleading declaring thereon.⁵ But if the

1. *Williams v. German Mut. F. Ins. Co.*, 68 Ill. 387; *Lambert v. Blackman*, 1 Blackf. (Ind.) 59; *Hartman v. Welz*, 1 B. Mon. (Ky.) 242; *Nourny v. Dubosty*, 12 Abb. Pr. (N. Y. Supreme Ct.) 128, where it was held that the proper method of declaring on such an instrument was to state it according to its legal effect. But see *Meigs v. Guiraud*, 3 Ohio Dec. (Reprint) 328, where the court refused to enter judgment on a petition in the usual form incorporating a note in French, until the plaintiff had amended by furnishing a copy of the note in the English language.

2. *M'Rae v. Raser*, 9 Port. (Ala.) 122; *Matlock v. Purefoy*, 18 Ark. 492; *Thackaray v. Hanson*, 1 Colo. 365; *Sappington v. Pulliam*, 4 Ill. 385; *Crittenden v. French*, 21 Ill. 600; *Fay v. Goulding*, 10 Pick. (Mass.) 122; *Gunter v. Lillard*, 1 Tex. Civ. App. 325; *Burmester v. Hogarth*, 11 M. & W. 97. Compare *Parks v. Edge*, 1 Cramp. & M. 429.

"*Bearer or A.*" — Where the note sued on was described as payable to "the bearer or A." and the instrument offered in evidence was payable to "bearer A." it was held that there was no material difference. *Gunter v. Lillard*, 1 Tex. Civ. App. 325.

Words Not Necessary to Assignability. — It was held in *Thackaray v. Hanson*, 1 Colo. 367, that, though in England, and in most of the states, words of negotiability were requisite to give an assignable quality to commercial paper, and in those jurisdictions such words were a material part of the in-

strument, and must be correctly described, yet, since under the Colorado statute all promissory notes and instruments for the payment of money were negotiable without such words, there was no variance where the contract was described according to its legal effect, and such words were omitted. To the same effect, under the Illinois statute, see *Sappington v. Pulliam*, 4 Ill. 385.

3. *Parsons Bills & N.* (2d ed.) 474.

4. *Harrison v. Weaver*, 2 Port. (Ala.) 542.

5. *Weaver v. Lapsley*, 42 Ala. 601; *Nesbitt v. Pearson*, 33 Ala. 668; *M'Rae v. Raser*, 9 Port. (Ala.) 122; *Owen v. Barnum*, 7 Ill. 461; *Parker v. Morton*, 29 Ind. 89; *Morrison v. Tate*, 1 Metc. (Ky.) 569; *Sexton v. Wood*, 17 Pick. (Mass.) 110; *Hardin v. Titus*, Dall. (Tex.) 622.

Payable in Current Funds. — It was held in *Morrison v. Tate*, 1 Metc. (Ky.) 569, that a bill payable in current funds might be declared on as payable in money, under the *Kentucky* statute making bills so payable negotiable.

Payable in Town Lots. — In *Parker v. Morton*, 29 Ind. 89, it was held that a note containing a stipulation that if it was paid in town lots it should be for a greater sum than the face of the note, was admissible under a declaration declaring on it as a note for a certain sum, and making no mention of this condition.

Separate Contract as to Payment. — The payee of a promissory note, by a contract in writing of the same date,

instrument sued on is payable in particular articles whose value in money is not stated therein a declaration thereon should contain an averment showing the value of such articles.¹

(10) *Transfers.* — A declaration in an action on a negotiable instrument need not set out the indorsements and transfers appearing thereon, when they are not necessary to the plaintiff's title, but when such indorsements are unnecessarily set out they must be proved as alleged.²

b. PLACE — Where Made. — It is not necessary to state in declaring on a negotiable instrument the place where such instrument was made,³ except where it is necessary to a recovery to show that the instrument sued on was executed in another jurisdiction.⁴

Variance. — When the place at which an instrument was made is alleged the allegation should be true, and if the instrument introduced in evidence does not agree with the one declared on in this particular the variance may be fatal.⁵ Where the declaration

agreed to take certain goods of the promisor, and apply what he could get for them in market to the payment of the note. It was held, in an action by the payee on such note, that the declaration need not set out such separate contract. *Sexton v. Wood*, 17 Pick. (Mass.) 110.

Payable in Fulfilled Cloth. — A declaration counting upon a note as payable in "fulled cloth at its cash price" is supported by a note payable in "woolen fulled cloth at its cash value." *Wead v. Marsh*, 14 Vt. 80.

1. *Phillips v. Dodge*, 8 Ga. 51, a note for fifteen sows and burrows; *Kearney v. King*, 2 B. & Ald. 301, where a bill of exchange was payable in Irish money.

Value of Specie. — In *Shaw v. Trunster*, 30 Tex. 390, it was held that evidence could not be introduced to show a difference in value between paper currency and specie, in an action on a note payable in specie, when there was no allegation of such a difference in value.

Cured by Verdict. — In an action on a bill payable in foreign money, if the value of such money is not averred in the declaration, a verdict finding its value in dollars will cure the defect. *Brown v. Barry*, 3 Dall. (U. S.) 365.

2. See 7. g. (3) *Action by Indorsee or upon Instrument Payable to Order.*

3. *Matlock v. Purefoy*, 18 Ark. 492; *Brown v. Weldon*, 71 Cal. 393; *Reagan v. Maze*, 4 Blackf. (Ind.) 345; *Wexel v. Cameron*, 31 Tex. 614.

4. *Matlock v. Purefoy*, 18 Ark. 492; *Crowley v. Barry*, 4 Gill (Md.) 204; *Cooke v. Addicks*, 5 Pa. Dist. Rep. 389;

Andrews v. Hoxie, 5 Tex. 185; *Kearney v. King*, 2 B. & Ald. 301; *Armani v. Castrique*, 2 D. & L. 432, 13 M. & W. 443, 14 L. J. Exch. 36.

Difference in Value of Money. — In *Kearney v. King*, 2 B. & Ald. 301, a declaration was held insufficient which declared upon a bill of exchange as drawn at Dublin, to wit, at Westminster, without an allegation that Dublin was in Ireland, where the bill introduced in evidence was drawn at Dublin in Ireland, for a certain sum in Irish money, which was of a different value from English money.

Damages. — Where the plaintiff seeks to recover interest and damages different from that allowed by the law of the forum, it is necessary to allege that the instrument sued on was made in another jurisdiction. *Matlock v. Purefoy*, 18 Ark. 492. And see *Rowland v. Hoover*, 2 How. (Miss.) 769.

Judicial Notice. — It was held in *Andrews v. Hoxie*, 5 Tex. 185, that the court could not take judicial notice that New Orleans was not in Texas, and that therefore where the petition described the bill of exchange sued on as drawn at New Orleans, it would be considered an action on a domestic bill.

Made and Delivered in Another State. — It was held in *Cooke v. Addicks*, 5 Pa. Dist. Rep. 389, that a plaintiff in declaring in Pennsylvania on an irregular indorsement which was valid in New Jersey, where it was made, should allege that such indorsement was made and delivered in New Jersey.

5. *Crowley v. Barry*, 4 Gill (Md.) 204; *Fairfield v. Adams*, 16 Pick. (Mass.)

alleges that the instrument sued on was made at a place named, and the instrument introduced in evidence does not show where it was made, this does not constitute a variance, the allegation as to the place of execution not being made as a matter of description.¹

Where Payable. — An instrument which on its face is payable at a particular place should be declared on as payable at such place, and if the declaration states the instrument as payable generally, it is a fatal variance.² When the place of payment is alleged, it must be stated truly.³

381; *Carter v. Preston*, 51 Miss. 423; *Sheppard v. Graves*, 14 How. (U. S.) 505.

Matter of Description or Venue. — It was held in *Carter v. Preston*, 51 Miss. 423, that where the place of execution of a note was set out as a matter of description, and not as a matter of venue, it must be proved as alleged.

Under a Videlicet. — It was said by Wilde, J., in *Munroe v. Cooper*, 5 Pick. (Mass.) 414, that the correct mode of declaring upon a promissory note bearing date of a place not within the county is "to set out the true date and to lay the venue under the form of a *videlicet*."

1. *Watkins v. Weaver*, 4 Ark. 556; *Anderson v. Hamilton*, 6 Blackf. (Ind.) 94; *Anderson v. Brown*, 1 Morr. (Iowa) 158; *Fairfield v. Adams*, 16 Pick. (Mass.) 381.

2. *Alabama*. — *Puckett v. King*, 2 Ala. 570. *Contra*, *Clancy v. Hilliard*, 39 Ala. 713; *Clark v. Moses*, 50 Ala. 326.

Arkansas. — *Sumner v. Ford*, 3 Ark. 389; *Dickinson v. Tunstall*, 4 Ark. 170. *Delaware*. — *Thornton v. Herring*, 5 Houst. (Del.) 154.

Illinois. — *Lowe v. Bliss*, 24 Ill. 168; *Ohio, etc., R. Co. v. Palm*, 18 Ill. 22; *Childs v. Laffin*, 55 Ill. 156.

Indiana. — *Alden v. Barbour*, 3 Ind. 414.

Missouri. — *Faulkner v. Faulkner*, 73 Mo. 327.

West Virginia. — *Damarin v. Young*, 27 W. Va. 436.

United States. — *Covington v. Comstock*, 14 Pet. (U. S.) 43; *Stone v. Lawrence*, 4 Cranch (C. C.) 11; *Sebree v. Dorr*, 9 Wheat. (U. S.) 558.

England. — *Hodge v. Fillis*, 3 Campb. 463.

In *Indiana*, by statute, notes are not negotiable as inland bills of exchange unless payable "in a bank in this state," Ind. Stat. 1896, § 5506, and when the plaintiff seeks to recover as in-

dorsee on a note as such a negotiable instrument, he must allege that it is so payable. *Walker v. Woollen*, 54 Ind. 164; *Burroughs v. Wilson*, 59 Ind. 538. And see *Coffing v. Hardy*, 86 Ind. 371, where it is held that allegations as to the character of the bank are not necessary. But under the *Kentucky* statute (1894, § 483), promissory notes are not negotiable unless payable and negotiable at a bank incorporated under the laws of Kentucky or organized in Kentucky under the laws of the United States, and therefore, in declaring on such a note, allegations as to the character of the bank are necessary. *Merritt v. Drovers, etc., Bank* (Ky. 1896) 35 S. W. Rep. 285; *Graham v. Louisville City Nat. Bank* (Ky. 1898) 45 S. W. Rep. 870.

Accepted Payable at Stated Place. — If a bill of exchange is accepted payable at a particular place, in an action against the acceptor, this addition to the acceptance need not be noticed in the declaration, being no part of the contract, but merely a memorandum, where payment may be demanded. *Lyon v. Sundius*, 1 Campb. 423.

Where Negotiated. — In an action against the maker of a note "payable and negotiable" at a certain bank, it is not necessary to aver or prove that it was negotiated at such bank. *Middleton v. Boston Locomotive Works*, 26 Pa. St. 257.

3. *Caruthers v. Real Estate Bank*, 4 Ark. 447; *Walker v. Walker*, 5 Ark. 643; *Comstock v. Savage*, 27 Conn. 184; *Childs v. Laffin*, 55 Ill. 156; *Crandall v. Auburn First Nat. Bank*, 61 Ind. 349. But see *Alden v. Barbour*, 3 Ind. 414; *Krueger v. Klinger*, 10 Tex. Civ. App. 576, where it was held that a variance was not material unless the defendant was misled.

Name of Bank Abbreviated. — There is no variance between a note described as payable at the Farmers' and Me-

c. DATE — Date of Making. — The date of the instrument sued on should be stated in the declaration or complaint,¹ and when the

chanics' Bank, and one introduced in evidence which on its face is payable at the "F. and Mechanics' Bank." *Comstock v. Savage*, 27 Conn. 184. *Compare State Bank v. Vaughan*, 36 Mo. 90.

Omission of Word "Bank." — In *Caruthers v. Real Estate Bank*, 4 Ark. 447, it was held that a note payable at the "Branch" at "Washing," was not admissible under a declaration describing an instrument as payable at the "Branch Bank" at "Washington." *Compare Crandall v. Auburn First Nat. Bank*, 61 Ind. 349.

Where Place of Payment Written. — Where the maker of a promissory note by a note at the foot makes it payable at a particular place, an allegation (after stating the promise to pay in the usual manner) that the defendant then and there made the note payable at the particular place does not amount to a misdescription of the note. *Hardy v. Woodrooffe*, 2 Stark. 319, 3 E. C. L. 426.

Payable to a Person at a Bank. — In *Walker v. Walker*, 5 Ark. 643, it was held that a bill of exchange directed "to Mr. John Standeford, payable at the Canal Bank," was admissible under a declaration describing it as payable at the Canal Bank.

Setting Out Instrument. — If an instrument payable at a particular place is set out in the plaintiff's pleading, it is held that the place of payment is sufficiently alleged. *Sydnor v. Hurd*, 8 Tex. 98.

1. *California.* — *Brown v. Weldon*, 71 Cal. 393.

Colorado. — *Manning v. Haas*, 5 Colo. 37.

Connecticut. — *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 543.

Illinois. — *Walker v. Welch*, 13 Ill. 674.

Indiana. — *Randles v. Randles*, 39 Ind. 555.

Kentucky. — *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564; *Brown v. Brown*, 7 Ky. L. Rep. 376. But see *Totten v. Cooke*, 2 Metc. (Ky.) 275.

New Hampshire. — *Marshall v. Russell*, 44 N. H. 509.

Vermont. — *Robinson v. Grandy*, 50 Vt. 122.

England. — *Giles v. Bourne*, 6 M. & S. 73; *Smith v. Lord*, 2 D. & L. 759, 14

L. J. Q. B. 112, 9 Jur. 450. *Compare Giles v. Bourne*, 2 Chit. Rep. 300, 18 E. C. L. 342.

Date Blank. — A complaint is insufficient, where neither the instrument nor a copy thereof is filed, which alleges that it was made by the defendant on a day left blank. *Randles v. Randles*, 39 Ind. 555; *Brown v. Brown*, 7 Ky. L. Rep. 376.

Coupons Detached from Bonds. — In *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 543, it was held that a count in assumpsit on coupons detached from railway mortgage bonds alleging a promise in consideration of an indebtedness was bad because it did not allege the time at which it was made.

Setting Out Note. — In *Brown v. Weldon*, 71 Cal. 393, it was held that where the note was set out in the complaint, it was a sufficient allegation as to the time it was made.

Action on a Number of Warrants. — In *Sherwood v. La Salle County*, (Tex. Civ. App. 1804) 26 S. W. Rep. 650, it was held that where the dates of a number of county warrants sued on were set out in an exhibit attached to the petition, no further allegation on the point was necessary.

Date and Time of Making. — It was held in *Robinson v. Grandy*, 50 Vt. 122, that an allegation that a note was made on a certain day was equivalent to an allegation that it was dated on that day. To the same effect see *Walker v. Welch*, 13 Ill. 674; *Giles v. Bourne*, 6 M. & S. 73. But in *Smith v. Lord*, 2 D. & L. 759, 14 L. J. Q. B. 112, 9 Jur. 450, it was held that the statement in the declaration that the defendant on a certain day made his note, did not require proof that the note bore date on that day.

Date of Instrument Incorrect. — A plaintiff who recites the date of a note declared on is not estopped thereby, and may show that it was actually made on a different date. *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564. And such a showing does not constitute a variance. *Marshall v. Russell*, 44 N. H. 509.

Instrument Not Dated. — It is a fatal variance if a note declared on as bearing a particular date proves not to have any date. *Atlantic Mut. F. Ins. Co.*

date of the instrument is stated, it should be stated truly, although under the modern liberal rules as to amendments the plaintiff need not be seriously affected by a variance.¹

v. Sanders, 36 N. H. 252. See also *Hanly v. Real Estate Bank*, 4 Ark. 598, in which case the instrument authorized the payee to insert a date.

Declaration in Brief Form.—In *Montpelier Bank v. Russell*, 27 Vt. 719, it was held that a declaration following the brief form prescribed by statute, was sufficient without an expressed averment as to when the note was made.

1. *Alabama*.—*M'Rae v. Raser*, 9 Port. (Ala.) 122; *Caller v. Boykin*, Minor (Ala.) 206.

Arkansas.—*Dickens v. Howell*, 24 Ark. 230.

Delaware.—*Wilmington Bank v. Simmons*, 1 Harr. (Del.) 331.

Illinois.—*Cutting v. Conklin*, 28 Ill. 506; *Streeter v. Streeter*, 43 Ill. 155; *Teeter v. Poe*, 48 Ill. App. 158.

Indiana.—*Reid v. Cox*, 5 Blackf. (Ind.) 312.

Maine.—*Dodge v. Haskell*, 69 Me. 429.

Minnesota.—*Almich v. Downey*, 45 Minn. 460.

Missouri.—*Hamilton v. Stewart*, 5 Mo. 266; *Grant v. Winn*, 7 Mo. 188.

New Hampshire.—*Drown v. Smith*, 3 N. H. 299.

New York.—*Phoenix Ins. Co. v. Walden*, Anth. N. P. (N. Y.) 126.

Ohio.—*Fallis v. Howarth*, Wright (Ohio) 303.

Pennsylvania.—*Church v. Feterow*, 2 F. & W. (Pa.) 301; *Stephens v. Graham*, 7 S. & R. (Pa.) 505.

South Carolina.—*Morris v. Fort*, 2 McCord L. (S. Car.) 397.

Vermont.—*Manchester Bank v. Allen*, 11 Vt. 302.

West Virginia.—*Damarin v. Young*, 27 W. Va. 437.

United States.—*Drake v. Found Treasury Min. Co.*, 53 Fed. Rep. 474.

Contra.—*Rife v. Pierson*, 2 Greene (Iowa) 129; *Brown v. Pickard*, 4 Utah 293. And see *Cooper Grocery Co. v. Moore*, (Tex. Civ. App. 1898) 46 S. W. Rep. 665, where the note produced was dated Sept. 24, and the petition was on a note dated Sept. 29, yet the petition was held good.

When Execution Is Proved.—Where a note is described in the declaration as bearing date April 6, 1864, and the one produced in evidence bears date Sep-

tember 6, 1864, such variance is fatal. The date of a note is a matter of essential description, and must be precisely proved. But in such case, if the execution of the note is proved, the question of variance cannot be raised, as such note is then admissible in evidence under the common counts. *Streeter v. Streeter*, 43 Ill. 155.

Difference of One Day.—Proof of a note dated the 26th July does not support a declaration stating a note dated on the 25th July. *Stephens v. Graham*, 7 S. & R. (Pa.) 505.

On or About.—A note dated October 12th is admissible under a petition alleging that it was executed "on or about the 11th day of October." *Rockwall First Nat. Bank v. Stephenson*, 82 Tex. 435.

Payable on Request.—A declaration on a note "to pay whenever after requested" is not proved by the production of a note payable ninety days after date. *Morris v. Fort*, 2 McCord L. (S. Car.) 397.

Instrument Not Dated.—If the note bears no date, it may be alleged to have been made at any day; but in such case the words "bearing date" or "dated" must be omitted. *Grant v. Winn*, 7 Mo. 188.

And in *Dickens v. Howell*, 24 Ark. 230, it was held that such an instrument might be described as payable on request; but a declaration describing a note in which time of payment is not named, is not supported by a note payable nine months after date. *Caller v. Boykin*, Minor, (Ala.) 206.

"Feb'y" for "February."—The using of the word "Feb'y" instead of "February" in describing the date of a note, does not constitute a material variance. *Cutting v. Conklin*, 28 Ill. 506.

Declaration on Instrument or on Original Contract.—When a plaintiff declares upon a written instrument as bearing a particular date, a mistake of the date is a fatal variance; but when he declares upon the contract, without any reference to the written instrument, it is not material on what day the promise is alleged to have been made; unless the nature of the contract makes the day material. *Drown v. Smith*, 3 N. H. 299.

Date of Transfer. — Where the instrument sued on has been transferred by the original payee, it is not necessary to allege in the declaration the date of such transfer,¹ and it seems that if the date of the transfer is stated, but not stated truly, the variance will be disregarded.²

Mistaken Date. — It was held in *Almich v. Downey*, 45 Minn. 460, that where it was shown that there was a mistake in the date of the instrument sued on, the pleadings should show such mistake, and if they do not do so they might be amended to conform to the proof; but in *Phoenix Ins. Co. v. Walden*, Anth. N. P. (N. Y.) 126, it was held proper in such case to declare upon the instrument as dated on the day when it was actually made, without any averment as to the date appearing on the face thereof; and the same was held as to an action by petition and summons in *Hamilton v. Stewart*, 5 Mo. 266.

An Antedated Note, or one signed by a new maker adding his signature after its date, is well pleaded if alleged to have been made upon the day of its date; and especially under the code, which authorizes an instrument for the payment of money only to be set forth *in hæc verba*. *Denick v. Hubbard*, 36 Hun (N. Y.) 188.

Instrument Filed with Complaint. — Where the note sued on was filed with the complaint, it was held in *Estep v. Estep*, 23 Ind. 114, that a variance between the date appearing on the note and that alleged in the complaint, could not have prejudiced the defendant, since the true date appeared on the record.

"4 mo. 1st." — Under a declaration alleging that the note sued on was made on the first day of April, an instrument dated "4 mo. 1st." is admissible in evidence, and constitutes no variance. *Field v. Field*, 9 Wend. (N. Y.) 394.

"One Thousand Eighteen Hundred," etc. — Where a declaration describes the instrument sued on as dated "one thousand eighteen hundred and thirty-seven," the words "one thousand" will be rejected as surplusage, and an instrument bearing date "1837" will be admissible in evidence. *Bequette v. Lasselle*, 5 Blackf. (Ind.) 443. And see *Berry v. Savage*, 3 Ill. 261, where the same was held as to the time of payment.

Amendment. — In *Fallis v. Howarth*, 14 Encyc. Pl. & Pr. — 32

Wright (Ohio) 303, it was held proper to allow an amendment at the cost of the plaintiff, where a note bearing date on the 19th of January was by mistake described as dated the 17th of January. And see *Dodge v. Haskell*, 69 Me. 429; *Damarin v. Young*, 27 W. Va. 437. But such amendment must not change the cause of action. *Drake v. Found Treasury Min. Co.*, 53 Fed. Rep. 474. And see in general article AMENDMENTS, vol. 1, p. 458.

1. *Holleville v. Patrick*, 14 Ark. 208; *Caldwell v. Lawrence*, 84 Ill. 161; *Lowe v. Needham*, 5 Ind. 140; *Engld v. Canfield*, 1 Cleve. L. Rep. (Ohio) 196, 4 Ohio Dec. (Reprint) 274; *Hutchins v. Flintge*, 2 Tex. 473. Compare *Silver v. Henderson*, 3 McLean (U. S.) 165; *Bond v. Central Bank*, 2 Ga. 92.

Transfer Before or After Maturity. — A petition by the indorsee of a note is not open to a motion to make more definite and certain by stating the date of the transfer of the note, whether before or after due. *Engld v. Canfield*, 1 Cleve. L. Rep. (Ohio) 196, 4 Ohio Dec. (Reprint) 274.

Indorsement Dated. — It is not necessary in an action brought by an assignee to allege that the indorsement was made on any particular day, although the indorsement is in fact dated. *Caldwell v. Lawrence*, 84 Ill. 161.

2. *Bond v. Central Bank*, 2 Ga. 92; *Penn v. Flack*, 3 Gill & J. (Md.) 369; *Parsons v. Parsons*, 5 Cow. (N. Y.) 476; *Davis v. Miller*, 14 Gratt. (Va.) 2; *Smith v. Lawson*, 18 W. Va. 212; *Young v. Wright*, 1 Campb. 139.

At Time of Making or After Maturity. — Where the declaration on a negotiable instrument states the indorsement as at the time of the making, and it is shown that it was in fact after the instrument became due, this was held in *Davis v. Miller*, 14 Gratt. (Va.) 2, to constitute no variance, and that it was only to be taken advantage of at the trial by a motion to exclude the evidence, or to instruct the jury to disregard it. And see *Parsons v. Parsons*, 5 Cow. (N. Y.) 476, where it was held that though a promissory note was

d. AMOUNT, INTEREST, DAMAGES, ETC. — Amount of Instrument. —

In actions on negotiable instruments the amount of the instrument should, of course, be stated,¹ and such amount must be truly stated, or the variance may be fatal.² Thus it has been

indorsed long after it became due, it might be declared on as indorsed when due; *Scarborough v. Bowyer*, (Tex. Civ. App. 1896) 36 S. W. Rep. 141, in which case it was held that a declaration not alleging the date of the credit was sufficient, in the absence of a special exception. But see *Riverside First Nat. Bank v. Holt*, 87 Cal. 158, in which case the credits indorsed on the note were set out in the complaint.

Effect of Variance. — Where the petition admits a credit on the note sued on as of the date November 8, 1877, and the credit indorsed on the note filed with the petition is November 8, 1876, the date on the exhibit being most favorable to the defendant must control. *Anderson v. Hale*, 9 Ky. L. Rep. 55.

1. *Noel v. Clark*, 3 Ark. 432; *Randles v. Randles*, 39 Ind. 555; *Conklin v. Field*, 37 How. Pr. (Suffolk County Ct.) 455; *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650; *Archer v. Ward*, 9 Gratt. (Va.) 622.

Amount Illegible. — A declaration is demurrable when the sum stated therein is so illegible that it cannot be determined whether a certain word is "four" or "five." *Noel v. Clark*, 3 Ark. 432.

Amount Appearing in Exhibit. — A petition on a negotiable instrument may be sufficient, although it does not state the amount of such instrument, where the amount appears from an exhibit filed with and made a part of the petition. *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650.

Amount Left Blank. — A complaint which, purporting to be on a promissory note, alleges a promise by the defendant to pay blank dollars and blank cents, is insufficient when no note or copy is filed. *Randles v. Randles*, 39 Ind. 555.

Action for Balance. — When a party has sued for a part of the amount due on a promissory note and recovered, supposing at the time that the remainder had been paid, and afterward, on discovering that the remainder had not been paid, brings an action to recover it, he need only allege in his complaint

a balance due on the note; he is not required to set forth the mistake which caused him in the former suit to claim only a part, instead of the whole amount of the note. *Conklin v. Field*, 37 How. Pr. (Suffolk County Ct.) 455.

2. *Fournier v. Black*, 32 Ala. 41; *Teeter v. Poe*, 48 Ill. App. 158; *Bissel v. Drake*, 19 Johns. (N. Y.) 66; *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

Amount Stated in Commencement of Complaint. — In *Fournier v. Black*, 32 Ala. 41, it was held that where the amount of the note sued on was stated in the commencement of the complaint, the action being according to one of the forms prescribed by the code, and no express statement of the amount being set forth, a note for a different amount introduced in evidence constituted a variance.

"\$180" for "\$300." — "But the variance between the note declared on, and the one proved to have been converted, is fatal. The declaration states the note to be for 180 dollars, and it appeared in evidence to be a note for 300 dollars." *Bissel v. Drake*, 19 Johns. (N. Y.) 66.

The Word "Dollars" Omitted. — A single bill for "four hundred and forty-seven," may be declared on as a bill for four hundred and forty-seven dollars, the word "dollars" being properly supplied by construction. *Stevens v. Smith*, 4 Dev. L. (N. Car.) 292.

Words or Figures. — In *Pilie v. Mollere*, 2 Martin N. S. (La.) 666, it was held that a declaration declaring on a note for a certain number of dollars and cents was defective where the note offered in evidence had such number of dollars written in words and the cents in figures, under the Louisiana statute providing that a note expressed in figures should not be admitted in evidence.

Indorsed for Less than Face. — Where an accommodation note is drawn for \$2200, and the payee declines to indorse for the full amount, and agrees to do so for a less sum, and directs the cashier of the bank where it is payable to pay \$750 upon it, such note may be declared upon as one for \$750. *Doug-*

held that a variance of one dollar between the amount of the note declared on and the one introduced in evidence,¹ or even a variance of half a cent,² was fatal. But it seems that these cases have carried the doctrine too far. Other cases hold that a trifling variance is not material.³ And even a material variance may be cured by amendment.⁴ When the instrument, or a copy of it, is attached to the petition the variance is immaterial.⁵

Exchange. — A negotiable instrument payable with exchange may be described without noticing such words.⁶

Interest. — If the instrument sued on is payable with interest a declaration on such instrument should so describe it.⁷ If the instrument introduced in evidence bears a different rate from the one named in the declaration, the variance is material, and may be fatal.⁸ It is likewise a variance to declare on an instrument as payable with interest, when in fact no interest is provided for.⁹

Time for Which Interest Runs. — It is no variance to claim interest

lass *v. Wilkinson*, 17 Wend. (N. Y.) 431, 22 Wend. (N. Y.) 559.

Amount Reduced by Arbitration. — An arbitration note, indorsed down by the arbitrators to the amount of the award, may be declared on as a note for the sum expressed on its face. *Gregory v. Allyn*, 10 Conn. 133. *Compare Wadsworth v. Aetna Nat. Bank*, 84 Ill. 272.

1. *Brown v. Martin*, 19 Tex. 343.

2. *Spangler v. Pugh*, 21 Ill. 85.

3. *Hunt v. Raymond*, 11 Ind. 225, where there was a difference of one cent. And see *Watkins v. Weaver*, 4 Ark. 556, where the variance complained of was between \$646.89 and \$646.98.

4. *Green v. Jackson*, 15 Me. 136; *Cooper v. Bailey*, 52 Me. 230; *Damarin v. Young*, 27 W. Va. 437; *Drake v. Found Treasure Min. Co.*, 53 Fed. Rep. 474.

5. *Ditto v. Barton*, 6 Martin N. S. (La.) 128; *Weyman v. Cater*, 13 La. 493; *Rio v. Gordon*, 14 La. 418; *Tennet v. Russell*, 1 Rob. (La.) 449.

6. *Morris v. Poillon*, 50 Ala. 403.

7. *Sawyer v. Patterson*, 11 Ala. 523; *Kenyon v. Bailey*, (Tex. Civ. App. 1896) 37 S. W. Rep. 776; *Coyle v. Gozler*, 2 Cranch (C. C.) 625. *Compare Wilson v. King*, 1 Morr. (Iowa) 106; *Beach v. Curle*, 15 Mo. 105.

In Figures or Words. — If the original note offered in evidence specifies the rate of interest in figures only, and the copy in the complaint states the rate of interest in words as well as figures, the variance is immaterial. *Corcoran v. Doll*, 32 Cal. 82.

Exhibit Attached to Petition. — Where the note sued on is attached to the petition as an exhibit, this will excuse a failure to describe such note as bearing interest. *Kenyon v. Bailey*, (Tex. Civ. App. 1896) 37 S. W. Rep. 776.

"Use till Paid." — The words "use till paid" appearing in a note have been held to mean interest till paid, and that no allegations as to such meaning were necessary. *McClellan v. Morris, Kirby* (Conn.) 145.

8. *Griffith v. Furry*, 30 Ill. 251. But see *Long v. Campbell*, 37 W. Va. 665.

9. *Blue v. Russell*, 3 Cranch (C. C.) 102; *Nelson v. Dutton*, 51 Mich. 416, in which case the note sued on provided for interest, but the interest clause was invalid by reason of an alteration.

Usurious Interest. — Under a statute providing that the effect of making an instrument payable with interest at a greater rate than allowed by law, shall be to make it payable without interest, an instrument so payable should be declared upon as one without interest. *Justice v. Charles*, 1 Ind. 32.

Special Agreement Avoiding Usury. — In suing on a note, discounted at more than legal interest upon a special agreement that only legal interest should be collected, it is not a material variance to plead the note in the usual form adopted where the whole amount is sought to be recovered, and then prove the special character of the discount, to repel the defense of usury. *Shoop v. Clark*, 4 Abb. App. Dec. (N. Y.) 235.

for a less time than the plaintiff is entitled to by the instrument sued on.¹

Demand for Interest. — In actions on negotiable instruments the plaintiff's pleading need not contain a demand for interest.²

Damages. — When special statutory damages are claimed, the petition must contain allegations showing the right to such damages,³ but damages provided for on the face of the note need not be specially claimed.⁴

Protest Fees. — When the plaintiff seeks to recover protest fees, the amount should be stated.⁵

1. *Bexar Bldg., etc., Assoc. v. Newman*, (Tex. Civ. App. 1893) 25 S. W. Rep. 461; *Rees v. Clark*, (Tex. Civ. App. 1897) 39 S. W. Rep. 160; *Long v. Campbell*, 37 W. Va. 665.

"From Day" Instead of "From Date." — In *Harrell v. Durrance*, 9 Fla. 501, where declarations on a note alleged that the note bore interest "from day" it was held that this allegation might be treated as mere surplusage, the plaintiff not having attempted to set out the very words of the note but only the legal effect; and that it would not be a variance if the note introduced bore interest "from date."

Conflict of Law. — When the plaintiff's right to interest is determined by the law of another jurisdiction, his pleadings must contain allegations which show his right to such interest according to the law of that jurisdiction. *Garner v. Tiffany, Minor* (Ala.) 167; *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 606; *Tryon v. Rankin*, 9 Tex. 595; *Whitlock v. Castro*, 22 Tex. 108.

Judicial Notice that Place Is Within State. — In *Garner v. Tiffany, Minor* (Ala.) 167, the declaration was on a note alleged to have been made at Fayetteville in the county of Madison, and it was held that this was sufficient to authorize the recovery of interest, as on a note payable in Alabama, since the court would presume that such place was within the state.

2. *Alabama.* — *Boddie v. Ely*, 3 Stew. (Ala.) 182.

California. — *Lane v. Gluckauf*, 28 Cal. 288. And see *Lambert v. Schmalz*, 118 Cal. 33.

Massachusetts. — *Hall v. Foster*, 114 Mass. 18.

South Carolina. — *Sims v. Goudelock*, 7 Rich. L. (S. Car.) 23.

Texas. — *Page v. Carson*, (Tex. 1891) 16 S. W. Rep. 1036. And see *Eaton v. Burns*, 31 Ind. 390.

Prayer for General Relief. — In *Page v. Carson*, (Tex. 1891) 16 S. W. Rep. 1036, a prayer for judgment for the amount of the note, and for general relief, was held sufficient to authorize a recovery of interest.

Interest Given by Law. — A count for interest is unnecessary where the law gives it as a matter of course. *Sims v. Goudelock*, 7 Rich. L. (S. Car.) 23.

Separate Counts for Interest. — A separate count for the recovery of interest is not necessary. *Hall v. Foster*, 114 Mass. 18; *Sims v. Goudelock*, 7 Rich. L. (S. Car.) 23.

Interest by Year or Month. — In *Churchill v. Merchants' Bank*, 19 Pick. (Mass.) 532, it was held that under a statute providing for interest at the rate of twenty-four per cent a year, a declaration claiming interest at the rate of two dollars for each hundred dollars for each month, was sufficient.

On Judgment by Default. — If the complaint on a promissory note prays for judgment for a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include interest accruing after the complaint is filed. *Lamping v. Hyatt*, 27 Cal. 102.

3. *Palmer v. York Bank*, 18 Me. 166; *Rose v. Perry*, 8 Yerg. (Tenn.) 156. Compare *Haeussler v. Haberstroth*, 7 Mo. App. 458; *McGarr v. Lloyd*, 3 Pa. St. 474. And see article DAMAGES, vol. 5, p. 700.

Note Negotiated. — In *Haeussler v. Haberstroth*, 7 Mo. App. 458, it was held that under the statute giving special damages on a note which had been negotiated, a petition which did not allege the negotiation of the note sued on was sufficient in the absence of special exception.

4. *Smith v. Whitaker*, 23 Ill. 367.

5. *Tinsley v. Penniman*, 8 Tex. Civ. App. 495; *Wilson v. Lenox*, 1 Cranch (U. S.) 194.

Collection Charges. — In order to recover collection charges in an action on an instrument providing for the payment of the expenses of collection in certain contingencies, it must be alleged that such contingency has happened.¹

Amount Due. — In some cases it is held that the declaration in an action on a negotiable instrument must allege the amount due from the defendant to the plaintiff.²

6. Promise — Necessity of Allegation. — In an action on a negotiable instrument it is usually necessary to allege that the defendant promised to pay the amount of such instrument.³

Under the Kentucky Statute authorizing joint actions against a drawer and indorser of a bill of exchange, the plaintiff must demand the costs of protest, according to the terms of the statute, as well as the debt and interest. *Johnson v. State Bank*, 5 T. B. Mon. (Ky.) 120; *Noel v. State Bank*, 7 T. B. Mon. (Ky.) 400; *Pendleton v. State Bank*, 2 J. J. Marsh. (Ky.) 148.

1. *Jones v. Smith*, 4 Tex. Civ. App. 353.

2. *Nebraska*. — *Gage v. Roberts*, 12 Neb. 276; *Spellman v. Frank*, 18 Neb. 110. But see *Hartzell v. McClurg*, (Neb. 1893) 74 N. W. Rep. 625.

New York. — *Cohu v. Husson*, 113 N. Y. 662, 23 N. Y. St. Rep. 505, *affirming* (C. Pl.) 6 N. Y. St. Rep. 292.

Pennsylvania. — *Pennsylvania Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134.

South Carolina. — *Holland v. Kemp*, 27 S. Car. 623.

Texas. — *Ralston v. Aultman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 746.

And see *Hollis v. Richardson*, 13 Gray (Mass.) 392.

Several Instruments. — In *Holland v. Kemp*, 27 S. Car. 623, it was held that where the action was on three notes a demand for the whole amount was sufficient, separate demands for the amount of each note not being necessary.

Damage or Sum Due. — In *Oishei v. Craven*, 11 N. Y. Misc. Rep. (Buffalo Super. Ct.) 139, 24 Civ. Pro. Rep. (N. Y.) 301, in an action under the provision of the New York code requiring the plaintiff to state that a certain sum is due to the plaintiff, it was held sufficient where there was an allegation that the note was due, that no part had been paid, and that it was protested for nonpayment, "all to the damage of the plaintiff in the sum" named.

Consolidation of Actions. — In *Ralston*

v. Aultman, (Tex. Civ. App. 1894) 26 S. W. Rep. 746, it was held that where an action on an account and on a note were consolidated, the petition should state the amount claimed on both.

3. *Georgia*. — *Bond v. Central Bank*, 2 Ga. 92.

Kentucky. — *Anderson v. Gaitskill*, 3 Ky. L. Rep. 539; *Kentucky Eclectic Inst. v. Gaines*, 4 Ky. L. Rep. 398; *Parks v. Buckler*, 7 Ky. L. Rep. 527.

Massachusetts. — *Dole v. Weeks*, 4 Mass. 451.

Missouri. — *Muldrow v. Tappan*, 6 Mo. 276; *McNulty v. Collins*, 7 Mo. 69.

New Jersey. — *Montague v. Church School Dist. No. 3*, 34 N. J. L. 218.

England. — *Henry v. Burbidge*, 3 Bing. N. Cas. 501, 32 E. C. L. 223. Compare *Shepherd v. Shepherd*, 9 Jur. 668.

Action Against Drawer. — A declaration against the drawer of a bill of exchange should allege a promise to pay. *Henry v. Burbidge*, 3 Bing. N. Cas. 501, 32 E. C. L. 223. But see *Starkey v. Cheeseman*, 1 Salk. 128.

Promise to the Plaintiff. — In an action on a note payable to bearer, it is not necessary to allege a promise directly to the plaintiff. *Bond v. Central Bank*, 2 Ga. 92; *Dole v. Weeks*, 4 Mass. 451.

Unconnected Promise. — A count alleging that the defendant corporation made its promissory note in writing, and ten days after the date thereof promised to pay to the plaintiff \$463.75, without any averment that the note contains a promise to pay, or any words from which it can be inferred that the promise is in the note, and when the copy of the note annexed to the declaration is not referred to in the count, is defective in substance. *Montague v. Church School Dist. No. 3*, 34 N. J. L. 218.

Promise to Pay on Request. — Where a promise on the part of the defendant to

Equivalent Allegations.—A failure to allege a promise by the defendant is immaterial if the declaration contains an averment that the defendant made or executed the instrument,¹ or at least where it is alleged that he executed and delivered the instrument,² or when to these allegations a further statement is added that the instrument was executed for a valuable consideration,³ or where a copy of the instrument sued on is set out in addition to the allegations of execution,⁴ but it seems that a mere statement of the consideration is not sufficient.⁵ On the other hand, it has been held unnecessary to aver a promise, where a copy of the instrument set out shows such a promise.⁶ A failure to allege a

pay on request may be inferred from his liability, a complaint which distinctly avers such a promise is not, for that reason, made defective, as the averment may be rejected as surplusage. *Henderson v. Howard*, 2 Ala. 342; *Shepherd v. Shepherd*, 1 C. B. 849, 50 E. C. L. 849.

Allegation of Liability.—In declaring upon a promissory note, it is sufficient to declare simply upon the promise to pay contained in the note, without raising thereupon a liability to pay and a further promise based upon such liability. *Dewey v. Washburn*, 12 Vt. 580.

Repetition of Allegation.—Where the plaintiff states that "the defendant, by his certain note in writing, then due and payable, promised to pay the plaintiff," he need not further aver that the defendant "thereby promised," etc. *Epperly v. Little*, 6 Ind. 344.

Promise After Death.—In *Stewart v. Eden*, 2 Cai. (N. Y.) 121, it was held that an allegation of a promise was defective because under the facts stated in the declaration it appeared that the promise had been made some two months after the death of the promisor.

Where an indorser dies before the maturity of the note, the declaration should aver a promise by his executor and not by the indorser himself. *Barnes v. Reynolds*, 4 How. (Miss.) 114.

Aider by Verdict.—A declaration in assumpsit must aver a promise on the part of the defendant, and a failure to do so is not cured by verdict. *Muldrow v. Tappan*, 6 Mo. 276; *McNulty v. Collins*, 7 Mo. 69.

Action of Debt.—In an action of debt, a promise by the defendant need not be alleged. *Conklin v. Harris*, 5 Ala. 213; *Simpkins v. Potheary*, 14 Jur.

464, wherein it was said: "If this allegation of a promise to pay the amount of the check declared on can be rejected as surplusage, we shall have a complete declaration in debt, which is right in every respect except that it contains that averment, which is more consistent with a count in assumpsit. Can we then reject that allegation as surplusage?" And it was held that the allegation could be rejected.

1. *Schuttler v. King*, 13 Mont. 226; *Kansas City First Nat. Bank v. Landis*, 34 Mo. App. 433; *Graves v. Drane*, 66 Tex. 658; *Matthews v. Boykin*, (Tex. Civ. App. 1897) 40 S. W. Rep. 845. Compare *Bledsoe v. Wills*, 22 Tex. 650.

On General Demurrer.—In *Graves v. Drane*, 66 Tex. 658, it was held that an allegation that defendant executed the note in suit was good on general demurrer, without an averment that he promised, but the court deprecated such pleading.

A Judgment by Default will be supported by a petition alleging the execution of a note, without an allegation of a promise to pay. *Matthews v. Boykin*, (Tex. Civ. App. 1897) 40 S. W. Rep. 845.

2. *Spencer v. McCarty*, 46 Tex. 213.

3. *Quigley v. Arteburn*, (Ky. 1895) 32 S. W. Rep. 165; *Ward v. Coffey*, 11 Ky. L. Rep. 339.

4. *Reynolds v. Baldwin*, 93 Ind. 57; *Burke v. Ashley*, 12 Hun (N. Y.) 637; *Fennell v. Morrison*, 37 Tex. 156; *Noonan v. Ilsey*, 21 Wis. 138.

5. *Goodpaster v. Richart*, 3 Ky. L. Rep. 392.

6. *Brown v. Weldon*, 71 Cal. 393; *Crosby v. New London, etc., R. Co.*, 26 Conn. 126; *Jackson v. Burgert*, 28 Ind. 36; *Napier v. Mayhew*, 35 Ind. 276; *Bailey v. Bailey*, 14 S. & R. (Pa.)

promise may be cured by the defendant's answer,¹ and the question cannot be raised after judgment.²

New Promise to Avoid Laches. — The plaintiff need not set out in his declaration a new promise made by the defendant, when such defendant has been discharged by the laches of the holder, and the plaintiff's right to recover rests upon such new promise.³

Liability — Conclusion of Law. — In actions on negotiable instruments, it is not necessary to allege as a conclusion the defendant's liability. It is sufficient to set out the facts from which that liability arises.⁴

7. Title and Ownership — *a. NECESSITY OF SHOWING TITLE.* — In a suit upon a note or bill the plaintiff must in his declaration or complaint show a legal right to sue thereon just as in every other case a plaintiff must show sufficient title to enable him to maintain the action he brings.⁵ And in general whatever forms

195; *Morgan v. Farmers' Bank*, 3 P. & W. (Pa.) 391. Compare *Huffaker v. National Bank*, 12 Bush. (Ky.) 287; *Goodpaster v. Richart*, 3 Ky. L. Rep. 392; *Cooke v. Simms*, 2 Call. (Va.) 39. 1. *Miller v. Miller*, 4 Ky. L. Rep. 364.

2. *Wolfstein v. Steinharter*, 10 Ky. L. Rep. 635.

3. *Tobey v. Berly*, 26 Ill. 426; *Brockman v. Sieverling*, 6 Ill. App. 512, which was an action brought to enforce the obligation of a surety on a new promise, made after a failure to prove demand against the estate of the principal. It was held not necessary to found the declaration on the new promise, but that it might be set up in replication to a plea of the statute. And see *Wait v. Morris*, 6 Wend. (N. Y.) 394.

4. *Adams v. M'Millan*, 8 Port. (Ala.) 445; *Kennon v. Bailey*, 15 Tex. Civ. App. 28. See in general article *LEGAL CONCLUSIONS*, vol. 12, p. 1020.

5. *Arkansas*. — *Buckner v. Real Estate Bank*, 5 Ark. 540.

Indiana. — *Richardson v. Snider*, 72 Ind. 425; *Archer v. Spencer*, 3 Blackf. (Ind.) 405; *Reed v. Garr*, 59 Ind. 299.

Kentucky. — *Dodd v. King*, 1 Metc. (Ky.) 430; *Haney v. Tempest*, 3 Metc. (Ky.) 95.

Louisiana. — *Clannon v. Calhoun*, 10 La. Ann. 460.

Missouri. — *Spears v. Bond*, 79 Mo. 467; *Jaccard v. Anderson*, 32 Mo. 188.

Tennessee. — *McCandless v. Polk*, 10 Humph. (Tenn.) 617.

Texas. — *Gilder v. McIntyre*, 29 Tex. 89; *Gray v. Osborne*, 24 Tex. 157; *Malone v. Craig*, 22 Tex. 609; *Thigpen*

v. Mundine, 24 Tex. 282; *Moody v. Bengel*, 28 Tex. 545; *Dibrell v. Ireland*, 1 Tex. App. Civ. Cas., § 302; *Unger v. Anderson*, 37 Tex. 550.

Washington. — *Davis v. Erickson*, 3 Wash. 654.

West Virginia. — *Huntington Bank v. Hysell*, 22 W. Va. 145.

United States. — *Kikindal v. Mitchell*, 2 McLean (U. S.) 402.

Payment Under Protest. — Where a person pays a bill under protest for the honor of one of several indorsers, a declaration which states that the plaintiff paid the bill under protest according to the usage and custom of merchants, without stating that he paid it to the last indorsee or that he had any title to the bill, was held to be sufficient against a special demurrer. *Cox v. Earle*, 3 B. & Ald. 430, 5 E. C. L. 334.

Title Set Up by Defendant — Variance.

— In an action by the executor of the payee of a promissory note against the maker, the son of the decedent having been interpleaded and answered setting up title in himself by purchase from his father, it is no variance that the proofs show that he was the owner by gift from his father, the substance of the issue tendered being ownership of the note, and the means whereby the defendant became the owner being subordinate and incidental. *McNally v. McAndrew*, 98 Wis. 62.

Admission of Title in Pleadings. —

When the plaintiff's title is admitted in the pleadings it cannot be contradicted by the evidence. *Brady v. Henry*, 77 Cal. 324. And under such circumstances the plaintiff's title need

a constituent part of the plaintiff's title must be correctly set out, subject, however, to such exceptions as that a bill payable to a fictitious payee or order may be declared on as payable to bearer,¹ or that the payee of a bill or note payable to his own order may describe it as payable to himself.²

Affirmative Showing of No Title. — Where the plaintiff according to his own showing is neither owner of the notes sued on nor entitled to the possession thereof, the notes according to the complaint having been assigned to a bank as security for a loan, no right is shown to maintain an action thereon.³

b. EFFECT OF PARTICULAR TITLE ALLEGED. — The particular title which the plaintiff alleges must control, and if the facts averred show no title there can be no recovery.⁴

not be proved. *Kinealy v. Burd*, 9 Mo. App. 363.

While mere possession of a note payable to the order of a person other than the holder, and undorsed, does not entitle the holder to maintain an action thereon in such a case, where the allegation of complaint was that the note was indorsed to the plaintiff by the payee, and the answer admitted the making of the note but denied that there was any consideration therefor and alleged that the note was transferred to the plaintiff long after it became due and payable, it was held error to dismiss the complaint at the close of the trial, the evidence showing that the plaintiff was the owner of the note, having previously bought it, though the note was not indorsed by the payee to the plaintiff. *Heller v. Peterson*, (City Ct.) 3 N. Y. Supp. 257.

Pleading *Ore Tenus* — Presumption. — And on an appeal from a court where the pleadings were oral, the institution of a suit and its prosecution were held to imply an allegation of title to the note in the plaintiff, and it nowhere appearing that such title was controverted, the court assumed it to have been admitted. *Graboski v. Gewerz*, (C. Pl.) 17 N. Y. Supp. 528.

1. *Kikindal v. Mitchell*, 2 McLean (U. S.) 402; *Chitty on Bills* (ed. 1839), 178.

2. *Smith v. M'Clure*, 5 East 476; *Kikindal v. Mitchell*, 2 McLean (U. S.) 402.

3. *Davis v. Erickson*, 3 Wash. 654.

Suit by Assignee. — Where an assignee, suing on a note, sets out the note and alleges assignment from the payee to the plaintiff, but also alleges that the assignor is the owner and

holder and that the defendant is indebted to the assignor, the complaint is bad on demurrer for not stating facts sufficient to constitute a cause of action. *Palmer v. Smedley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 205, 28 Barb. (N. Y.) 468.

Mere Possession in Another when a bill is due, the title being sufficiently averred, is immaterial. Thus when a complaint in an action by the indorsee of a bill averred the making and indorsement of the bill to the plaintiff, another allegation that it was presented by another (a bank) for payment when it fell due is not an allegation of ownership by the bank, but, at most, imports a deposit and a holding by such bank as the agent of the plaintiff. *Farmers', etc., Bank v. Wadsworth*, 24 N. Y. 547.

4. *Russell v. Swan*, 16 Mass. 314; *Richardson v. Snider*, 72 Ind. 425, wherein it was held that a man by becoming the successor in business of another does not become the owner of bills of exchange of which that other died possessed, and, therefore, allegations limiting the general statement of title by showing that the plaintiffs are holders of the instrument sued on because they are the successors in business of the former owner are bad.

Suit in Dual Capacity. — Where a single plaintiff sues in a dual representative capacity, as assignee and receiver, having a cause of action as assignee but none as receiver because the assignment vested the notes in him prior to his appointment as receiver, the allegation in the complaint in respect to the receivership may be rejected as surplusage. *Geilfuss v. Gates*, 87 Wis. 398.

c. TITLE BY OPERATION OF LAW — SURVIVORSHIP. — Plaintiffs claiming to recover upon a promissory note as heirs of the owner, or in any other capacity by reason of a right conferred by operation of law, must allege the facts which show that under the law the title has regularly passed to them.¹

d. AVERMENT AS TO PAYEE — (1) Generally. — A complaint upon a promissory note should aver to whom the note is payable, as an entire absence of averment in this regard may result in a failure to show title in the plaintiff to the note.²

1. *Williams v. Riley*, 88 Ind. 290, which was a suit by heirs at law; *Fant v. Wickes*, 10 Tex. Civ. App. 394, which was a suit by a widow wherein it was alleged that the plaintiff was "the surviving wife" of the owner of the note sued on, "and as such surviving wife is now the owner and holder of said note," and it was held that the petition was sufficient on general demurrer; *Hansell v. Gregg*, 7 Tex. 223, to the same point as the last case; *Loungeway v. Hale*, 73 Tex. 495, wherein the petition alleged that the plaintiffs acquired ownership by descent from the payee, and it was held sufficient without an allegation that they were the owners and holders of the note.

Action by One Member of Partnership. — Where an action was brought by one person upon a promissory note executed to a firm, and the original complaint does not contain any averment as to who constitutes the firm nor allege that any member thereof is dead, it fails to show the essential facts necessary to authorize the plaintiff to maintain the action as surviving partner. *Manning v. Smith*, 16 Nev. 87.

Executor of Surviving Partner. — In an action brought by the executors of a surviving partner of a firm it was held that the declaration need not state who were the particular persons composing the firm; that in deriving title through the indorsement of a firm it is not necessary to allege who compose the firm; and that if this be the law in respect to a derivative title from the act of the parties, more particularity and certainty are not essential to a derivative title by the act of the law. *Childress v. Emory*, 8 Wheat. (U. S.) 668.

Note Payable to Deceased Wife. — Where a husband sued on an undorsed note made payable to his deceased wife, without alleging that he was the husband and had paid the

debts of his wife or otherwise making an equitable case, it was held he could not recover. *Craige v. Tingle*, 63 Ga. 274.

2. *Timmons v. Wiggins*, 78 Ind. 297; *White v. Joy*, 13 N. Y. 83; *Cherry v. Ferguson*, 2 McMull. L. (S. Car.) 15.

Plaintiff Payee. — A complaint on a note, a copy of which is made a part thereof, is not bad for a failure to aver that the note was payable to the plaintiff. *Jaqua v. Woodbury*, 3 Ind. App. 289.

Action by Indorsee or Transferee. — In *White v. Joy*, 13 N. Y. 83, the complaint averred that the defendants "by a promissory note in writing, for value received, promised to pay the sum of \$1,000 one year after the said date. And the same was thereupon transferred to the said plaintiff, who is now the holder and owner thereof, etc." The court held that the complaint was defective in substance for failure to state to whom the note was payable.

But in an action against the makers it is sufficient to allege the execution of the note and the indorsement by the payee to the plaintiff, and that the plaintiff is the holder thereof, without alleging delivery to the payee or to the plaintiff. *Burbank v. French*, 12 Wis. 376.

An averment that the said H. & H. (the payees of the bill of exchange in suit), "to whom or to whose order the payment of the said money in the said bill of exchange specified, was requested or directed to be made, afterwards indorsed it to the plaintiff," is a sufficient averment that the bill was payable to their order. *Mitchell v. Welch*, 17 Pa. St. 339.

Defect Cured by Answer. — If the complaint is defective in not stating to whom the note sued on was made payable, the defect may be cured by an answer which admits the paper to be a promissory note capable of being transferred and delivered as an item of in-

Correct Description. — The description in this regard should be correct, as the pleading and proof must correspond, and a variance if misleading as to the identity of the paper sued on will be fatal.¹

(2) **Incorrect Name of Payee in Instrument.** — A suit may be brought by the payee in his true name, where the name used in the writing is different or erroneous, if proper averments show that the party suing is the party intended by the designation given in the instrument;² or the suit may be brought in the name which appears upon the written instrument, as the maker

debtedness, and which objects only that the plaintiff has shown no title to it. *White v. Joy*, 13 N. Y. 85.

1. *Cherry v. Fergeson*, 2 McMull. L. (S. Car.) 15; *Sweetzer v. Claffin*, 74 Tex. 667; *Flogny v. Adams*, 11 Martin (La.) 547; *Thompson v. Rathbun*, 18 Oregon 202. See, however, in this connection, as well as for various modifications of general rules as to alleging title, the several following sections of this title.

If Not Misleading the variance may be disregarded. *McClelland v. Smith*, 3 Tex. 210, in which case, however, there does not appear from the report to have been any variance whatever.

Objection — Amendment. — If the payee is not correctly designated it is held that the variance may be taken advantage of by an objection to the evidence or motion for nonsuit, although the court may upon motion for nonsuit allow an amendment, if such a course will not operate as a surprise upon the defendant. *Farmer v. Cram*, 7 Cal. 135.

2. *Taylor v. Strickland*, 37 Ala. 642; *Wilson v. Turner*, 81 Ill. 402; *Wright v. Curtis*, 27 Ill. 514; *Bonner v. Gordon*, 63 Ill. 443; *Smith v. Walker*, 7 Ind. App. 614; *McKinney v. Harter*, 7 Blackf. (Ind.) 385; *Leaphardt v. Sloan*, 5 Blackf. (Ind.) 278; *Rhyan v. Dunnigan*, 76 Ind. 178; *Flogny v. Adams*, 11 Martin (La.) 547; *Meadway Cotton Manufactory v. Adams*, 10 Mass. 360; *Lowell v. Morse*, 1 Met. (Mass.) 473; *Elliot v. Abbot*, 12 N. H. 554; *Hunt v. Aldrich*, 27 N. H. 31; *Andrews v. Wynn*, 4 S. Dak. 40; *Willis v. Barrett*, 2 Stark. 29, 3 E. C. L. 303.

Identification by Averment. — Where there is a variance in the description of the payee in pleading or in the name in which the payee sues, and that appearing in the note, they must be identified by proper averments. *Flogny v. Adams*, 11 Martin (La.) 547; *Harden v. Harden*, 1 Strobh. L. (S. Car.) 56.

Allegation of Execution to Plaintiff. —

An allegation that the note was "executed and delivered to the plaintiffs" is admitted by a failure to deny it, and an ostensible variance in one of the names of the plaintiffs is waived as a verbal mistake. *Anderson v. Rogers*, 1 Bush (Ky.) 200.

Initials. — Where the plaintiff, John C. Harvey, alleged that the defendant by his note promised to pay to the plaintiff, etc., and a copy of the note set out was payable to J. C. Harvey, it was held that, the copy of the note being a part of the complaint, the averments in the complaint taken with the copy were equivalent to a direct allegation that the note was made to the plaintiff by the name of J. C. Harvey. *Farley v. Harvey*, 14 Ind. 377. See also *Taylor v. Coquillard*, 5 Blackf. (Ind.) 158; *Doron v. Crosby*, 12 Ind. 634.

And an allegation that the note is payable to a party by his full Christian name is sufficient to admit a note in which the initials of his Christian name are designated, where there is proof that the names refer to the same person. *Peyton v. Tappan*, 2 Ill. 388. But see *Andrews v. Wynn*, 4 S. Dak. 40.

Where the plaintiff sued as Mary A. Quarles on a note made payable to M. A. Quarles, it was held that the possession of the note rendered the initials sufficient. *Quarles v. Collier*, 3 Strobh. L. (S. Car.) 223. But in *Harden v. Harden*, 1 Strobh. L. (S. Car.) 56, where the note was described as if made payable to Ira Harden, it appearing that the note was payable to Ira H. Harden, the variance was held to be fatal, though it was said that if the plaintiff had averred that he was the same person he could have recovered thereon. But see *White v. Fassitt*, 10 Humph. (Tenn.) 191.

Objection. — Where it was not averred in the declaration that Mary H. Banks, one of the plaintiffs, was the same per-

acknowledges that name, and, it is held, cannot set up that it is not the proper one.¹

Proof of Identity. — But where the action is brought in the payee's proper name with an averment that the note was executed to him by the name appearing therein, it is held that he must prove that he was in fact the person intended as the payee.²

Mistake in Spelling. — A mere mistake in the spelling of the surname of the payee in a note is not material when the action is brought by the payee who describes himself properly, especially where the names are of the same sound.³

son called M. H. Banks in the promissory note sued on, it was held that if there was a variance between the instrument set forth and that offered in evidence, the defendant might crave oyer, if it was an instrument on which oyer ought to be granted, and demur, or he might object to it when offered in evidence to the jury, but the variance could not be reached by a mere demurrer to the declaration. *Robertson v. Banks*, 1 Smed. & M. (Miss.) 670. But see *Andrews v. Wynn*, 4 S. Dak. 40.

In the case of a variance as to the middle name of the payee, between the name described in the declaration and the note itself, the variance must be taken advantage of in some way before judgment if it be deemed material at all. *Long v. Campbell*, 37 W. Va. 665, which case, however, seems to go upon the principle that the middle name or initial is no part of a name. See also article NAMES, *ante*, p. 270.

Full Name. — Under the statute of 3 and 4 William IV., c. 42, § 12, the full Christian name and surname of the payee were necessary to be given, unless it was stated in the pleading to have been described by initials in the bill sued on. *Levy v. Webb*, 9 Q. B. 427, 58 E. C. L. 427.

Amendment. — If there is a mistake in one of the initials of the payees named as set out in the declaration, it may be amended. *Cooper v. Bailey*, 52 Me. 230.

1. *Davis v. David*, 1 Greene (Iowa) 427; *Shaw v. Fortine*, 98 Mich. 254; *Kemp v. McCormick*, 1 Mont. 420.

Initials Instead of Full Christian Name being used to designate the payee in the instrument may be used as the designation in the pleading. *Woodberry v. Dye*, 10 Rich. L. (S. Car.) 31; *Davis v. David*, 1 Greene (Iowa) 427; *Shaw v. Fortine*, 98 Mich. 254.

Though it is also held that the plaintiff must sue in his correct name and

allege the execution to him in the wrong name. *Pinckard v. Milmine*, 76 Ill. 453. See article NAMES, *ante*, p. 270.

2. *Bonner v. Gordon*, 63 Ill. 444; *Chenot v. Lefevre*, 8 Ill. 637.

Suit by Individual on Note to Partnership. — In an action by an individual upon a promissory note made payable to a firm name, under an allegation that the note was intended for the benefit of the payee, and that the firm name was inserted by mistake, it is the duty of the plaintiff to prove such error. *McMicken v. Webb*, 6 How. (U. S.) 292.

Inaccuracy in Christian Name — Failure to Deny Execution. — Where a declaration by a person whose Christian name is Elizabeth avers the execution of a note by the defendant to the plaintiff by the name of Lizia, under the general issue the note is admissible without further proof. *Wilson v. Turner*, 81 Ill. 402. And in such a case the note is sufficient proof, unless the execution thereof is denied under oath. *Frye v. Menkins*, 15 Ill. 339. See also *Great-house v. Kipp*, 4 Ill. 371; *Wright v. Curtis*, 27 Ill. 514.

So where the plaintiff declares in his full Christian name and surname, alleging that the defendant promised to pay the plaintiff a certain sum of money, and setting out a copy of the note, which was taken to be a part of the complaint and from which it appeared that the note was payable to one of the same surname, the initials instead of the full Christian name being prefixed thereto, it was held that the production of the note was sufficient without any other proof, it not being denied under oath that the note was payable to the plaintiff. *Farley v. Harvey*, 14 Ind. 377.

3. *Cutting v. Conklin*, 28 Ill. 506; *Power v. Woolley*, 21 Ark. 462.

A note payable to N. S. Bake is admissible in an action by N. S. Baker under the common counts with proof

Change of Corporate Name. — If the name of a corporation is changed it may sue on a note payable to the old name in the latter, averring identity.¹

(3) **Instrument Payable to Blank.** — A *bona fide* holder of a note or bill in which the name of the payee is left blank may insert his own name therein and declare upon the instrument as so perfected.²

(4) **Action by Payee Against Maker.** — In an action by the payee of a note against the maker thereof, an allegation that the note was payable to him is material inasmuch as, if he were not the payee, he could not maintain his action without further allegations.³ But after an allegation of the execution of a promissory

that it was in fact executed to the plaintiff. *Williams v. Baker*, 67 Ill. 239.

In a Suit Before a Justice of the Peace by John Hopper the note in suit was made payable to John Harper, and it was held that the plaintiff might prove that the note was executed to him by the wrong name. *Jester v. Hopper*, 13 Ark. 43.

Misspelled Christian Name. — Where the note offered in evidence corresponded with that set out, except that it was payable to Stevens Stebbins and the note described was payable to Steven Stebbins, there was held to be no material variance. *Stevens v. Stebbins*, 4 Ill. 25.

1. *Madison College v. Burke*, 6 Ala. 494; *Cumberland College v. Ish*, 22 Cal. 641; *Newlan v. Lombard University*, 62 Ill. 195. See article CORPORATIONS, vol. 5, p. 66.

Where a complaint by the Cumberland College on a note made payable to "the board of trustees of Sonomo Academy or their successors in office" showed that the plaintiff was the same corporation as was formerly called "Sonomo Academy," it was held sufficient. *Cumberland College v. Ish*, 22 Cal. 641.

2. *Greenhow v. Boyle*, 7 Blackf. (Ind.) 57; *State Bank v. Garey*, 6 B. Mon. (Ky.) 627; *Elliot v. Abbot*, 12 N. H. 554; *U. S. v. White*, 2 Hill (N. Y.) 61; *Thompson v. Rathbun*, 18 Oregon 202; *Seay v. State Bank*, 3 Sneed (Tenn.) 558; *Close v. Fields*, 2 Tex. 232; *Crutchly v. Mann*, 5 Taunt. 529, 1 E. C. L. 179, 1 Marsh. 29; *Cruchley v. Clarence*, 2 M. & S. 90. See also *Schooler v. Tilden*, 71 Mo. 580.

Time for Filling Blank. — It is held that the name of the payee in a bill must be inserted before a suit is brought against the acceptor. *Green-*

how v. Boyle, 7 Blackf. (Ind.) 57. See also *Close v. Fields*, 2 Tex. 232. And that the name of the payee in a note must be inserted before action brought. *Thompson v. Rathbun*, 18 Oregon 202; *Schooler v. Tilden*, 71 Mo. 580. *Contra*, in *State Bank v. Garey*, 6 B. Mon. (Ky.) 627, which was an action against the acceptor and drawer of a bill of exchange, it was held that the blank could be filled even after suit brought, and that when the name of the payee is inserted the paper will be considered as payable to him from the beginning. So the name of the payee of a note, it has been held, may be inserted even at the trial, but if the plaintiff proceeds to trial without doing so, it is fatal upon special plea or demurrer. *Seay v. State Bank*, 3 Sneed (Tenn.) 558.

The Assignment or Indorsement of a bill by the *bona fide* holder authorizes the assignee or indorsee to insert the name of the indorser or assignee as payee. *State Bank v. Garey*, 6 B. Mon. (Ky.) 628.

When Suit Is Not on Instrument. — Where one joint maker of a note payable in blank signed the same as security, it was held that he could sue his co-maker for the amount which he was compelled to pay on the note, and such an action not being upon the note itself, it cannot be objected that the failure to insert the name of the payee rendered the note void. *Schooler v. Tilden*, 71 Mo. 580.

3. *Bennett v. Crowell*, 7 Minn. 385. See *infra*, §. *Indorsement or Assignment*.

Sufficiency. — An allegation that "defendant made his promissory note in writing and thereby promised to pay plaintiff," sufficiently shows ownership of the note in the plaintiff. *Moss v. Cully*, 1 Oregon 147; *Hook v. White*, 36 Cal. 299.

note to the plaintiff by the defendant is made, an averment of a continuous holding or ownership, as that the plaintiff is still the owner and holder thereof, is not necessary.¹

(5) *Note Payable to Order.* — A note payable to the order of a particular person is the equivalent of one payable to him or his order, and a note in the one form may be declared upon as in the other.²

Name of Plaintiff and Payee the Same. — Where the name of the plaintiff is the same as that of the payee mentioned in the note, it is not necessary to allege that the plaintiff and the payee mentioned in the note are the same person. *Chappell v. Bissell*, 10 How. Pr. (N. Y. Supreme Ct.) 275; *Hayward v. Grant*, 13 Minn. 165.

Where a note was set out in the complaint *in hac verba*, showing that it was payable to the order of the plaintiff, an allegation that the plaintiff is the owner and holder thereof is held to be sufficient. *Smith v. Waite*, 103 Cal. 372. And in *Malone v. Craig*, 22 Tex. 609, it was held that a petition which alleged the execution and delivery of a note, giving a copy thereof from which it appeared that the name of the payee of the note corresponded with the name of the plaintiff, was insufficient, because it did not allege that the note was executed and delivered to the plaintiff, or that he was the owner and holder thereof. See also *infra*, 3. *b. Delivery.*

But where it was averred that the note was delivered to the plaintiff, it was held that the presumption of law was that they were the payees named in the note, the surnames of the plaintiffs being the same as those mentioned in the note, although there was no allegation that the plaintiffs were the payees. *Hayward v. Grant*, 13 Minn. 165.

1. *California.* — *Shasta Bank v. Boyd*, 99 Cal. 604; *Hook v. White*, 36 Cal. 299; *Wedderspoon v. Rogers*, 32 Cal. 569.

Connecticut. — *Sherman v. Globe*, 4 Conn. 246.

District of Columbia. — *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448; *Durant v. Murdock*, 3 App. Cas. (D. C.) 114.

Minnesota. — *Holbrook v. Sims*, 39 Minn. 122.

Montana. — *Schuttler v. King*, 13 Mont. 228.

Nebraska. — *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625.

New York. — *Niblo v. Harrison*, 7 Abb. Pr. (N. Y. Super. Ct.) 447; *De Santes v. Searle*, 11 How. Pr. (N. Y. C. Pl.) 477.

Texas. — *Wilson v. Hampton*, 2 Tex. Unrep. Cas. 426; *Bouvet v. Woodward*, 2 Tex. Unrep. Cas. 449; *Frank v. J. S. Brown Hardware Co.*, 10 Tex. Civ. App. 430; *Kinsey v. Bellas*, 1 Tex. App. Civ. Cas., § 96.

See also 17. *d. Character of Statutes and Proceedings Thereunder.*

Denial of Transfer. — It is not necessary that the payee should allege that he has not transferred the note, as he is presumed to remain the owner and holder of the paper until the contrary is made to appear. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

A Coda Form, under which, in an action on a note, the plaintiff must allege that the note is the property of the petitioner, contemplates the bringing of a suit by an assignee or bearer of a note made payable to another and not a suit by the payee against the maker. *Busick v. Bumin*, 3 Iowa 63.

2. *Sherman v. Globe*, 4 Conn. 246; *Howard v. Palmer*, 64 Me. 86; *Fay v. Goulding*, 10 Pick. (Mass.) 122; *Kikindal v. Mitchell*, 2 McLean (U. S.) 402; *Smith v. M'Clure*, 5 East 476; *Frederick v. Cotton*, 2 Show. 8.

A bill payable to order is payable to the payee, and the order need not be averred. *Frederick v. Cotton*, 2 Show. 8; *Fay v. Goulding*, 10 Pick. (Mass.) 122; *Whitney v. Whitney*, *Quincy (Mass.)* 117; *Sappington v. Pulliam*, 4 Ill. 387. Though if the plaintiff were an indorsee, such an allegation might be necessary. *Fay v. Goulding*, 10 Pick. (Mass.) 122; *Whitney v. Whitney*, *Quincy (Mass.)* 117.

Note to Plaintiff or Bearer. — Where the averment was that the note in suit was payable to the plaintiff or order, and the evidence showed that it was payable to plaintiff or bearer, it was held that there was no such discrepancy as amounted to a failure of proof. *Barrows v. Million*, 43 Mo. App. 79.

(6) *Action in Name of Payee for Use of Another.* — Where it is necessary to commence a suit in the name of the original payee and the beneficial interest is in another, the suit may be brought in the name of the payee for the use of the beneficial owner, and this form has been considered sufficient authority from a nominal plaintiff to justify the officer in paying the proceeds of the judgment to the person so designated.¹

(7) *Action by Payee Against Irregular Indorser.* — In an action by the payee of a note against an irregular indorser it is sufficient to aver an indorsement and delivery by the defendant to the plaintiff.²

(8) *Descriptio Personæ* — (a) *Generally.* — If the name of the payee in the body of the note is followed by words indicating a representative capacity, they are generally considered merely *descriptio personæ*, and as such are immaterial, and the payee may declare upon the note in his own name,³ as where the word

1. *Numlin v. Westlake*, 2 Ohio 24; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352. See, for the right of assignee to sue in his own name and kindred questions, *supra*, VI. *Parties Plaintiff* and subsections.

If the suit is in the name of the payee without designating the person for whose use it is brought, the plaintiff should reply to a plea of the assignment that the suit is for the benefit of the real owner and not demur, as by the latter course he admits a want of interest in himself and defeats his action. *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352; *Vincent v. Groom*, 1 Yerg. (Tenn.) 430; *Waggoner v. Colvin*, 11 Wend. (N. Y.) 27.

Variance Between Writ and Declaration — If a writ does not show that the action is for the use of another, the declaration should not be for the use of another, but should follow the writ. *Goodman v. Walker*, 30 Ala. 482.

Variance Between Caption and Body of Petition. — In *Beattie v. Lett*, 28 Mo. 596, it is held that the indorsee of a promissory note being entitled to maintain an action thereon in his own name, although indorsed to him for collection, if the caption of the petition shows a suit by the indorsee for the use of the indorser and in the body of the petition it is alleged that the title is in the plaintiff by indorsement, the words in the caption "to the use of," etc., may be disregarded.

Amendment. — The court may permit the plaintiff to amend his declaration by showing that he sues for the use of another. *Buffington v. Blackwell*, 52

Ga. 129, which was an action in the name of A. on a written acknowledgment to him by B. of a receipt of a sum of money, and the amendment was allowed after plea by B. that the money belonged to C., that A. was a mere agent, and that he had defenses against C.

Against Indorser. — A declaration in the name of the payee for the use of another against an indorser was held bad on demurrer because it did not state the indorsement to the defendant nor the indorsement from him. *McInnis v. Rabun*, 1 Port. (Ala.) 386.

2. *Price v. Lavender*, 38 Ala. 389, distinguishing *McInnis v. Rabun*, 1 Port. (Ala.) 386, in that there was no allegation in that case that the note was indorsed to the payee. See *supra*, 3. c. *Irregular Indorsement Before Delivery to Payee.*

3. *Alabama.* — *Milton v. Haden*, 32 Ala. 30; *Castleberry v. Fennell*, 4 Ala. 642; *Preston v. Dunham*, 52 Ala. 217. *Arkansas.* — *McLain v. Onstott*, 3 Ark. 478.

Georgia. — *Collier v. Barnes*, 64 Ga. 484; *Lester v. McIntosh*, 101 Ga. 675.

Illinois. — *Bond v. Betts*, 1 Ill. 205; *Baker v. Ormsby*, 5 Ill. 325.

Maine. — *Blackstone Nat. Bank v. Lane*, 80 Me. 165.

Maryland. — *Graham v. Fahnestock*, 5 Gill (Md.) 215; *Turner v. Plowden*, 2 Gill & J. (Md.) 455.

Mississippi. — *Falls v. Wilson*, 24 Miss. 168; *Trotter v. White*, 10 Smed. & M. (Miss.) 607.

New York. — *Litchfield v. Flint*, 104 N. Y. 543; *Chase v. Behrman*, 1 N. Y.

manager,¹ *executor* or *administrator*,² *agent*, *president*, or the like,³ follows the name of the payee; and being immaterial, if such a description is added to the name of the plaintiff it may be disregarded as surplusage and will not prevent a recovery in his individual capacity.⁴

City Ct. 352; *Davis v. Garr*, 6 N. Y. 124.

Tennessee. — *Rutherford v. Mitchell*, Mart. & Y. (Tenn.) 261; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

Texas. — *Gayle v. Ennis*, 1 Tex. 184; *Rider v. Duval*, 28 Tex. 622; *McDonald v. Young*, (Tex. Civ. App. 1897) 41 S. W. Rep. 885.

In *Litchfield v. Flint*, 104 N. Y. 543, it was said that where the note was payable to a particular payee whose name was followed by the designation "executor," etc., if the payee wish to sue upon the note itself, the above designation being merely *descriptio personæ*, the note being payable to the individual, he was bound to sue in his individual name. *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

Denial of Representative Capacity. — In such a case, if the representative capacity as appears in the note is set out in the pleading it cannot be put in issue by a plea in abatement. *Baker v. Ormsby*, 5 Ill. 325.

Where it is alleged that the plaintiff was administrator in an action upon a note made payable to him as administrator or bearer, if the capacity in which he sues is not put in issue, he need not prove it. *Trammell v. Swan*, 25 Tex. 473.

Revivor. — In *Laughman v. Thompson*, 6 Smed. & M. (Miss.) 259, the suit was brought by one to whom a note was payable as administrator *de bonis non*, and upon the death of the plaintiff the suit was revived in the name of his administrator, and this was held to be proper although the note was payable to the deceased as administrator of another. *Bradley v. Graves*, 46 Ala. 277.

Action by Assignee. — Where a note was payable to one as curator, and by such payee assigned, in an action by the assignee, the defendants excepted to the sufficiency of the petition upon the ground that the note, being payable to the assignor, "curatrix," etc., could not be assigned by her, but it was held that this description of the payee might be rejected as surplusage and could not affect her right to assign the note. *Lipscomb v. Ward*, 2 Tex. 277.

1. *Chase v. Behrman*, 1 N. Y. City Ct. 352.

2. *Falls v. Wilson*, 24 Miss. 168; *Laughman v. Thompson*, 6 Smed. & M. (Miss.) 259; *Carter v. Saunders*, 2 How. (Miss.) 851; *Litchfield v. Flint*, 104 N. Y. 543; *Merritt v. Seaman*, 6 N. Y. 168.

An administrator may sue on a note in his own name without reference to the character of administrator appended to his name as payee in the body of the note. *Gayle v. Ennis*, 1 Tex. 184; *Claiborne v. Yoeman*, 15 Tex. 44. And if the payee describes himself as administrator according to the description in the note upon which he sues, a denial that he is executor does not raise a material issue. *Claiborne v. Yoeman*, 15 Tex. 44.

3. *Castleberry v. Fennell*, 4 Ala. 642; *Preston v. Dunham*, 52 Ala. 217; *Bond v. Betts*, 1 Ill. 205; *Lester v. McIntosh*, 101 Ga. 675; *Buffum v. Chadwick*, 8 Mass. 103.

Sufficiency. — A suit in which the plaintiff describes the bill declared on as made and delivered to him by the name and description of "J. D. F., agent for," etc., is held to be properly brought. *Castleberry v. Fennell*, 4 Ala. 642.

In an action on a bill payable to a person as agent there is no variance if the declaration describes the payee by name, omitting the word "agent." *Graham v. Fahnestock*, 5 Gill (Md.) 215; *Turner v. Plowden*, 2 Gill & J. (Md.) 455; *Rutherford v. Mitchell*, Mart. & Y. (Tenn.) 261; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29.

4. *Lester v. McIntosh*, 101 Ga. 675; *Falls v. Wilson*, 24 Miss. 168; *Trotter v. White*, 10 Smed. & M. (Miss.) 607; *Litchfield v. Flint*, 104 N. Y. 543; *Merritt v. Seaman*, 6 N. Y. 168.

In *Trotter v. White*, 10 Smed. & M. (Miss.) 607, a suit was brought on a note payable to the defendant in error as administratrix, etc., in a foreign state, and it was objected that she could not maintain a suit in Mississippi without having shown that letters of administration had been procured in the latter state, but the court said that the objec-

(b) **Name of Payee Not Designated.** — If the name of the payee is not designated but the note is made payable to a representative merely, it is held that the person who at the time bore the relation so indicated may sue individually alleging the execution of the note to him by that style.¹

(c) **Contract Made for Principal.** — On the other hand, it is held that where the contract appears to have been made with a principal, though effected through agents, and the written promise is to the agents *eo nomine*, the principal must sue.²

tion could not avail because the notes evidencing the debt were payable to her as administratrix and she could prosecute the suit as in her own name.

Note Payable to Bearer. — Where a note is payable to an assignee in bankruptcy or bearer, in an action thereon, language describing the representative capacity of the plaintiff may be treated as surplusage and the plaintiff recover in his individual capacity. *Collier v. Barnes*, 64 Ga. 484.

So where a note is payable to bearer, a description of the plaintiff as administrator, etc., is merely *descriptio personae* and cannot affect his right to recover in his own name. *Rider v. Duval*, 28 Tex. 622. See also *Trammell v. Swan*, 25 Tex. 473.

1. *Buck v. Merrick*, 8 Allen (Mass.) 123; *Adams v. King*, 16 Ill. 169, wherein the note was payable to "the administrators" of a person specified, and it was held that the plaintiffs might sue individually alleging that the note was payable to them by the name and style of administrators of the decedent.

Sufficiency. — A note in suit being made payable to the treasurer of a parish, or his successor in that office, an averment in the declaration that the plaintiff was such treasurer when the note was made, and that it was payable to himself, sufficiently shows his right to bring the action. Whether, on a trial of the case, the evidence would show that the action is or is not rightly brought by him, is a question not open on the demurrer. *Buck v. Merrick*, 8 Allen (Mass.) 123. See also *Davis v. Garr*, 6 N. Y. 124.

So in *Durfee v. Morris*, 49 Mo. 55, it was held that the plaintiff might sue in his own name upon a note made payable to the "superintendent of the Decatur Agricultural Works," describing himself as such superintendent.

2. *Gilmore v. Pope*, 5 Mass. 491.

See in general article PRINCIPAL AND AGENT.

A note payable to "the president and directors of the Planters and Merchants' Bank of Mobile" is in legal effect a note payable to the corporation and may be sued on as such. *Hazard v. Planters', etc., Bank*, 4 Ala. 299; *Cumberland College v. Ish*, 22 Cal. 641; *Alston v. Heartman*, 2 Ala. 699, wherein the promise was to pay "to the Treasurer of the Manual Labor Institute of South Alabama," and it was held that no action could be sustained thereon in the name of the treasurer.

Suit in Name of Principal or Agent. — An action upon a note made payable to an agent for a principal, naming both, was brought by the agent for the use of the principal, and it was held to be an action by the principal and that the words importing that the agent sued for the use of the principal were surplusage and might be stricken out at any time, and that therefore the death of the agent before the pending action would not affect the suit. *Martin v. Lamb*, 77 Ga. 252, under code provisions permitting the suit in such a case as this to be brought by either the principal or the agent; *Wilson v. First Presb. Church*, 56 Ga. 554.

Averment Identifying Interest of Principal. — As has been shown, a suit may be brought in a name other than the name of the payee in the note with a proper averment showing that the party suing is the party to whom the note was made. See *supra*, 7. d. (2) *Incorrect Name of Payee in Instrument*. And this rule has been applied to a suit by a principal upon a note executed to the agent as such. Thus, a bank may sue as payee on a note payable to the cashier, alleging that the promise was made to it by the name of the cashier, or that it was thus intended to designate the plaintiff. *Darby v. Berney Nat. Bank*, 97 Ala. 643; *Pratt v. Topeka Bank*, 12 Kan. 570; *Hobbs v. Chemical*

(9) *Impersonal Payee.* — An instrument payable to an impersonal payee is construed as payable to bearer,¹ and may be declared on in the manner of declaring upon such instruments.²

(10) *Fictitious Payee.* — A bill or note payable to a fictitious person and indorsed in the name of such payee is deemed to be payable to bearer, in the hands of an innocent holder,³ and an instrument so payable may be declared on as one payable to bearer.⁴

e. JOINT INTERESTS — (1) *Generally.* — If a note is declared upon as payable to the plaintiff he cannot recover upon an instrument which is payable to others jointly with him.⁵

Assignment. — If in a suit by one plaintiff it appears that the note sued on was assigned to him and another he must show how he

Nat. Bank, 97 Ga. 525. And in such a case it is held that the declaration must contain an allegation showing that the person was such cashier and that the ownership of the note was in the plaintiff, and that the omission of such allegations, unless cured by amendment, would render the pleading fatally defective, and advantage of the defect might be taken even at the trial term by a motion to dismiss. *Hobbs v. Chemical Nat. Bank*, 97 Ga. 525.

But it has also been held that, under the practice permitting the real owner to sue, a corporation might sue on a note which was made payable to its treasurer without alleging that the note was made payable to it by that name. *Rutland, etc., R. Co. v. Cole*, 24 Vt. 33.

1. See title *Bills of Exchange and Promissory Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 114.

2. *Mechanics' Bank v. Straiton*, 3 Keyes (N. Y.) 365, 5 Abb. Pr. N. S. (N. Y.) 11.

3. For the effect of an instrument made so payable, see title *Bills of Exchange and Promissory Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 115.

4. *Hunter v. Blodget*, 2 Yeates (Pa.) 480; *Farnsworth v. Drake*, 11 Ind. 101; *Hunt v. Aldrich*, 27 N. H. 31; *Kikindal v. Mitchell*, 2 McLean (U. S.) 402; *Minet v. Gibson*, 3 T. R. 481, 1 H. Bl. 569. See also *Rogers v. Ware*, 2 Neb. 29.

Where a note was made payable to a bank for the purpose of being discounted, but with the assent of the makers it was discounted by an individual, it was held that the party receiving it might declare upon it as a note payable to the bank, or as payable

to himself by the name of the bank, or that he might declare in his own name as on a note payable to bearer, treating the name of the bank as fictitious, or that he might sue as indorsee if he could obtain a valid indorsement by the bank. *Elliot v. Abbot*, 12 N. H. 549. See also *Hunt v. Aldrich*, 27 N. H. 31; *Rhyan v. Dunnigan*, 76 Ind. 178; *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567.

Exception to Rule of Certainty. — It is said to be an exception to the general rule requiring whatever forms a constituent part of the plaintiff's title to be set out correctly, that a bill payable to a fictitious payee or his order may be declared on as a bill payable to bearer. *Kikindal v. Mitchell*, 2 McLean (U. S.) 402.

Payee Named or Bearer. — When the instrument is payable to a fictitious payee, or bearer, title need not be traced through the indorsement of the fictitious payee. *Lane v. Krekle*, 22 Iowa 405.

5. *Connolly v. Cottle*, 1 Ill. 364; *Manning v. Smith*, 16 Nev. 85, holding that where a suit is brought by one on a note made payable to two in a firm name the plaintiff cannot recover without alleging his right to sue, as that he is the survivor.

But in *Spencer v. McCarty*, 46 Tex. 213, where it was alleged that the plaintiff was the owner and holder of the note sued on, which was copied into the petition, it was held that the fact that the note was payable to several, including the plaintiff, created no variance when the note was offered in evidence, and, on the other hand, that if the note is declared on as joint a recovery cannot be had by one of the joint plaintiffs on a note payable to him.

acquired the interest of the other, and if he sues as the sole owner by assignment, the variance will be fatal.¹

(2) *Partnership*. — See article PARTNERSHIP.

f. HUSBAND AND WIFE. — If the husband has a right to sue upon a note made payable to his wife he shows his title sufficiently by alleging his relation to the payee of the note without the further allegation that he is the owner and holder thereof.²

Where Husband and Wife May Be Joined as plaintiffs in an action upon an instrument payable to either, the relation of husband and wife should be alleged in order to show the right of the plaintiff who is not a party to the paper.³

1. *Taylor v. Normand*, 12 Rob. (La.) 240.

It being held that a complaint is sufficient which contains no direct allegation that the plaintiffs are the payees where the surnames of the plaintiffs are the same as those mentioned in the note, and it is averred that the note was delivered to the plaintiffs, the presumption being that they are the payees named in the note, *Hayward v. Grant*, 13 Minn. 165, in such a case an alleged indorsement by the "said Lester," one of the payees, to the plaintiff, the other payee, would vest the entire property in the note in the plaintiff. *Cabbott v. Radford*, 17 Minn. 320.

Assignment from One of Two Payees.—

So if a plaintiff declares on an assignment by one of two joint payees of an order, it must be shown that the owner who made the assignment was a partner with the other or in some other way had authority to make the assignment. *De Forest v. Frary*, 6 Cow. (N. Y.) 151.

Joinder of Assignee of One Payee with Other Payee.—An averment of the assignment for creditors by one of the payees vests in the assignee the right to sue in conjunction with the other original payee. *Bell v. Mansfield*, (Ky. 1890) 13 S. W. Rep. 838.

Suit by Two as Indorsees on a note indorsed to one only cannot be sustained. *Chapman v. Harper*, 7 Blackf. (Ind.) 333.

2. *Hollifield v. Wilkinson*, 54 Ala. 275. See for joinder of husband and wife, *supra*, VII. 4. *Husband and Wife*.

Where a note was made payable to the wife or bearer and the husband declares thereon, it is said that he should state that the note was payable to the wife and that it thereby became his property by virtue of their relation as

husband and wife, but he may sue upon it as bearer alleging a transfer to him by delivery from his wife. *Fort v. Brunson*, 2 Spears L. (S. Car.) 658.

Note Payable to Deceased Wife.—In an action by one on a note payable to his deceased wife and unindorsed, if the plaintiff does not allege among other things that he was the husband of the payee he cannot recover. *Craige v. Tingle*, 63 Ga. 274.

Derivative Title.—In *Clason v. Parrish*, 93 Va. 24, it is held that under the statute in that state the execution of indorsements on a note alleged in the declaration need not be proved, unless put in issue by a verified plea, and that, therefore, upon an averment of transfer by a wife proof of transfer by the husband is not sufficient to maintain the issue on the part of the plaintiff raised by the plea of *nil debet*.

But it is said that a note payable to a married woman and indorsed by her husband may be stated to have been payable to the husband. *Kikindal v. Mitchell*, 2 McLean (U. S.) 402 [citing *Ankerstein v. Clarke*, 4 T. R. 616, wherein it was held that if a bond is given to the husband and wife as administratrix the husband alone may declare on it as made to himself].

Assignment.—In *Blackwood v. Brown*, 32 Mich. 107, it is held that in an action by the husband upon a due-bill belonging to the wife not payable to bearer and not negotiable, he must allege and prove an assignment to himself.

3. *Griffin v. Kemp*, 46 Ind. 177; *Milton v. Haden*, 32 Ala. 30.

Note Filed as Complaint.—Under a statute permitting a note to be filed in lieu of a complaint, it was held that a note payable to a woman who was one of two plaintiffs in the suit was not a sufficient statement of a cause of action

g. INDORSEMENT OR ASSIGNMENT — (1) Action by Another than Payee — General Rule. — If the payee named in an instrument is a person other than the plaintiff it is necessary to show by what right the plaintiff claims, in order to enable him to maintain an action thereon in his own name.¹

(2) *Action by Assignee — (a) Necessity of Alleging Assignment.* — In an action on a promissory note by the transferee or assignee against the maker, where the title of the plaintiff depends upon the assignment, such assignment must be averred, or some other allegation made to show the plaintiff's ownership.²

without an averment of her marriage with her coplaintiff. *Vandagriff v. Tate*, 4 Blackf. (Ind.) 174. But when this case was decided the equitable owner of a note could not sue upon it in his own name, and the law in this regard having been changed, the ruling in the above case was not followed in a subsequent decision. *Garner v. Cook*, 30 Ind. 331.

1. *Georgia.* — *Dalton City Co. v. Johnson*, 57 Ga. 398.

Iowa. — *Montague v. Reineger*, 11 Iowa 503.

Massachusetts. — *Hollis v. Richardson*, 13 Gray (Mass.) 392.

Minnesota. — *Bennett v. Crowell*, 7 Minn. 385; *Topping v. Clay*, 62 Minn. 3; *Van Eman v. Stanchfield*, 10 Minn. 255; *Foster v. Johnson*, 39 Minn. 378.

Missouri. — *Mechanics' Bank v. Donnell*, 35 Mo. 373; *Donovan v. H. M. Thompson Pottery Co.*, 9 Mo. App. 595.

New York. — *Graboski v. Gewerz*, (C. Pl.) 17 N. Y. Supp. 528; *Doubleday v. Kress*, 50 N. Y. 410; *Lord v. Chesebrough*, 4 Sandf. (N. Y.) 696.

Pennsylvania. — *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134.

South Dakota. — *Andrews v. Wynn*, 4 S. Dak. 40.

Texas. — *Dibrell v. Ireland*, 1 Tex. App. Civ. Cas., § 302; *Winn v. Sloan*, 1 Tex. App. Civ. Cas., § 1106.

New Promise. — If there is an express promise to pay the plaintiff the declaration should not be upon the note but upon the new and express promise of which the assignment of the note was the consideration. *Hollis v. Richardson*, 13 Gray (Mass.) 392; *Mowry v. Todd*, 12 Mass. 281.

Effect of Trial of Issue as to Indorsement. — Where the pleading did not show that the note sued on had been sold or indorsed to the plaintiff, but the defendant denied the indorsement

and the case was tried on the issue so made, the petition was held to be good after judgment. *Downing v. Glenn*, 26 Neb. 323.

2. *Alabama.* — *Browder v. Gaston*, 30 Ala. 677; *Douglas v. Beasley*, 40 Ala. 142.

California. — *Alexander v. McDow*, 108 Cal. 25.

Indiana. — *Holman v. Langtree*, 40 Ind. 349; *Green v. Louthain*, 49 Ind. 139; *Clark v. Trueblood*, 16 Ind. App. 98; *Archer v. Spencer*, 3 Blackf. (Ind.) 405; *Harter v. Ellis*, 6 Blackf. (Ind.) 154.

Kentucky. — *Dodd v. King*, 1 Metc. (Ky.) 430; *Haney v. Tempest*, 3 Metc. (Ky.) 95; *Hogland v. Brown*, 8 B. Mon. (Ky.) 477.

Massachusetts. — *Hollis v. Richardson*, 13 Gray (Mass.) 392.

Michigan. — *Blackwood v. Brown*, 32 Mich. 107; *Draper v. Fletcher*, 26 Mich. 154.

New Jersey. — *Stroud v. Howell*, 3 N. J. L. 229; *Crisman v. Swisher*, 28 N. J. L. 149.

Texas. — *Winn v. Sloan*, 1 Tex. App. Civ. Cas., § 1106.

Assignee Showing No Title. — Where an assignee suing on a note set out the note and alleged assignment from the payee to the plaintiff, but also alleged that the assignor was the owner and holder and that the defendant was indebted to the assignor, the complaint was held bad on demurrer for not stating facts sufficient to constitute a cause of action. *Palmer v. Smedley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 205, 28 Barb. (N. Y.) 468.

But where the note and assignment are set out in the petition, the omission to say "whereby plaintiff hath become proprietor thereof," is of form only. *Rodgers v. Ellis*, 1 Bibb (Ky.) 163.

And it is not necessary to allege that the note was not paid to the assignor

(b) *Effect of Right of Assignee to Sue.* — It is held that a plaintiff must allege an assignment in his declaration and prove the same upon the trial, although under a statute an assignee may sue in his own name.¹

(c) *General Averment of Assignment.* — A general averment of assignment to the plaintiff is held to be sufficient.²

Allegation of Indorsement. — An allegation of indorsement by the

before the assignment. *Lowe v. Needham*, 5 Ind. 140.

Amendment. — Where the declaration does not set forth any assignment, if the defect is relied upon, it was held to be a matter of course to allow an amendment introducing the proper averment. *Waldron v. Herring*, 28 Mich. 493.

A State of Demand Before a Justice must set out the assignment. *Crisman v. Swisher*, 28 N. J. L. 149.

Proof — Admission — Waiver of Objection. — In an action upon a writing which is not a promissory note and is not negotiable, payable to a named payee or bearer, the plaintiff, being one other than the payee, must prove an assignment of the contract to himself unless the fact is admitted or such proof is waived, and if on the trial before the justice no objection is raised for want of such proof, it will be presumed that the plaintiff's title was conceded. *Austin v. Burns*, 16 Barb. (N. Y.) 643.

Under Common Counts. — A written promise to pay to the order of the payee a certain sum of money at a fixed date and attorneys' fees was held to be inadmissible under the money counts if objected to, it not being a negotiable instrument, and in such a suit, if the plaintiff can recover at all under the count for goods sold and delivered, the assignment should be a transfer of the claim for goods sold and delivered against the defendant which would not pass by an assignment of the note. *Altman v. Fowler*, 70 Mich. 60.

1. *Blackwood v. Brown*, 32 Mich. 107; *Draper v. Fletcher*, 26 Mich. 154.

2. *Browder v. Gaston*, 30 Ala. 677.

Sufficiency of Averment. — An allegation that the note was "assigned, transferred, delivered, and indorsed" to the plaintiff was held sufficient over an objection that the complaint did not allege that the owner ever transferred the note to the plaintiff. *Oishei v. Craven*, 24 Civ. Pro. Rep. (Buffalo Super. Ct.) 302.

An allegation that in writing and before the commencement of the action a note had been duly assigned and transferred to the plaintiff, and that he had ever since been and was at the time the holder thereof, was sufficient as an allegation that the note was assigned and transferred to the plaintiff by the payee. *Topping v. Clay*, 65 Minn. 346.

That Plaintiff Is Owner. — In an action on a promissory note by an assignee, it is held that the allegation, "said note being the property of the plaintiff," is a sufficient averment of the plaintiff's title without an averment that the note was assigned or transferred to the plaintiff. *Nesbitt v. Pearson*, 33 Ala. 673; *Morris v. Poillon*, 50 Ala. 403; *Clark v. Moses*, 50 Ala. 326 [citing *Browder v. Gaston*, 30 Ala. 677; *Douglas v. Beasley*, 40 Ala. 142].

In the absence of statute requiring a formal assignment, a parol assignment being good, at law as in equity, under statute, a formal allegation of assignment is not necessary, but it is sufficient to aver that the plaintiff is the holder and owner of the instrument. *Draper v. Fletcher*, 26 Mich. 155.

Writing or Parol. — A failure to state in the declaration whether the assignment of the note sued on was in writing or by parol was held to be a defect of form not bad upon general demurrer, but only available upon special demurrer and waived if not so taken advantage of. *Satterwhite v. Lewis*, Litt. Sel. Cas. (Ky.) 60.

Derivative Title. — Where the equitable owner of a note may sue upon it, an allegation that the note was made to a certain corporation by name; that another corporation by name then became the owners of the note, and that the latter then sold and assigned the note to the plaintiffs was held to sufficiently show the plaintiff's title, although it would have been more formal for the plaintiffs to have averred that the payee assigned the note to the plaintiff's assignor. *Farnsworth v. Drake*, 11 Ind. 102.

payee to the plaintiff and that the plaintiff is the lawful holder and owner of the note is held to be a sufficient allegation of the assignment.¹

An Assignee Need Not Sue as Such, and if he describes himself as assignee the description may be disregarded as surplusage.²

(d) **Assignment by Indorsement.** — But if an assignment by indorsement is required, a mere allegation of assignment will not be sufficient, but an allegation of the indorsement is necessary.³

1. *Brown v. Richardson*, 20 N. Y. 472; *Manheimer v. Levy*, (City Ct.) 3 N. Y. Supp. 130; *Freeman's Bank v. Ruckman*, 16 Gratt. (Va.) 126.

Alder by Other Allegations. — A note containing a provision for the payment of attorney's fees, being stripped of the essential character of a negotiable instrument, could not pass by simple indorsement with all the attaching liabilities to the indorser, an assignment of it became necessary to convey title; but such an instrument may be assigned by indorsement, as may a negotiable instrument, and where the assignment is pleaded by the allegation that the note was indorsed, it is sufficient, the allegation being followed and aided by the statement that the principal and interest are due from the defendant to the plaintiff. *Alexander v. McDow*, 108 Cal. 29.

2. *Brinkley v. Going*, 1 Ill. 366; *Best v. Nokomis Nat. Bank*, 76 Ill. 608; *Blaikie v. Griswold*, 10 Wis. 297; *Nutting v. Hill*, 71 Ga. 557.

Under Assignment for Creditors. — The assignee, under a general assignment for the benefit of creditors, is the assignee of an express trust, has the entire legal title, and may sue in his own name without referring to his character as assignee. *Butterfield v. Macomber*, 22 How. Pr. (N. Y. Supreme Ct.) 150.

Necessity under Statute. — Under a statute providing that the assignee of a bond or bill may bring an action in his own name styling himself assignee of the payee or obligee, in an action on a non-negotiable note the plaintiff must style himself as assignee of the payee, and if he fails to do so there is nothing by which he can amend. *Thompson v. Malone*, 13 Rich. L. (S. Car.) 252.

In an action of debt on a sealed note, the plaintiff declared as indorsee instead of as assignee of the payee under the above statute, and it was held that this was no ground for nonsuit, but that the defendant should have specially

demurred. *May v. Hancock*, 1 Bailey L. (S. Car.) 299.

In an action brought upon a non-negotiable note by the assignee, the plaintiff failed to style himself as assignee in the writ, but did so in his declaration, and upon an interlocutory order for judgment by default the court refused to set aside the order on any other terms than that the defendant should put in an issuable plea and go to trial on the merits. *Vance v. Findly*, 1 Nott & M. (S. Car.) 578.

3. *Keeler v. Campbell*, 24 Ill. 288; *Porter v. Drennan*, 13 Ill. App. 367; *Hilborn v. Artus*, 4 Ill. 344. As to the effect of mere delivery of note payable to bearer, see title *Bills and Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 250.

But it has been held that such a statute was intended to make instruments for the payment of money, or other things, negotiable, which were not so at common law; and it has no reference to such as were negotiable at the time it was enacted; and hence, bonds and notes, payable to bearer, being by the common law transferable by delivery, are not required, by this act, in order to pass the legal title thereto, to be indorsed in writing. *Craig v. Vicksburg*, 31 Miss. 216; *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373; *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 312.

Assignment in Writing — Allegation. — Under a statute providing that when an action is brought by the assignee on a claim arising out of contract and not assigned by indorsement in writing, the assignor shall be made a party defendant, an averment that the note was assigned in writing is not equivalent to an averment that it was assigned by indorsement in writing. *Reed v. Garr*, 59 Ind. 299.

Under a statute providing that promissory notes shall be assignable by indorsement thereon under the hand of the payee, or of his assignee or as-

(e) **Action for Use of Assignee.** — An allegation that the action is brought for the use of a *cestui que use* is not for the benefit of the defendant in an action upon a note assigned by indorsement, but is allowed solely for the benefit of the *cestui que use*,¹ and in the case of an action upon a non-negotiable note brought by the payee for the use of another, it is held unnecessary to allege or set forth any assignment or indorsement.²

(3) **Action by Indorsee or upon Instrument Payable to Order** —
(a) **Necessity of Allegation of Indorsement.** — In an action by an indorsee or upon an instrument the title to which the plaintiff can acquire only by indorsement, the indorsement is a substantial fact to be averred.³

Mere Possession of a note payable to the order of a person other

signees, etc., the legal title can be transferred to an assignee only by an indorsement on the note itself, and under an allegation that the note was "assigned and delivered" an assignment in writing on a separate piece of paper, or even orally with delivery, could be proved, and while such transfer would have passed the equitable title, yet the holder would have had no right to maintain an action in his own name, and the allegation is therefore insufficient. *Keeler v. Campbell*, 24 Ill. 288.

In *Boynton v. Renwick*, 46 Ill. 283, it was held that an averment of an assignment was sufficient and that it would be assumed that the assignment was on the note and not by a separate writing. In this case the plaintiffs claim no right as assignee under the statute, but simply aver the fact that the note was assigned after due, and the court *distinguishes* it from *Keeler v. Campbell*, 24 Ill. 287.

Copy Annexed. — In *Leedy v. Nash*, 67 Ind. 311, it was held that a complaint alleging that the note was assigned in writing to the plaintiff by the payee, with a copy of the note and assignment thereon attached, showed an indorsement in writing, and was insufficient on demurrer for not joining the payee as a defendant.

Indorsement — Allegation. — An allegation that the instrument was indorsed to the plaintiff by the payee is a sufficient allegation of assignment under a statute which requires the assignment to be by indorsement under the hand of the payee. *Simpson v. Ranlett*, 7 Ill. 312; *Hill v. Shalter*, 73 Ind. 459; *Marvin v. Slaughter*, 4 Blackf. (Ind.) 529; *Simpkins v. Smith*, 94 Ind. 470; *Keller v. Williams*, 49 Ind. 504.

Note Payable at Bank — Legal Title by Indorsement. — Under a statute requiring an action on a note payable at a bank or designated place to be brought by the legal owner, an allegation that the note was "duly transferred" to the plaintiff was held to be insufficient to show a legal title by indorsement. But while such a complaint may be subject to demurrer if the defendant pleads the want of authority of the plaintiff to bring the suit in his own name, a note indorsed in blank by the payee will be sufficient to sustain the plaintiff's right. *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505.

1. As between the parties to the action it need not have been inserted. *Zimmerman v. Wead*, 18 Ill. 305.

2. *Hickok v. Labussier*, 1 Morr. (Iowa) 115, holding that the plaintiff is not bound to set forth and prove the assignment, because such proof becomes necessary only where the defense set up can be defeated in consequence of the assignment.

3. *Hooker v. Gallagher*, 6 Fla. 351; *Farris v. Wells*, 68 Ga. 604; *Mechanics' Bank v. Donnell*, 35 Mo. 373; *Dyer v. Krayner*, 37 Mo. 603; *Camp v. Owego Bank*, 10 Watts (Pa.) 130; *McCandless v. Polk*, 10 Humph. (Tenn.) 617; *Bradley County v. Surgoine*, 6 Baxt. (Tenn.) 108; *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448; *Cunliffe v. Whitehead*, 3 Bing. N. Cas. 828, 32 E. C. L. 343. See also *Lynch v. Jersey City First Nat. Bank*, 107 N. Y. 179; *Goodwin v. Cobe*, 24 Misc. Rep. (N. Y. City Ct.) 389.

Under a statute providing that notes made payable to the order of the maker, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect as against

than the holder, and unindorsed, does not entitle the holder to payment, and therefore does not entitle him to maintain an action thereon.¹

Averment of Ownership.— It is held that a simple averment of ownership is not sufficient, but that the plaintiff must show by what right he claims.² But the necessity for alleging indorsement in an action upon an instrument payable to order is founded upon the rule that without such indorsement the plaintiff would not have a right to sue in his own name,³ and under the statutes of many states, an assignee being permitted to sue in his own name,⁴ it is held that a mere allegation of ownership is sufficient in an action by one other than the payee without alleging indorsement.⁵

the maker and all persons having knowledge of the facts as if payable to bearer, it is held that notes payable to the order of the maker are valid without indorsement if negotiated by the maker, and are to be deemed payable to bearer, and that a complaint by the holder of such a note is good without alleging an indorsement by the maker. *Odell v. Clyde*, 23 Misc. Rep. (N. Y. Supreme Ct.) 734. But this statute was superseded by an act of 1897, which provided that "where a note is drawn to the maker's own order it is not complete until indorsed by him." *Odell v. Clyde*, 23 Misc. Rep. (N. Y. Supreme Ct.) 734.

Statutory Negotiability.— Where a warehouse receipt is made negotiable by statute when transferred in a certain manner, the holder must allege such a transfer as brings his case within the statute, and where the act requires a transfer by indorsement and delivery an allegation that the receipt was assigned and transferred is not sufficient. *People's Bank v. Etting*, 14 Phila. (Pa.) 230, 37 Leg. Int. (Pa.) 404.

Notice of Indorsement in an action by an indorsee against the maker need not be averred. *Reynolds v. Davies*, 1 B. & P. 625; *Elmendorf v. Shotwell*, 15 N. J. L. 153. Nor in an action by indorsee against acceptor. *Skelton v. Halstead*, 2 Dowl. N. S. 69, 6 Jur. 916.

1. *Graboski v. Gewerz*, (C. Pl.) 17 N. Y. Supp. 528; *Doubleday v. Kress*, 50 N. Y. 410; *Van Eman v. Stanchfield*, 10 Minn. 255.

Oral Pleadings.— But on appeal from a court where the pleadings are oral the institution of a suit and its prosecution will imply an allegation of title in the plaintiff, and the court will assume the title to have been admitted

if it does not appear to have been controverted. *Graboski v. Gewerz*, (C. Pl.) 17 N. Y. Supp. 528.

2. *Montague v. Reineger*, 11 Iowa 503; *Hollis v. Richardson*, 13 Gray (Mass.) 392; *Topping v. Clay*, 62 Minn. 3; *Mechanics' Bank v. Donnell*, 35 Mo. 373.

3. If a bill of exchange is assigned otherwise than by indorsement it is equivalent to an assignment of a non-negotiable paper; therefore it is said that under the common-law rule an assignment by indorsement must be alleged when the action is brought in the name of the assignee in order to show title in him. *Buckner v. Real Estate Bank*, 5 Ark. 537.

In *Red River Valley Invest. Co. v. Cole*, 62 Minn. 457, the indorsee of a note payable to order alleged that the note was sold, assigned, and delivered to him, and it was held that the indorsement was admissible under this allegation, though it was not decided whether it was admissible to give the plaintiff the right of a *bona fide* indorsee for value before maturity as to defenses available against the payee had the objection been made at the proper time, but the defendant waived the objection by failing to except to those parts of the charge in which the court instructed that the plaintiff was a *bona fide* indorsee and could recover as such.

4. See *supra*, VI. *Parties Plaintiff*; 5. *Assignee*; article *EQUITABLE ASSIGNMENTS*, vol. 7, p. 730; 4 Am. and Eng. Encyc. of Law (2d ed.), p. 252, title *Bills and Notes*.

5. *Reeve v. Fraker*, 32 Wis. 243; *Billings v. Jane*, 11 Barb. (N. Y.) 620; *Holstein v. Rice*, 15 How. Pr. (N. Y. Supreme Ct.) 1; *Gunter v. McEntire*,

(b) **Sufficiency of Allegation of Indorsement.** — The term "indorse" having a technical meaning, a general and concise averment of indorsement is sufficient, and imports everything necessary to pass the title from the indorser to the indorsee.¹

Immaterial Parts of Indorsement. — In an action by the indorsee against the maker of a promissory note words which do not restrict or qualify the transfer need not be noticed.²

(c) **Effect of Statutory Form.** — A statutory form, good if the instrument itself imports *prima facie* property in the plaintiff, has been held to be insufficient if the cause of action is described as upon an instrument which is not *prima facie* the property of the plaintiff, and to make it good there must be an averment in the pleading.³

(Tex. Civ. App. 1893) 24 S. W. Rep. 590.

Sufficiency. — The plaintiff must either allege an indorsement to the plaintiff or that he is the legal owner and holder. *Gurnee v. Beach*, 40 Hun (N. Y.) 108; *New York Marbled Works v. Smith*, 4 Duer (N. Y.) 362.

An averment that before maturity and for value received the note lawfully came into the plaintiff's possession was held to be sufficient. *Lee v. Ainslee*, 1 Hilt. (N. Y.) 277. But in *Parker v. Totten*, 10 How. Pr. (N. Y. Supreme Ct.) 233, it was held that an allegation of the delivery of a note to the payee and an indorsement by him and a delivery to the plaintiff was insufficient.

1. *Snelgrove v. Branch Bank*, 5 Ala. 295; *Pryce v. Jordan*, 69 Cal. 569; *Higgins v. Bullock*, 66 Ill. 37; *Rubelman v. McNichol*, 13 Mo. App. 584; *Myers v. Farmers' State Bank*, (Neb. 1898) 74 N. W. Rep. 252; *Levy v. Ley*, 6 Abb. Pr. (N. Y. C. Pl.) 90; *Rutherford v. Smith*, 28 Tex. 322; *Brooks v. Edson*, 7 Vt. 351; *Perkins v. Bradley*, 24 Vt. 66.

General Allegation. — An allegation that the note was indorsed and delivered to the plaintiff is a sufficient allegation that the note was indorsed to the plaintiff. *Cushing v. Mendall*, 6 Blackf. (Ind.) 153.

Promise. — In an action by an indorsee it is sufficient to allege the indorsement without alleging the promise to the plaintiff. By operation of law the original promise is to the plaintiff. *Ware v. Webb*, 32 Me. 41.

Description of Indorsement — Variance. — Where the indorsement is set out in substance it is no variance if the indorsee suing as R. Solon Craig avers that the payee indorsed the note to the

plaintiff and upon the trial the indorsement introduced in evidence is to R. S. Craig. It is said, however, that if the declaration had averred that the payee had indorsed the paper to the plaintiff by the designation aforesaid, or by the name of R. Solon Craig, there would have been a variance. *Speer v. Craig*, 22 Ill. 433.

But in *Carpenter v. Sheldon*, 22 Ind. 259, it was alleged that the note was indorsed to the plaintiff by Caleb Hende, and the note offered in evidence was indorsed by C. Hende, and it was held that the variance was immaterial as the allegation was equivalent to one that Caleb Hende indorsed by the name of C. Hende. See also *Henshaw v. Liberty Marine, etc., Ins. Co.*, 9 Mo. 336; *Forman v. Jacob*, 1 Stark. 46, 2 E. C. L. 28.

And in *Gee v. Saunders*, 66 Tex. 333, an allegation of an indorsement by Saunders & Co. was held to be sufficient to admit an indorsement by S. P. Saunders & Co., as the variance was not misleading.

Where the indorsement was declared on as made by William Abercrombie to the indorsee, or order, but the indorsement did not contain the words "or order," it was held there was no variance, because the indorsement as declared on was according to the legal import of the indorsement as it appeared. *Acheson v. Fountain*, 1 Stra. 557.

2. *McDonald v. Bailey*, 14 Me. 101.

3. *Browder v. Gaston*, 30 Ala. 677; *Letoudal v. Huguenin*, 26 Ala. 552; *Cumming v. Richards*, 32 Ala. 459; *Douglas v. Beasley*, 40 Ala. 142; *Yell v. Snow*, 24 Ark. 554.

Allegation that Amount Is Due Plaintiff.

— In *Prindle v. Caruthers*, 15 N. Y.

(d) **Indorsement by Procuration.** — If a bill or note is indorsed by procuration, the indorsement may be alleged to have been so made, or it may be alleged that the instrument was indorsed by the principal.¹

(e) **Striking Out and Filling Indorsements** — *aa. STRIKING OUT INDORSEMENTS.* — The holder of a bill or note may strike out indorsements subsequent to a blank indorsement, and recover on the instrument as indorsee under the blank indorsement.²

Immaterial Transfers. — Transfers which are not material to the plaintiff's title need not be noticed.³

429, it was held that the complaint, under section 162 of the old code of New York, sufficiently implied that the plaintiff was the owner of the instrument in some legal manner of deriving title. This case was followed in *Sargent v. Steubenville, etc., R. Co.*, 32 Ohio St. 449, where it was held that under the Ohio code an allegation of title is sufficiently implied in the statement that there is due to the plaintiff on the note a specified amount. These cases were decided under similar statutes, but in the former there seems to have been an allegation that the plaintiff purchased the instrument sued on, and in *Conkling v. Gandall*, 1 Keyes (N. Y.) 228, the decision in *Prindle v. Caruthers*, 15 N. Y. 429, was restricted, it being held that the statute in New York did not apply in an action against an indorser, as in such a case the facts necessary to charge the indorser, such as demand and notice, must be alleged, because his contract is a conditional one. See also *Alder v. Bloomingdale*, 1 Duer (N. Y.) 602. But the rule laid down in *Prindle v. Caruthers*, 15 N. Y. 429, was adhered to as the correct rule in an action against the maker of a note. *Richter v. Kramer*, 1 N. Y. City Ct. 348; *Continental Bank v. Bramhall*, 10 Bosw. (N. Y.) 595; *Phelps v. Ferguson*, 9 Abb. Pr. (N. Y. Super. Ct.) 208.

Effect of Copy. — It has been held that the omission of an allegation of indorsement in an action by an indorsee against an indorser is cured by the copy of the note and indorsement which is made a part of the pleading. *Drumm v. Bradfute*, 18 La. Ann. 680; *Atkins v. Cobb*, 56 Ga. 86.

1. *Yeatman v. Cullen*, 5 Blackf. (Ind.) 240; *Manhattan Co. v. Ledyard*, 1 Cai. (N. Y.) 192; *Meyer, etc., Co. v. Black*, 4 N. Mex. 190; *Slack v. Greenville First Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 354. See also *Heys v. Heseltine*, 2 Campl. 604.

Variance. — But if the declaration states that the party indorsed it, his own proper hand being thereunto subscribed, and it appears to have been done by procuration from such party, it has been held that this is a fatal variance. *Levy v. Wilson*, 5 Esp. N. P. 180; *Fullerton v. Seymour*, 5 Vi. 249.

2. *Emerson v. Cutts*, 12 Mass. 78.

Nugatory Indorsement. — Where a note loses its assignable quality by reason of a judgment's having been rendered thereon against one of the makers in the name of the assignee, the insertion of the name of another person in the indorsement of the payee, which was previously blank, is a nugatory act, and the name thus inserted may be stricken out at the trial of an action brought by the assignee against another maker. *Sawyer v. Patterson*, 11 Ala. 523.

Unnecessary Allegation of Second Indorsement. — Where in an action by the holder of a promissory note indorsed in blank, plaintiff alleges that, by a second indorsement in blank, made by certain persons as commissioners of a bank, the note was transferred to him, the allegation is unnecessary; and in the absence of any pretense of an equitable defense against the bank, or of plaintiff's having come unfairly by the note, he will not be required to prove the authority of the commissioners. *Hepburn v. Ratliff*, 2 La. Ann. 331.

3. *Illinois.* — *Rozet v. Harvey*, 26 Ill. App. 558.

Louisiana. — *Thierry v. Laffon*, 4 La. Ann. 347; *Abat v. Tournillon*, 6 Martin N. S. (La.) 648.

Minnesota. — *Crosby v. Wright*, (Minn. 1897) 73 N. W. Rep. 162.

Missouri. — *Kinealy v. Burd*, 9 Mo. App. 359.

New Hampshire. — *Tibbets v. Gerish*, 25 N. H. 41.

Rhode Island. — *Bank of America v. Senior*, 11 R. I. 376.

bb. POSSESSION AFTER INDORSEMENT. — Where a bill or note after indorsement comes again into the possession of the indorser, he may maintain an action thereon without showing how he became reinvested with the title, and may strike out his own or subsequent indorsements.¹

Indorsement Not Canceled. — The fact that the plaintiff's indorsement is not canceled is immaterial, because when the instrument is found in his possession the presumption is that the indorsement was not perfected by delivery or that he had taken up the instrument and thereby become the legal owner thereof.²

Payee Against Maker After Indorsement. — After an indorsement of a promissory note by the payee thereof the possession of the payee raises the presumption that he paid the note, and he may sue the maker thereon without noticing the indorsement,³ and a plaintiff

- Texas.* — San Antonio, etc., Pass. R. Co. *v.* Cockrill, 72 Tex. 614.
1. *Alabama.* — Pitts *v.* Keyser, 1 Stew. (Ala.) 154; Pickett *v.* Stewart, 12 Ala. 202.
- Colorado.* — Spencer *v.* Carstarphen, 15 Colo. 445.
- Connecticut.* — Bond *v.* Storrs, 13 Conn. 412.
- Illinois.* — Brinkley *v.* Going, 1 Ill. 366; Kyle *v.* Thompson, 3 Ill. 432; Rozet *v.* Harvey, 26 Ill. App. 558; Parks *v.* Brown, 16 Ill. 454; Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Montreal Bank *v.* Dewar, 6 Ill. App. 296; Steinfeld *v.* Taylor, 51 Ill. App. 399.
- Indiana.* — Pilkington *v.* Woods, 10 Ind. 432.
- Iowa.* — Pilmer *v.* Branch of State Bank, 19 Iowa 112.
- Kentucky.* — Bell *v.* Morehead, 3 A. K. Marsh. (Ky.) 158; Caldwell *v.* Evans, 5 Bush (Ky.) 380.
- Louisiana.* — Huie *v.* Bailey, 16 La. 213; Hebrard *v.* Bollenhagen, 9 Rob. (La.) 155; Thierry *v.* Laffon, 4 La. Ann. 347; Abat *v.* Turnillon, 6 Martin N. S. (La.) 648.
- Maryland.* — Bowie *v.* Duvall, 1 Gill & J. (Md.) 175.
- Michigan.* — Reading *v.* Beardsley, 41 Mich. 123.
- Missouri.* — Wickersham *v.* Jarvis, 2 Mo. App. 279; Glasgow *v.* Switzer, 12 Mo. 395.
- New Hampshire.* — Witherell *v.* Ela, 42 N. H. 295.
- New Jersey.* — Middleton *v.* Griffith, 57 N. J. L. 442.
- New York.* — Chautauqua County Bank *v.* Davis, 21 Wend. (N. Y.) 584; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367; Norris *v.* Badger, 6 Cow. (N. Y.) 455; Wright *v.* Boyd, 3 Barb. (N. Y.) 523; Mottram *v.* Mills, 1 Sandf. (N. Y.) 37.
- Rhode Island.* — Bank of America *v.* Senior, 11 R. I. 376.
- Tennessee.* — Brady *v.* White, 4 Baxt. (Tenn.) 382.
- Texas.* — Collins *v.* Panhandle Nat. Bank, 75 Tex. 254; Texas Land, etc., Co. *v.* Carroll, 63 Tex. 48.
- United States.* — Dugan *v.* U. S., 3 Wheat. (U. S.) 173; U. S. *v.* Barker, 1 Paine (U. S.) 156.
- England.* — Chaters *v.* Bell, 4 Esp. N. P. 210; Penny *v.* Innes, 1 C. M. & R. 439; Theed *v.* Lovell, 2 Stra. 1103.
- A Special Indorsement for Collection may be stricken out either at the trial or on the final hearing. Manhattan Co. *v.* Reynolds, 2 Hill (N. Y.) 140; Watervliet Bank *v.* White, 1 Den. (N. Y.) 608.
2. *Georgia.* — Leitner *v.* Miller, 49 Ga. 486.
- Maine.* — Warren *v.* Gilman, 15 Me. 70; Green *v.* Jackson, 15 Me. 136.
- Maryland.* — Canton Nat. Bldg. Assoc. *v.* Weber, 34 Md. 669.
- Missouri.* — Wickersham *v.* Jarvis, 2 Mo. App. 279.
- Tennessee.* — Smith *v.* McManus, 7 Yerg. (Tenn.) 477; Brady *v.* White, 4 Baxt. (Tenn.) 382.
- The Holder May Cancel His Own and subsequent indorsements at the trial or may recover without canceling them. Mottram *v.* Mills, 1 Sandf. (N. Y.) 37; Hargous *v.* Lahens, 3 Sandf. (N. Y.) 213.
3. Anniston Pipe Works *v.* Mary Pratt Furnace Co., 94 Ala. 606; Tuska-loosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 160; Herndon *v.* Taylor, 6 Ala. 461; Dicks *v.* Cash, 7 Martin N. S. (La.)

suing as payee may show that he paid and took up the instrument, under his indorsement to another, after dishonor by the maker.¹

cc. **PASSING OVER INTERMEDIATE INDORSEMENTS.** — When a note has passed through several successive transferees it is held that the plaintiff may ignore all intermediate transfers not necessary to show his title, and allege a transfer by the payee directly to himself² or to his immediate indorser.³

But if the Plaintiff Undertakes to Trace His Title though intermediate indorsers, it is not sufficient to prove merely an indorsement of the defendant, but he must also show the subsequent indorsement as alleged.⁴

368; *Hyde v. Groce*, 7 Martin N. S. (La.) 574; *Hill v. Holmes*, 12 La. 96; *Todman v. Purdy*, 5 Nev. 238; *Holbrook v. Sims*, 39 Minn. 122; *Best v. Nokomis Nat. Bank*, 76 Ill. 608; *Rice v. Hogan*, 8 Dana (Ky.) 133; *Lonsdale v. Brown*, 3 Wash. (U. S.) 404; *Dugan v. U. S.*, 3 Wheat. (U. S.) 172.

Reassignment. — If the payee after the assignment describes himself as assignee in an action by him on the note against the maker, such description may be disregarded as surplusage. *Brinkley v. Going*, 1 Ill. 366.

But it is also held that if the plaintiff shows that he had assigned the instrument he must also show how the title got back to him. *Six v. Price*, (Ky. 1897) 43 S. W. Rep. 433; *Brotherton v. Street*, 124 Ind. 599.

Complaint and Note Considered Together. — The complaint may be sufficient when taken in connection with the note itself to show a retransfer to the plaintiff. *Smith v. Thurston*, 8 Ind. App. 105.

Owner and Holder. — An allegation that the plaintiff is the owner and holder is sufficient without specially pleading a transfer on the back of an instrument to himself. *Todman v. Purdy*, 5 Nev. 238; *Whittenhall v. Korber*, 12 Kan. 618.

And if it appears that the title was at one time out of the plaintiff by indorsement to another person, in the absence of an averment that the plaintiff is the owner he does not show title. *Texas Land, etc., Co. v. Carroll*, 63 Tex. 48; *Johnson v. Arlidge*, (Tex. 1891) 17 S. W. Rep. 28.

1. *McDonough v. Heyman*, 38 Mich. 334.

Where before the maturity of a note the plaintiff indorsed it to another, and upon its nonpayment took it up, in a

suit by the plaintiff against the maker an allegation that the plaintiff took up said note and paid to the indorsee the face and interest thereon is susceptible of but one meaning, that the note was reassigned to the payee. *Taylor v. Hearn*, 131 Ind. 539; *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625. And under similar allegations it was held that the count was on the note and not on an implied promise. *Clark v. Schwing*, 1 Dana (Ky.) 334.

2. *Crosby v. Wright*, (Minn. 1897) 73 N. W. Rep. 162; *Mitchell v. Fuller*, 15 Pa. St. 268; *Preston v. Mann*, 25 Conn. 127.

3. *Chaters v. Bell*, 4 Esp. N. P. 210; *Bank of America v. Senior*, 11 R. I. 376.

But the allegation of an indorsement by the payee to another without an allegation of the indorsement from the latter to the plaintiff is not sufficient where mere delivery alone would not transfer title. *Cunliffe v. Whitehead*, 3 Bing. N. Cas. 828, 32 E. C. L. 343.

An averment that a note payable to George W. Goode was indorsed to the plaintiff by L. A. Darue, "who, as appears by the indorsements thereon, was the indorsee of the said George W. Goode, whereby the plaintiff, who is the holder and the last indorsee thereof, is entitled to the same," was held to be insufficient. *Dyer v. Krayner*, 37 Mo. 603.

In *Burrall v. DeGroot*, 5 Duer (N. Y.) 379, an allegation that the payee indorsed the note to another who also indorsed it in blank, and that the note so indorsed was delivered to the plaintiff, who now holds and owns the same, was held a sufficient allegation that the payee indorsed the note, and that his indorsee indorsed it to the plaintiff.

4. *Strader v. Alexander*, 9 Port. (Ala.) 441; *Woodruff v. Munroe*, 33 Md.

(*t*) **Blank Indorsements.** — The prevailing doctrine is that a blank indorsement by the payee of a bill or note confers a complete and perfect title,¹ and a subsequent holder having such title may sue thereon without filling up the indorsement, alleging the blank indorsement and that he is the owner and holder of the paper.²

Allegation that Indorsement Is to Plaintiff. — The holder of such a note may declare upon it as indorsed to himself by the payee, and a blank indorsement will be admissible to support the allegation,³ and it is not necessary in such a case that the blank indorsement

146; *Coyle v. Gozzler*, 2 Cranch (C. C.) 625; *Waynam v. Bend*, 1 Campb. 175.

Waiver of Proof. — In *Bosanquet v. Anderson*, 6 Esp. N. P. 43, it was held that while in an action by an indorsee of a bill of exchange it is necessary to prove the several indorsements which have taken place as laid in the declaration, if the defendant applies for time to the holder and offers terms, it is an admission of the holder's title and a waiver of proof of all indorsements except the first.

1. See title *Bills and Notes*, 4 Am. and Eng. Encyc. of Law (2d ed.), p. 266.

2. *Eames v. Crosier*, 101 Cal. 260; *Sistermans v. Field*, 9 Gray (Mass.) 331; *Mitchell v. Hyde*, 12 How. Pr. (N. Y. Supreme Ct.) 460; *Phelps v. Ferguson*, 9 Abb. Pr. (N. Y. Super. Ct.) 208, holding that an allegation that the instrument after indorsement in blank was delivered by the payee and before maturity "came lawfully into the possession of this plaintiff for value," was sufficient, being a short and sufficient mode of averring the fact of actual ownership.

But without an allegation of ownership the simple allegation of indorsement in blank is held to be insufficient. *Huntington Bank v. Hysell*, 22 W. Va. 142; *Sistermans v. Field*, 9 Gray (Mass.) 331.

Suit by Part of Firm. — Where a bill had been indorsed in blank to a firm one of the members of which afterwards died, and the others sued thereon without describing themselves as surviving partners, it was held that the declaration was sufficient, as the plaintiffs were not bound to show that the bill was indorsed or delivered to them jointly with their deceased partner. *Attwood v. Rattenbury*, 6 Moo. 579, 17 E. C. L. 61.

Representative Capacity. — So assignees, receivers, or trustees who hold as indorsees under blank indorsements

may sue individually and need not allege official capacity. *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Bacon v. Smith*, 2 La. Ann. 441; *Livingston v. Clinton*, decided in 1799, an unreported case cited in *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 264, and cited and approved in *Gregory v. McNealy*, 12 Fla. 578, holding that "if a note be indorsed in blank the court never inquires into the right of the plaintiff, whether he sues in his own right or as trustee," unless a plea sets up that the possession of the plaintiff was *mala fide*, or by casualty without consideration. *McCallum v. Driggs*, 35 Fla. 288.

Allegation of Title by Gift. — If the plaintiff alleges an indorsement in blank the note with the indorsement thereon is sufficient evidence of ownership, although there is an additional allegation that the plaintiff acquired title by gift. *Bedell v. Carl*, 33 N. Y. 581.

3. *Poorman v. Mills*, 35 Cal. 118; *Moore v. Pendleton*, 16 Ind. 481; *Castle v. Candee*, 16 Conn. 223; *Bowers v. Trevor*, 5 Blackf. (Ind.) 24; *Gillham v. State Bank*, 3 Ill. 245; *Jackson v. Haskell*, 3 Ill. 565.

Allegation of Indorsement to Plaintiff. — It is sufficient to allege that the payee, by writing his name on the back thereof, indorsed the note to the plaintiff. *Rubelman v. McNichol*, 13 Mo. App. 584.

And it is sufficient to allege that the payee indorsed the note by writing his name across the back, such allegation being followed by another that the plaintiff is the holder and owner of the note. *Osborne v. Stevens*, 15 Wash. 478.

But an allegation that a note was indorsed to plaintiff by the indorser writing his name across the back thereof is held to mean a special indorsement to the plaintiff. *Toles v. Montague*, 53 Ill. 384.

should be filled up by inserting the plaintiff's name.¹ This last statement is not the universal rule, however, as under the early English doctrine, sometimes followed in America, it was considered that an indorsement in blank operated only as an authority to the indorsee or holder to fill out and make a complete indorsement.²

h. COPY OF INDORSEMENT OR ASSIGNMENT.³

i. INSTRUMENTS PAYABLE TO BEARER — (1) *Necessity and Sufficiency of Allegations.* — In an action on an instrument made payable to bearer the plaintiff need not allege how he derived his title, but an allegation that he is the bearer or owner and holder is sufficient.⁴ The undertaking being to pay the bearer, that plaintiff is the bearer is one of the material elements of his cause of action, and, therefore, must be stated in his pleading.⁵

1. *Sawyer v. Patterson*, 11 Ala. 523; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 506; *Miller v. Henry*, 54 Ala. 120; *Riggs v. Andrews*, 8 Ala. 628; *Bancroft v. Paine*, 15 Ala. 834.

2. See *supra*, VI. *Parties Plaintiff*; title *Bills of Exchange and Promissory Notes*, 4 Am. and Eng. Encyc. of Law (2d ed.), p. 267.

3. See *infra*, 17. *d.* (9) (b) *bb.* *Copy of Indorsement or Assignment.*

4. *Carroll v. Meeks*, 3 Port. (Ala.) 226; *Black v. Duncan*, 60 Ind. 522; *Dabney v. Reed*, 12 Iowa 315; *Lane v. Krekle*, 22 Iowa 399; *Ellicott v. U. S. Insurance Co.*, 8 Gill & J. (Md.) 166; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Dole v. Weeks*, 4 Mass. 451; *Churchill v. Merchants' Bank*, 19 Pick. (Mass.) 532; *Mechanics' Bank v. Straiton*, 5 Abb. Pr. N. S. (N. Y. Ct. App.) 16; *White v. Tarbell*, 27 Vt. 573; *Sanford v. McCreedy*, 28 Wis. 103. But see, as to effect of delivery of note payable to bearer, title *Bills and Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 250.

Delivery. — In an action against the maker of negotiable paper payable to bearer an allegation that the instrument was transferred and delivered to the plaintiff for value, and that he is the owner and holder thereof, without alleging by whom the transfer was made, is sufficient. *Mechanics' Bank v. Straiton*, 5 Abb. Pr. N. S. (N. Y. Ct. App.) 12. See also *Creighton v. Gordon*, 1 Morr. (Iowa) 41; *Black v. Duncan*, 60 Ind. 522.

Express Promise — Plaintiff as Payee. — It is held that an express promise to the plaintiff need not be alleged in an action upon an instrument payable

to bearer. *Dole v. Weeks*, 4 Mass. 451.

In an action by the named payee in a note made payable to him, or bearer, an allegation that the note was payable to the plaintiff, or bearer, is sufficient without alleging delivery by the defendant, or that the plaintiff was the owner and holder. *Peets v. Bratt*, 6 Barb. (N. Y.) 662.

Where the plaintiff avers that the note in suit was payable to him, or order, and his evidence shows that it is payable to himself, or bearer, there is no such discrepancy as amounts to a failure of proof. *Barrows v. Million*, 43 Mo. App. 79, *citing* *Pleasant Hill Bank v. Wills*, 79 Mo. 275, wherein it was held that a recovery will not be defeated because a non-negotiable instrument is alleged to be negotiable.

Where the plaintiff alleged that the note was payable to himself, while the note produced was payable to another, or bearer, it was held that the variance would be regarded on appeal as having been cured by amendment. *McKinley v. Shank*, 24 Ind. 258.

In an action by one of several payees of a note made payable to them, or bearer, it was alleged that the note was payable to the plaintiff, and the note was set out in the petition, and it was held there was no variance in the evidence when the note was offered in evidence. *Spencer v. McCarty*, 46 Tex. 213.

5. *Mechanics' Bank v. Straiton*, 5 Abb. Pr. N. S. (N. Y. Ct. App.) 16; *Colbertson v. Beeson*, 30 Tex. 76; *Spears v. Bond*, 79 Mo. 467.

Instruments Assignable Only by Indorsement. — Where, under statute, a note

(2) *Intermediate Assignments.* — The holder of a note payable to bearer which has been transferred to him by delivery need not set out a title through intermediate assignments.¹

8. **Maturity** — *a.* **TIME OF PAYMENT.** — It has been held that the time of payment of a negotiable instrument need not be alleged in the declaration or complaint,² but when the time of payment is set out it should be correctly stated, or the variance may be fatal.³

payable to bearer does not pass by mere delivery, but an assignment by indorsement is necessary, such assignment must be averred when a suit is brought by one other than the payee. *Porter v. Drennan*, 13 Ill. App. 364; *Hilborn v. Artus*, 4 Ill. 344. See 7. *g.* (2) *Action by Assignee*; title *Bills and Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 250.

1. *Carroll v. Meeks*, 3 Port. (Ala.) 226; *Lane v. Krekle*, 22 Iowa 399.

Allegation and Proof. — Where the holder of a bank check payable to a named payee, or bearer, in an action against the drawer, alleged that it was delivered by the defendant to the said payee and by him to the plaintiff, it was held that proof that the instrument was delivered by the defendant directly to the plaintiff was sufficient to support a recovery. *Hoyt v. Seeley*, 18 Conn. 353.

Where the plaintiff alleges that the note sued on was payable to a named payee and indorsed to the plaintiff, it is not material that the note offered in evidence was payable to the named payee or bearer. *Mason v. Kleberg*, 4 Tex. 85.

Note to Maker's Order — Statute. — Under a statute in New York, notes payable to the order of the maker were valid without indorsement if negotiated by the maker and were to be deemed payable to bearer, and no allegation of indorsement by the payee was necessary. *Odell v. Clyde*, 23 Misc. Rep. (N. Y. Supreme Ct.) 734; *Hendricks v. Wolff*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 428. Though the above statute was superseded by a later act which required that "where a note is drawn to the maker's own order it is not complete until indorsed by him." *Odell v. Clyde*, 23 Misc. Rep. (N. Y. Supreme Ct.) 734.

2. *Peets v. Bratt*, 6 Barb. (N. Y.) 662; *White v. Tarbell*, 27 Vt. 573; *Gurney v. Hill*, 2 Dowl. N. S. 936, 7 Jur. 834, 12 L. J. Q. B. 297. Compare *Kentucky*

Eclectic Inst. v. Gaines, 8 Ky. L. Rep. 257; *Burton v. White*, 1 Bush (Ky.) 9, in which case the note sued on was filed with the petition.

On General Demurrer. — In *Pennington v. Schwartz*, 70 Tex. 211, a petition on a promissory note which contained no averment as to the time of payment of the note, but only a general allegation that the note "remains still due," was good on general demurrer.

Cured by Defendant's Demurrer. — Where the declaration does not show when the demand sued on fell due, and the defendant craves oyer, and sets out the note in his demurrer, the defect is cured. *Degraffinreid v. Mays*, 6 Yerg. (Tenn.) 466.

The Word "Date" Omitted. — A declaration on a note payable "twelve months after" need not allege that this means twelve months after date. *McPherson v. Biscoe*, 3 Ark. 90.

Time of Payment Conditional. — In *Walker v. Woollen*, 54 Ind. 164, the note sued on was payable "six months after date, or before, if made out of the sale of" an article named. In a suit after the six months had expired it was held unnecessary to make any allegation as to such conditional time of payment.

3. *Alabama.* — *Griffin v. State Bank*, 6 Ala. 908; *M'Rae v. Raser*, 9 Port. (Ala.) 122.

District of Columbia. — *Johnston v. Randall*, 2 Mackey (D. C.) 81.

Illinois. — *Reading v. Linington*, 12 Ill. App. 491.

Indiana. — *Hoover v. Johnson*, 6 Blackf. (Ind.) 473.

Maine. — *Hilt v. Campbell*, 6 Me. 109.

Vermont. — *Woodstock Bank v. Downer*, 27 Vt. 482.

In Summary Proceedings by a bank a misdescription of a note as to the time of its maturity was held to be a fatal variance. *Griffin v. State Bank*, 6 Ala. 908.

Payable on Contingency. — In *Hilt v. Campbell*, 6 Me. 109, it was held that

No Time of Payment Stated. — In an action on an instrument which states no time of payment, it may be alleged to be payable on demand,¹ but a declaration alleging an instrument payable on

a count on a note payable on the occurrence of a certain event, or in a reasonable time, is not supported by evidence of a note payable only on the occurrence of the event; though it is proved that the contingency is rendered impossible by the misconduct of the defendant. The plaintiff should have alleged the facts tending to deprive the defendant of any excuse for not paying the money. But in *Hoover v. Johnson*, 6 Blackf. (Ind.) 473, it was held that a failure to recite a contingency attached to the time of payment was not a material variance, where the condition did not postpone the time of payment.

Payable in Instalments. — Where a petition declares on an instrument as payable at a certain time, and the instrument introduced in evidence shows that a part of it is payable at that time, and that the defendant is entitled to a longer time in which to pay the balance, there is a fatal variance. *Woodstock Bank v. Downer*, 27 Vt. 482. And the same has been held where a part of the note is payable at the time mentioned in the declaration, and the balance at an earlier date. *Reading v. Linington*, 12 Ill. App. 491.

One Day After Date. — Under a declaration alleging that the note sued on was payable on February 16th, a note dated February 15th and payable one day after date is admissible in evidence. *Hamilton v. Pumphrey*, 20 Ind. 396.

On Demand After Date. — After judgment by default, it cannot be objected that a note payable "on demand" was declared on as payable "on demand after date." *Mumford v. Tolman*, 54 Ill. App. 471, 157 Ill. 258.

The Word "In" Omitted. — Where, in an action on a note, the declaration avers the note to be payable "eighteen months," the word "in" being omitted, it will be deemed sufficiently certain on general demurrer. *Doyle v. Knapp*, 4 Ill. 334. Compare *Tipton v. Utley*, 59 Ill. 25.

The Word "Date" Omitted. — A note payable "one day after" is admissible in evidence under a declaration setting out a note payable "one day after date." *White v. Word*, 22 Ala. 442. And see *McPherson v. Biscoe*, 3 Ark. 90.

Days of Grace. — A note may be de-

scribed in the declaration as payable on a certain day, as expressed in the note, although days of grace are allowed; it is enough to describe it as the parties made it. *Roberts v. Corby*, 86 Ill. 182. See also *Dollfus v. Froesch*, 1 Den. (N. Y.) 371; *Padwick v. Turner*, 11 Q. B. 124, 63 E. C. L. 124, 11 Jur. 930, 17 L. J. Q. B. 7. But see *Brown v. Shock*, 27 Mo. App. 351, where the petition showed that the action was commenced before the days of grace had expired.

Unnecessary Averments. — In declaring upon a promissory note, bearing date on the 17th of April, 1857, and payable six months after date, the note was described as being "payable six months after the date thereof, to wit, on the 17th day of October, 1857." The averment as to the time at which the note was payable (six months after date) was in the terms of the note; and making it more specific, by stating the day on which it fell due, was mere surplusage, and if incorrect in this particular, it would not vitiate. *Archer v. Claffin*, 31 Ill. 306.

Mistake in Time of Payment. — A declaration describing the note sued on as bearing date in November, 1836, and payable the first day of March, 1829, "meaning thirty-nine," must be considered as containing a sufficient cause of action after a judgment by default. *Cater v. Hunter*, 3 Ala. 30. Compare *Shrock v. Bowden*, 4 How. (Miss.) 426.

Variance Avoided by Amendment. — In *Carver v. Carver*, 53 Ind. 241, and *Estep v. Estep*, 23 Ind. 114, it was held that the complaint would be treated as amended in order to avoid a variance between the time of payment alleged and that appearing on the face of the instrument.

1. *Connecticut.* — *Bacon v. Page*, 1 Conn. 404.

Kentucky. — *Payne v. Mattox*, 1 Bibb (Ky.) 164.

Iowa. — *Green v. Drebilbis*, 1 Greene (Iowa) 552.

Minnesota. — *Libby v. Mikelborg*, 28 Minn. 38; *Libby v. Husby*, 28 Minn. 40.

New York. — *Herrick v. Bennett*, 8 Johns. (N. Y.) 374; *Niles v. Bradley*, 20 Misc. Rep. (N. Y. City Ct.) 172.

Vermont. — *White v. Tarbell*, 27 Vt. 573.

demand will not support an action on an instrument payable at a day certain.¹

On or Before. — An instrument payable "on or before" a certain day may be described as payable on that day.²

b. ALLEGATION THAT INSTRUMENT IS DUE. — It should be stated in the declaration or complaint that the instrument sued on is due;³ but where it appears from the face of the writ that

Wisconsin. — *Terry v. Milwaukee*, 15 Wis. 490.

United States. — *Sebree v. Dorr*, 9 Wheat. (U. S.) 558.

"On Demand" or Equivalent Words. — Where no time of payment is mentioned in a note, it is payable on demand, and should be so described in the declaration, but the words "on demand" need not be used, if words of equal import as to the time of payment are employed. *Green v. Drebilbis*, 1 Greene (Iowa) 552. And see *Smith v. Allen*, 5 Day (Conn.) 337, in which case it was held that an instrument in the following words and figures: "Due A. \$100 on demand," might be declared on as an express promise to pay on demand.

1. *Morris v. Fort*, 2 McCord L. (S. Car.) 397; *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *Sheehy v. Mandeville*, 7 Cranch (U. S.) 208. Compare *Chapman v. Carolin*, 3 Bosw. (N. Y.) 456.

2. *Preston v. Dunham*, 52 Ala. 217; *Morton v. Tenny*, 16 Ill. 494; *Tipton v. Utley*, 59 Ill. 25; *Bates v. Leclair*, 49 Vt. 229. Compare *Kikindal v. Mitchell*, 2 McLean (U. S.) 402.

"By" Equivalent to "On." — In *Preston v. Dunham*, 52 Ala. 217, it was held that under a declaration describing a note as payable "on" November 1st, a note payable "by" November 1st was properly admitted in evidence.

3. *Georgia.* — *Wilson v. Morrison*, 29 Ga. 269.

Indiana. — *Stafford v. Davidson*, 47 Ind. 320.

Iowa. — *Whitney v. Bird*, 11 Iowa 407.

New York. — *Dodge v. Johnson*, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 339; *Williams v. McAllister*, 23 N. Y. Wkly Dig. 97. Compare *Appleby v. Elkins*, 2 Sandf. (N. Y.) 673.

Oregon. — *Williams v. Knighton*, 1 Oregon 234.

Texas. — *Seligson v. Hobby*, 51 Tex. 147.

Vermont. — *Ladue v. Ladue*, 16 Vt. 189.

England. — *Abbott v. Aslett*, 1 M. & W. 209.

Holder's Election as to Maturity. — An allegation that the holder of a note has demanded payment is, in the absence of a special objection, a sufficient averment that the note is due, when it contains a provision making it payable at the holder's election. *Graham v. Miller*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1107. But see *Harris v. McArthur*, 90 Ga. 216; *Gillespie v. Brown*, (Tex. Civ. App. 1895) 30 S. W. Rep. 448.

Payable on Condition. — In *Ladue v. Ladue*, 16 Vt. 189, where a note was payable one year after the death of a certain person, it was held that the declaration was sufficient, although it alleged the death under a *videlicet*.

Renewal Note. — Where it appears upon the face of a complaint that defendant gave a second note in renewal of the one sued upon, and it is not shown that such second note is due, the complaint is defective, and does not state a cause of action. *Williams v. McAllister*, 23 N. Y. Wkly. Dig. 97.

Action for Installments. — In *Tucker v. Randall*, 2 Mass. 283, which was an action for two instalments of a note payable by instalments, but containing no provision that the whole should become due for failure to pay any instalment, an allegation that the whole note was due was held to be properly rejected as surplusage.

Only Part of Notes Due. — Where an action is founded on several notes, it must be alleged that all of them are due, or the complaint will be insufficient as to those not alleged to be due. *Dodge v. Johnson*, 9 Civ. Pro. Rep. (N. Y. Supreme Ct.) 339.

The Word "Month" Omitted. — In a declaration on a promissory note it was described as falling due "three from the date of said note," and it was averred that "the said three months from the date of said note had long since elapsed." The note was in fact payable three months from date, and it

the instrument sued on is due, this is held to excuse a direct allegation to that effect in the declaration.¹ So, when the note itself, or a copy of it, is attached to the petition, it is held to excuse a failure to allege that the instrument is due, if such note or copy shows that it is in fact due.²

9. Performance of Conditions Precedent — Allegation of Performance in General. — Where an instrument is not an absolute and unconditional promise for the payment of a certain sum at a specified time, but the liability of the defendant depends on some fact or the performance of some condition not appearing upon the face of the instrument, the existence of the fact or performance of the condition must be alleged.³

was held that the declaration was sufficient. *Passumpsic Bank v. Goss*, 31 Vt. 315.

Allegations of Fraud. — It is error for the court to strike out allegations of fraud in a complaint seeking to recover on promissory notes not yet due, where the credit was induced by reason of the fraudulent representations. *Starkweather v. Bronner*, 18 Hun (N. Y.) 346.

Attachment Before Maturity. — It is no ground of demurrer to a petition in an attachment suit upon a note before maturity, that it states the note to be "due," or that it fails to refer to the law, or state the existence of the facts which authorize an attachment under such circumstances. It is sufficient that the affidavit sets forth facts which, under the statute, constitute a cause for attachment. *Kritzer v. Smith*, 21 Mo. 296.

1. *Brush v. Raney*, 34 Ind. 418; *Knowles v. Byrnes*, 5 Met. (Mass.) 115; *Hale v. Vesper*, Smith (N. H.) 283; *Shepherd v. Shepherd*, 1 C. B. 849, 50 E. C. L. 849.

Instrument Not Dated. — Where the note sued on was not dated, and the complaint did not in terms allege that it was due when the action was brought, but alleged that it was made on the first day of August, 1868, and it appeared from the note that it had seven months to run, and the suit was commenced on the second day of March, 1869, it was held that the complaint was sufficient. *Brush v. Raney*, 34 Ind. 418.

2. *Indiana*. — *Womack v. Dunn*, 9 Ind. 183; *Womack v. Womack*, 9 Ind. 288; *Green v. Louthain*, 49 Ind. 139; *West v. Hayes*, 104 Ind. 251; *Taylor v. Hearn*, 131 Ind. 537; *Postel v. Oard*, 1 Ind. App. 252.

New York. — *Keteltas v. Myers*, 19 N. Y. 231, reversing 3 E. D. Smith (N. Y.) 83. Compare *Blackwell v. Reid*, 41 Miss. 102.

3. *Arkansas*. — *Bertrand v. Byrd*, 4 Ark. 187.

California. — *County Bank v. Greenberg*, 116 Cal. 468; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 268; *Rogers v. Cody*, 8 Cal. 324; *Naftzger v. Gregg*, (Cal. 1892) 31 Pac. Rep. 612.

Colorado. — *Travelers' Ins. Co. v. Denver*, 11 Colo. 438.

Delaware. — *Kennedy v. Murdick*, 5 Harr. (Del.) 263.

Indiana. — *Titlow v. Hubbard*, 63 Ind. 6; *Union County v. Mason*, 9 Ind. 97.

Kentucky. — *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036.

Mississippi. — *Van Vacter v. Flack*, 1 Smed. & M. (Miss.) 393.

Missouri. — *Edelen v. Worth*, 69 Mo. App. 124; *Campbell v. Polk County*, 49 Mo. 214.

New Hampshire. — *Atlantic Mut. F. Ins. Co. v. Young*, 38 N. H. 451.

New Jersey. — *Rice v. Porter*, 16 N. J. L. 446.

New York. — *Munger v. Shannon*, 61 N. Y. 260; *Tooker v. Arnoux*, 76 N. Y. 397; *Conkling v. Gandall*, 1 Keyes (N. Y.) 231; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Williams v. Babcock*, 25 Barb. (N. Y.) 109; *Considerant v. Brisbane*, 14 How. Pr. (N. Y. Super. Ct.) 487; *Hurlbut v. Root*, 12 How. Pr. (N. Y. Supreme Ct.) 511; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Duffield v. Johnston*, 96 N. Y. 369; *Kellogg v. Lawrence*, Hill & D. Supp. (N. Y.) 333.

Tennessee. — *Hyde v. Darden*, 3 Heisk. (Tenn.) 515.

Texas. — *Carlisle v. Hooks*, 58 Tex. 420; *Martin v. Shumatte*, 62 Tex. 188.

Declaration *NEGOTIABLE INSTRUMENTS.* and Complaint.

Condition in Promissory Note. — Where a promissory note contains a condition which is a part of the contract to pay it is held that the liability of the defendant cannot be shown without an allegation of the performance of such condition.¹

Wisconsin. — *Reeve v. Oshkosh*, 33 Wis. 477.

England. — *Ralli v. Sarell, D. & R. N. P.* 33, 16 E. C. L. 422.

As to Pleading Performance of Conditions Precedent Generally, see article CONDITIONS PRECEDENT, vol. 4, p. 626.

Matter Within Defendant's Knowledge. — By a contract in writing B. transferred to I. a note made by L. which was past due, stipulating that it should be first paid from the proceeds of certain land which the maker of the note had bought from the payee thereof and for the sale of which the payee had filed a bill in the chancery court, and that if the land did not bring the amount of the note when sold under the decree in chancery then B. would pay the deficiency; and it was held that in declaring upon the contract it was sufficient to allege that the decree had been rendered in the chancery suit, that the land had been sold thereunder, and that the amount produced was insufficient to pay the note, alleging what the deficiency was; and that it was not necessary to allege that B., who was the complainant in the chancery court, had notice of these facts, because, being a party to that suit, he was presumed to have been cognizant of the decree rendered and of subsequent proceedings. *Brown v. Isbell*, 11 Ala. 1009.

1. *Edelen v. Worth*, 69 Mo. App. 124. See *Wilson v. Morrison*, 29 Ga. 269, where there appears to have been no such allegation, but the plaintiff was nonsuited for failure to prove performance of condition.

Sufficiency. — Where a note was made payable when a certain mortgage should be satisfied of record, a complaint sufficiently alleges a satisfaction of the mortgage by averring that it had been declared fraudulent and void in proceedings described, setting forth a copy of the decree and a satisfaction of the mortgage by the clerk in obedience to the decree. *Coulter v. Clark*, 2 Ind. App. 515.

Where a note is payable upon the contingency that the child of the person for whose benefit it was made should

live two years, it is only necessary to aver that the child lived two years, and no allegation as to the name, sex, time of birth, or how long it lived is necessary. *Littleton v. Hutchins*, 20 N. H. 425.

In an action upon the following obligation: "If Asa Smith lands my flour safe at New Orleans this spring and takes in a note that I have indorsed for him to Francis Jackson, I will then owe him a balance of 185 dollars," an averment that all but a certain part of the obligation which Smith was to pay had been paid and that that part the defendant had released because the plaintiff had deposited the money in his hands, was held sufficient. *Smith v. Robinson*, 3 T. B. Mon. (Ky.) 174.

Allegation of Date. — An allegation that the contingency upon which liability on a note depended, happened on the — day of — was held to be good after verdict under plea of non-assumpsit. The verdict finds the averments of the declaration to be true, and it must have been proved to the satisfaction of the court and the jury that the contingency happened before the institution of the suit. *Allen v. Dickson, Minor* (Ala.) 119.

Whether Condition Is Precedent or Subsequent. — It is held that where a condition or qualifying stipulation is contained in an instrument whether it shall be construed to be a condition precedent or subsequent does not depend upon the use of technical words nor upon what part of the instrument the words constituting the condition may be placed in, but rather upon the intention and understanding of the parties at the time of making the contract. *Hyde v. Darden*, 3 Heisk. (Tenn.) 518.

Stipulation for Discharge in Specified Property. — A stipulation in a promissory note that the note might be discharged in cotton is for the benefit of the defendant, and he must show that he delivered or offered to deliver in payment of the note. *Love v. Simmons*, 10 Ala. 113. See also *Lockwood v. Smith*, 1 Root (Conn.) 498.

So in an action on a note for a certain amount to be paid in certain kinds

Premium Note — Assessment. — Assessment and apportionment being a condition precedent to liability on a premium note, the performance of such condition must be alleged in a complaint to recover an assessment thereon.¹

Condition in Separate Writing. — If a note is subject to conditions contained in a separate writing, referred to in the note, it is held that the performance of those conditions must be averred.²

Conditional Acceptance of Draft. — In like manner if a draft is conditionally accepted performance of the condition must be alleged in an action against the acceptor.³

Order Drawn on Particular Fund. — Where an order is drawn payable out of certain funds to come into the hands of the acceptor, it must be averred that such funds have come to his hands.⁴

10. Demand, Nonpayment, and Protest — *a.* **PRESENTMENT AND DEMAND** — (1) *Necessity of Alleging* — (a) **In Action Against Maker.** — In an action against the maker of a promissory note, it is not

of property at the election of the payee, it was held unnecessary to aver that the payee made his election, as he was bound at all events to make the payment in one of the articles specified within the time or on failure became immediately liable. *Townsend v. Wells*, 3 Day (Conn.) 327.

1. *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Williams v. Babcock*, 25 Barb. (N. Y.) 109. See also *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430.

2. *Titlow v. Hubbard*, 63 Ind. 6.

Separate Agreement Varying Terms. — In declaration on a promissory note absolute on its face and in the ordinary form it is not necessary to notice a contemporaneous agreement in writing varying the terms of the note, contained in a separate paper. Such agreement is matter of defense only. *Smalley v. Bristol*, 1 Mich. 153. But see *Naftzger v. Gregg*, (Cal. 1892) 31 Pac. Rep. 612.

3. *Bertrand v. Byrd*, 4 Ark. 187; *Rice v. Porter*, 16 N. J. L. 446; *Kellogg v. Lawrence*, Hill & D. Supp. (N. Y.) 332; *Carlisle v. Hooks*, 58 Tex. 420; *Ralli v. Sarell, D. & R. N. P.* 33, 16 E. C. L. 422.

A Conditional Acceptance Must Be Declared on Specially with an averment that the condition has been performed, and if such an acceptance is declared on as an absolute one the variance will be fatal, notwithstanding it may appear in evidence that the condition has been actually performed. *Rice v. Porter*, 16 N. J. L. 446 [citing *Julian v.*

Shobrooke, 2 Wils. 9, 1 Selw. N. P. 329 (ed. of 1836); *Mila v. Prest*, 1 Holt 182, 3 E. C. L. 79; *Langston v. Corney*, 4 Campb. 176; *Townsley v. Sumrall*, 2 Pet. (U. S.) 170; *Ralli v. Sarell, D. & R. N. P.* 33, 16 E. C. L. 422].

Sufficiency. — Where an order is "accepted, payable out of the amount due C. on my note executed to him, payable July 1, 1893, provided the note can be gotten here by that date," a complaint which alleges "that the conditions contained in such acceptance have all been complied with, and the note mentioned in the acceptance of the defendant has been taken up by the defendant, and in paying the same the defendant has reserved the amount herein sued on out of the amount due on said note of the said Craven," is sufficient. *Taylor v. Insley*, 7 Colo. App. 176.

4. *Tooker v. Arnoux*, 76 N. Y. 397; *County Bank v. Greenberg*, 116 Cal. 468; *Van Vacter v. Flack*, 1 Smed. & M. (Miss.) 393.

Warrants on Special Funds. — In an action upon warrants drawn on a special fund it is necessary for the plaintiff to allege that there is money in that fund to pay the same. *Travelers' Ins. Co. v. Denver*, 11 Colo. 438; *Reeve v. Oshkosh*, 33 Wis. 477; *Campbell v. Polk County*, 49 Mo. 214; *Union County v. Mason*, 9 Ind. 97.

But if It Is Payable Out of the General Funds it need not be averred that there are sufficient funds to meet it. *Reeve v. Oshkosh*, 33 Wis. 477; *Brown v. Jacobs*, 77 Wis. 27.

necessary to allege that the note has been presented to the maker and payment demanded.¹

Note Payable on Demand. — In an action against the maker of a note payable on demand it is not necessary to allege that payment has been demanded of the maker, it being held in most of the cases that the bringing of the action is a sufficient demand of payment.²

Payable at Special Time or Place. — In an action against the maker of a note payable at a particular time or place, the declaration need not aver a presentation and demand of payment at such time or place.³

1. *Arkansas.* — Hanly v. Gaines, 5 Ark. 38; Rust v. Reives, 24 Ark. 362.

Connecticut. — Jackson v. Packer, 13 Conn. 342.

Georgia. — Dougherty v. Western Bank, 13 Ga. 288.

Indiana. — Dunkle v. Nichols, 101 Ind. 473.

Iowa. — Marvin v. Adamson, 11 Iowa 371.

Maryland. — Bowie v. Duvall, 1 Gill & J. (Md.) 175.

Massachusetts. — Knowles v. Byrnes, 5 Met. (Mass.) 115.

Nebraska. — Belcher v. Palmer, 35 Neb. 449.

New York. — Fairchild v. Ogdensburgh, etc., R. Co., 15 N. Y. 337; Stowits v. Troy Bank, 21 Wend. (N. Y.) 186.

Tennessee. — Nashville v. First Nat. Bank, 1 Baxt. (Tenn.) 402.

Texas. — Edwards v. Hasbrook, 2 Tex. 579; Hardin v. Titus, Dall. (Tex.) 622.

United States. — Chillicothe Branch of State Bank v. Fox, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683; Harrisburg Trust Co. v. Shufeldt, 78 Fed. Rep. 292.

Action by Surety. — In an action by a surety on a promissory note against his principal, who is the maker, it is not necessary to allege a demand of payment from such maker. Clanton v. Coward, 67 Cal. 373.

Draft by One Officer of a Corporation on Another. — It is held in Fairchild v. Ogdensburgh, etc., R. Co., 15 N. Y. 337, that a draft by the president of a corporation on the treasurer, for the payment of the corporation indebtedness to the payee, was in effect a promissory note, and that an allegation of presentment for payment was not necessary in an action on such instrument. But see Marion, etc., R. Co. v. Dillon, 7 Ind. 404.

Note Payable in Property. — In an action against the maker of a note payable in property, it is held that a demand for payment should be alleged. Hardin v. Titus, Dall. (Tex.) 622. And see Letcher v. Taylor, Hard. (Ky.) 85.

2. *Dougherty v. Western Bank*, 13 Ga. 288; *Harrisburg Trust Co. v. Shufeldt*, 78 Fed. Rep. 292; *Chillicothe Branch of State Bank v. Fox*, 3 Blatchf. (U. S.) 431, 5 Fed. Cas. No. 2,683. Compare *Letcher v. Taylor*, Hard. (Ky.) 85, in which case, however, the note was payable in property on demand.

Certificate of Deposit. — It was held in *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377, that an action could not be maintained against a bank issuing a certificate of deposit, payable on demand, without alleging a presentation of the certificate and demand for payment.

3. *Alabama.* — *Montgomery v. Elliott*, 6 Ala. 701; *Irvine v. Withers*, 1 Stew. (Ala.) 234.

Arkansas. — *Sumner v. Ford*, 3 Ark. 389; *Rust v. Reives*, 24 Ark. 362.

California. — *Montgomery v. Tutt*, 11 Cal. 318.

Connecticut. — *Eldred v. Hawes*, 4 Conn. 405; *Jackson v. Packer*, 13 Conn. 342.

Delaware. — *Allen v. Miles*, 4 Harr. (Del.) 234; *Martin v. Delaplaine*, 5 Harr. (Del.) 329.

Florida. — *Greeley v. Whitehead*, 35 Fla. 523.

Georgia. — *Dougherty v. Western Bank*, 13 Ga. 287.

Illinois. — *Butterfield v. Kinzie*, 2 Ill. 445; *Armstrong v. Caldwell*, 2 Ill. 546.

Indiana. — *Hall v. Allen*, 37 Ind. 541; *Hartwell v. Candler*, 5 Blackf. (Ind.) 215.

Kentucky. — *Grant v. Groshon*, Hard. (Ky.) 91; *State Bank v. Hickey*, 4 Litt. (Ky.) 226.

Louisiana. — *Ripka v. Pope*, 5 La.

(b) **In Action Against Acceptor.** — In an action against the acceptor of a bill of exchange, it is not necessary to allege a presentment and demand for payment.¹

Payable at Particular Place. — In an action against the acceptor of a bill of exchange payable at a particular place, a presentment and demand of payment at that place need not be alleged.²

Anq. 61; *Leitchford v. Starns*, 16 La. Ann. 252. Compare *Parker v. Bernard*, 9 Rob. (La.) 18.

Maine. — *Bacon v. Dyer*, 12 Me. 19; *Remick v. O'Kyle*, 12 Me. 340; *McKenney v. Whipple*, 21 Me. 98; *Gammmon v. Everett*, 25 Me. 66; *Lyon v. Williamson*, 27 Me. 149; *Patterson v. Vose*, 43 Me. 552; *Blackstone Nat. Bank v. Lane*, 80 Me. 165.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175.

Massachusetts. — *Carley v. Vence*, 17 Mass. 389; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Carter v. Smith*, 9 Cush. (Mass.) 321.

Michigan. — *Reeve v. Pack*, 6 Mich. 240.

New Jersey. — *Weed v. Van Houten*, 9 N. J. L. 189.

New York. — *Fairchild v. Ogdensburgh, etc.*, R. Co., 15 N. Y. 337; *Hill v. Place*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 18; *Spellman v. Weider*, 5 How. Pr. (N. Y. Supreme Ct.) 5; *Ferner v. Williams*, 37 Barb. (N. Y.) 10; *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271.

North Carolina. — *Nichols v. Pool*, 2 Jones L. (N. Car.) 23.

South Carolina. — *McKenzie v. Durant*, 9 Rich. L. (S. Car.) 61.

Tennessee. — *Mulherrin v. Hannum*, 2 Yerg. (Tenn.) 81.

Texas. — *Edwards v. Hasbrook*, 2 Tex. 579; *Andrews v. Hoxie*, 5 Tex. 171; *Hubbell v. Lord*, 9 Tex. 472.

Vermont. — *Hart v. Green*, 8 Vt. 191; *Tarbell v. Downer*, 27 Vt. 509.

Virginia. — *Watkins v. Crouch*, 5 Leigh (Va.) 522; *Armistead v. Armistead*, 10 Leigh (Va.) 536.

West Virginia. — *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

Wisconsin. — *Howard v. Boorman*, 17 Wis. 459.

United States. — *U. S. Bank v. Smith*, 11 Wheat. (U. S.) 171; *Smith v. Johnson*, 2 Cranch (C. C.) 645; *U. S. Bank v. Bussard*, 3 Cranch (C. C.) 173; *Wallace v. M'Connell*, 13 Pet. (U. S.) 136; *Thompson v. Cook*, 2 McLean (U. S.) 122; *Covington v. Comstock*, 14 Pet. (U. S.) 43; *Brabston v. Gibson*, 9 How.

(U. S.) 263; *Kendall v. Badger*, 1 McAll. (U. S.) 523.

England. — *Williams v. Waring*, 10 B. & C. 2, 21 E. C. L. 11. But see *Bowes v. Howe*, 5 Taunt. 30, 1 E. C. L. 8; *Emblin v. Dartnell*, 12 M. & W. 830.

Bank Note Payable on Demand. — In *Dougherty v. Western Bank*, 13 Ga. 288, it was held that on a bank note payable on demand, at a particular time and place, it is necessary, in an action against the bank, that a demand at the place, and at the time designated or afterward, must be averred, but in this case it was stated that a bank note payable at Rome was payable generally.

1. *Alabama.* — *Smith v. Paul*, 8 Port. (Ala.) 503.

Connecticut. — *Jackson v. Packer*, 13 Conn. 342.

Kentucky. — *Rice v. Hogan*, 8 Dana (Ky.) 133.

Missouri. — *State Bank v. Young*, 35 Mo. 371.

Pennsylvania. — *Garden City Nat. Bank v. Fitler*, 155 Pa. St. 210.

But see *Williams v. Germaine*, 7 B. & C. 468, 14 E. C. L. 84; *Fenton v. Goundry*, 13 East 459.

Accepted for Honor. — It was held in *Williams v. Germaine*, 7 B. & C. 468, 14 E. C. L. 84, that in a declaration against the drawer and acceptor of a bill accepted for honor, it is necessary to aver that presentment for payment was made to the drawee.

2. *Alabama.* — *Montgomery v. Elliott*, 6 Ala. 703; *Irvine v. Withers*, 1 Stew. (Ala.) 234.

Arkansas. — *Sumner v. Ford*, 3 Ark. 389.

California. — *Montgomery v. Tutt*, 11 Cal. 318.

Delaware. — *Allen v. Miles*, 4 Harr. (Del.) 234; *Martin v. Hamilton*, 5 Harr. (Del.) 314, 5 Harr. (Del.) 329.

Georgia. — *Dougherty v. Western Bank*, 13 Ga. 288.

Illinois. — *Butterfield v. Kinzie*, 2 Ill. 445; *Armstrong v. Caldwell*, 2 Ill. 546.

(c) **In Action Against Drawer.** — In an action against the drawer of a bill of exchange, the weight of authority seems to be that a presentment to the acceptor and demand of payment must be alleged.¹

(d) **In Action Against Guarantor.** — In an action against the guarantor of a promissory note, it is not necessary to allege presentment to the maker and demand of payment.²

(e) **In Action Against Indorser.** — In an action against the indorser of a negotiable instrument, it is necessary to allege presentment to the person primarily liable and demand of payment.³ In some

Indiana. — *Hartwell v. Candler*, 5 Blackf. (Ind.) 215, a decision on a statute providing that such averment should be unnecessary.

Maryland. — *Bowie v. Duvall*, 1 Gill & J. (Md.) 175.

New York. — *Fairchild v. Ogdensburgh, etc.*, R. Co., 15 N. Y. 337; *Wolcott v. Van Santvoord*, 17 Johns. (N. Y.) 248.

Texas. — *Edwards v. Hasbrook*, 2 Tex. 579.

Vermont. — *Hart v. Green*, 8 Vt. 191; *Tarbell v. Downer*, 27 Vt. 509.

Virginia. — *Armistead v. Armisteads*, 10 Leigh (Va.) 536.

United States. — *U. S. Bank v. Smith*, 11 Wheat. (U. S.) 171.

England. — *Fenton v. Goundry*, 13 East 459. *Contra*, *Rowe v. Young*, 2 Brod. & B. 165, 6 E. C. L. 83, in which case the decisions were fully reviewed, and the rule settled. But Parliament immediately interfered, and by the statute of 1 & 2 Geo. IV., c. 78, restored the rule as it existed previous to this decision.

Surplusage. — When in an action against the acceptor of a bill of exchange, payable at a particular time and place, it is alleged that it was then and there presented, such allegation is surplusage, and need not be proved. *Hart v. Green*, 8 Vt. 191; *Tarbell v. Downer*, 27 Vt. 509.

Payable on Demand. — On a bill of exchange payable on demand at a particular place, it need not be alleged, in an action against the acceptor, that a demand was made at that place. *Montgomery v. Elliott*, 6 Ala. 701; *Haxtum v. Bishop*, 3 Wend. (N. Y.) 13.

Qualified Acceptance. — In *Gammon v. Schmoll*, 5 Taunt. 344, 1 E. C. L. 128, it was held that where the bill is directed generally and accepted payable at a particular place, if the holder receives such qualified acceptance he must, in declaring on the bill against

the acceptor, aver a presentment to the acceptor at the place specified. And see, to the same effect, *Hodge v. Fillis*, 3 Campb. 463.

1. *Alabama.* — *Shirley v. Fellows*, 9 Port. (Ala.) 300. But see *Smith v. Paul*, 8 Port. (Ala.) 503, wherein it was held that in an action against the drawer of a bill, who was also the drawee and acceptor, an averment of presentment for payment was not necessary.

Minnesota. — *Spink, etc., Drug Co. v. Ryan Drug Co.*, (Minn. 1898) 75 N. W. Rep. 18.

Missouri. — *State Bank v. Young*, 35 Mo. 371; *Myers v. Commercial Bank*, 72 Mo. App. 4.

New York. — *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252. But see *Mason v. Franklin*, 3 Johns. (N. Y.) 202.

Pennsylvania. — *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134.

South Carolina. — *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

Texas. — *Forrest v. Rawlings*, 35 Tex. 626.

Wisconsin. — *Dolph v. Rice*, 18 Wis. 397. But see *Bach v. Bell*, 7 Wis. 433.

England. — *Ambrose v. Hopwood*, 2 Taunt. 61; *Gammon v. Schmoll*, 5 Taunt. 344, 1 E. C. L. 128.

2. *Marvin v. Adamson*, 11 Iowa 371; *Peddicord v. Whittam*, 9 Iowa 471; *Thrasher v. Ely*, 2 Smed. & M. (Miss.) 139. See in general article PRINCIPAL AND SURETY.

Guarantor Liable as Indorser. — In *Lightstone v. Laurencel*, 4 Cal. 277, it was held that a declaration was insufficient which treated the maker and guarantor of a note as joint makers, in so far as it contained no allegation of demand, the liability of the guarantor in such case being held to be that of an indorser.

3. *Alabama.* — *Mims v. Central*

states, however, such averments of presentment and demand are

Bank, 2 Ala. 294; Kennon v. M'Rae, 3 Stew. & P. (Ala.) 249.

Arkansas. — Grace v. McDaniel, 13 Ark. 394; Rogers v. James, 33 Ark. 77.

California. — Lightstone v. Laurencel, 4 Cal. 277; Eastman v. Turman, 24 Cal. 379.

Delaware. — Wilmington Bank v. Cooper, 1 Harr. (Del.) 10; Allen v. Miles, 4 Harr. (Del.) 234.

District of Columbia. — Bond v. Shepherd, 3 McArthur (D. C.) 367.

Indiana. — Hartwell v. Candler, 5 Blackf. (Ind.) 215; Goodlet v. Britton, 6 Blackf. (Ind.) 500.

Kansas. — Malott v. Jewett, 1 Kan. App. 14.

Michigan. — Barber v. Taylor, 1 Mich. 352.

Missouri. — Jaccard v. Anderson, 32 Mo. 188; State Bank v. Haden, 35 Mo. 358; Deitz v. Corwin, 35 Mo. 376; Faulkner v. Faulkner, 73 Mo. 327.

New Jersey. — Disborough v. Vanness, 8 N. J. L. 231.

New York. — Spellman v. Weider, 5 How. Pr. (N. Y. Supreme Ct.) 5; Marshall v. Rockwood, 12 How. Pr. (N. Y. Supreme Ct.) 452; Ferner v. Williams, 37 Barb. (N. Y.) 9; Alder v. Bloomingdale, 1 Duer (N. Y.) 601; Price v. McClave, 6 Duer (N. Y.) 544, affirming 3 Abb. Pr. (N. Y.) 253; Jaffray v. Krauss, 79 Hun (N. Y.) 449; Conkling v. Gandall, 1 Abb. App. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228.

Pennsylvania. — Chestnut St. Nat. Bank v. Ellis, 161 Pa. St. 241; Peale v. Addicks, 174 Pa. St. 543, 38 W. N. C. (Pa.) 101; Cooke v. Addicks, 5 Pa. Dist. Rep. 388; Dilworth v. Hurst, 1 Phila. (Pa.) 222, 8 Leg. Int. (Pa.) 127; Tradesmen's Bank v. Johnson, 12 Pa. Co. Ct. Rep. 6.

Tennessee. — Tumley v. Clarksville, etc., R. Co., 2 Coldw. (Tenn.) 327.

Texas. — Fisher v. Phelps, 21 Tex. 551.

West Virginia. — Huntington Bank v. Hysell, 22 W. Va. 142.

Wisconsin. — Catlin v. Jones, 1 Pin. (Wis.) 130.

United States. — Renner v. Columbia Bank, 9 Wheat. (U. S.) 582; U. S. Bank v. Smith, 11 Wheat. (U. S.) 171.

England. — Rushton v. Aspinall, 2 Doug. 679; Parks v. Edge, 3 Tyrw. 364, 1 Comp. & M. 429; Parker v. Ade, 1 Dowl. P. C. 643; Lambert v. Oakes, 1 Ld. Raym. 443.

Action Against Maker and Indorser. —

Where the maker and indorser of a promissory note have been joined as defendants in one action, the declaration, to charge the indorser, must contain the same averments as to presentment and demand as though the indorser was sued alone. Goodlet v. Britton, 6 Blackf. (Ind.) 500; Spellman v. Weider, 5 How. Pr. (N. Y. Supreme Ct.) 5. But in the latter case it was held that the omission of such averment was not available on joint demurrer. And in Belcher v. Palmer, 35 Neb. 449, it was held that in such a joint action the omission of allegations as to demand was not fatal on appeal, where the objection was made by the makers and not by the indorser.

Several Instalments. — In an action to recover from an indorser several instalments of principal and interest due on a note, the complaint is insufficient unless it contains allegations of presentment and demand as to each of the instalments, sufficient to charge the indorser. Eastman v. Turman, 24 Cal. 379.

In Justice's Court. — In Barber v. Taylor, 1 Mich. 352, it was held that allegations as to presentment of the notes sued on were necessary, in an action against an indorser in a justice's court.

Complaint on Copy. — In an action under a statute providing that it shall be necessary in a complaint on a promissory note only to set out a copy of the note, with an allegation that a specified sum is due the payee, where the proceeding is against an indorser the complaint must also contain an averment of a demand of payment. Conkling v. Gandall, 1 Abb. App. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228.

Irregular Indorsement. — In an action against an irregular indorser the petition must contain the same averments as to presentment and demand of payment that are necessary in an action against a regular indorser, unless the petition makes out a case to charge such irregular indorser as joint maker. State Bank v. Haden, 35 Mo. 358; Cooke v. Addicks, 5 Pa. Dist. Rep. 388.

Order by Verdict. — A failure to allege presentment and demand of payment in an action against an indorser is not cured by verdict. Blacklege v. Benedict, 12 Ind. 389; Bosch v. Kassing,

or have been dispensed with by statute.¹

(2) *Sufficient Allegations of Demand* — In General. — Where an allegation of demand is required it has been held unnecessary to state that presentment was made, in addition to the general allegation of demand.² An allegation that "payment was refused" has been held to imply a demand of payment.³ It need not be alleged that the holder personally presented the instrument,⁴ nor, in an action on an instrument payable at a certain place, need it be alleged that the plaintiff was there present, ready to receive payment.⁵ But it seems that an allegation that the instrument sued on was protested is not a sufficient averment that payment was demanded.⁶

"Duly Presented." — An allegation that the instrument sued on was duly presented for payment is sufficient.⁷

64 Iowa 312; *Knott v. Hicks*, 2 Humph. (Tenn.) 162; *Harlan v. Dew*, 3 Head (Tenn.) 505; *Baxter v. Erwin*, 1 Shannon's Tenn. Cas. 113. This is true, even though a demurrer filed to the declaration fails to specify such defect. *White v. Cannada*, 25 Ark. 41.

1. *McDougald v. Rutherford*, 30 Ala. 253; *Hutchins v. Flintge*, 2 Tex. 473; *Andrews v. Hoxie*, 5 Tex. 171; *Frosh v. Holmes*, 8 Tex. 20; *Williams v. Irwin*, 3 Dev. & B. L. (N. Car.) 74; *Dismukes v. Wright*, 3 Dev. & B. L. (N. Car.) 78. And see *Hilburn v. Paysinger*, 1 Bailey L. (S. Car.) 97; *Holt v. Salmon*, Rice L. (S. Car.) 91, construing the Georgia statute.

2. *Mercantile Bank v. McCarthy*, 7 Mo. App. 318.

3. *Shaler v. Van Wormer*, 33 Mo. 386.

Demand of Acceptance. — The petition in an action by the indorsee against an indorser of a bill of exchange alleged that the bill was presented to the drawee "for acceptance, and was by him then and there declined and refused acceptance, and not accepted." It was held that this was a sufficient averment of a demand of acceptance. *Burlington First Nat. Bank v. Hatch*, 78 Mo. 15.

4. *White v. Low*, 7 Barb. (N. Y.) 204.

5. *Dewey v. Washburn*, 12 Vt. 580; *Carpenter v. Coit*, 1 D. Chip. (Vt.) 88.

6. *Price v. McClave*, 5 Duer (N. Y.) 670; *Price v. McClave*, 6 Duer (N. Y.) 544, affirming 3 Abb. Pr. (N. Y.) 253; *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241; *Peale v. Addicks*, 174 Pa. St. 543. *Contra*, *Ducros v. Jacobs*, 10 Rob. (La.) 453; *Voisin v. Jewell*, 9 La. 144, in which case it was held that

under an allegation that the note in suit was "duly protested," evidence was admissible that it was duly presented for payment.

Action on Bank Deposit. — As a bank is entitled to some written evidence of the payment of money deposited with it, the fact that some such written evidence was offered should be shown in the complaint. *McEwen v. Davis*, 39 Ind. 109. But see *Emerson v. Thatcher*, 6 Kan. App. 325.

7. *District of Columbia.* — *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448; *Young v. Warner*, 6 App. Cas. (D. C.) 433.

Missouri. — *Ewing v. Pulitzer*, 12 Mo. App. 578.

New York. — *Chemical Nat. Bank v. Carpentier*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 301; *Woodbury v. Sack-rider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402; *Spencer v. Rogers Locomotive Works*, 17 Abb. Pr. (N. Y. Super. Ct.) 120; *Ferner v. Williams*, 37 Barb. (N. Y.) 10, 14 Abb. Pr. (N. Y.) 215; *Gay v. Paine*, 5 How. Pr. (N. Y. Supreme Ct.) 207; *Adams v. Sherrill*, 14 How. Pr. (N. Y. Supreme Ct.) 297. But see *Graham v. Machado*, 6 Duer (N. Y.) 514.

Wisconsin. — *Frankfort Bank v. Countryman*, 11 Wis. 398; *Davis v. Barron*, 13 Wis. 227; *Howard v. Boorman*, 17 Wis. 459; *Cutler v. Ainsworth*, 21 Wis. 381; *Wallace v. Crilley*, 46 Wis. 577.

Compare *Harbison v. State Bank*, 28 Ind. 133; *Peale v. Addicks*, 38 W. N. C. (Pa.) 201.

During Business Hours. — In *Wallace v. Crilley*, 46 Wis. 577, it was held that a statement that the note sued on was presented at the maker's place of

To Whom Presented. — An allegation that the instrument sued on was presented at the place at which it is made payable is equivalent to an averment that it was presented to the proper person.¹ But such an allegation of presentment is not sufficient when the instrument is not payable at the place where it is alleged to have been presented.²

(3) *Pleading Matter Excusing Presentment and Demand.* — Facts which render presentment and demand of payment unnecessary may be alleged in lieu of allegations of presentment and demand.³ Where a waiver of demand is expressed in the instru-

business and "payment was then and there duly demanded," was equivalent to stating that the presentment was during business hours.

Under Statute. — Under a code provision that performance of conditions precedent may be stated generally, an averment that the instrument sued on was duly presented, or that payment was duly demanded, is sufficient. *Gay v. Paine*, 5 How. Pr. (N. Y. Supreme Ct.) 107; *Adams v. Sherrill*, 14 How. Pr. (N. Y. Supreme Ct.) 297; *Ferner v. Williams*, 37 Barb. (N. Y.) 10, 14 Abb. Pr. (N. Y.) 215. Compare *Graham v. Machado*, 6 Duer (N. Y.) 514.

1. *Smith v. Raymond*, 9 Port. (Ala.) 459; *Churchill v. Merchants' Bank*, 19 Pick. (Mass.) 532; *Pearson v. Bank of Metropolis*, 1 Pet. (U. S.) 89; *Huffam v. Ellis*, 3 Taunt. 415; *Shelton v. Braithwaite*, 8 M. & W. 252, 1 Dowl. N. S. 354, 5 Jur. 1200; *Hawkey v. Borwick*, 4 Bing. 135, 13 E. C. L. 376, 12 Moo. 478.

Officer of Bank. — An averment in a declaration against the indorser of a note payable in bank, that it was at maturity presented at the bank, was sufficient, without stating to what officer of the bank it was presented. *Smith v. Raymond*, 9 Port. (Ala.) 459; *Pearson v. Bank of Metropolis*, 1 Pet. (U. S.) 89; *Churchill v. Merchants' Bank*, 19 Pick. (Mass.) 532.

2. *Mehl v. Waldorf*, 35 Mo. 466.

Search for Maker at Bank. — Where a note is payable at a bank, an allegation that search for the maker was made at the bank, in order to present the note to him, is not sufficient, as the maker may have had funds in the bank which might have been applied to the payment of the note if it had been presented to the officers of the bank. *Hartwell v. Candler*, 5 Blackf. (Ind.) 215.

3. *Alabama*. — *Cockrill v. Hobson*,

16 Ala. 393; *McDougald v. Rutherford*, 30 Ala. 253.

Delaware. — *Wilmington Bank v. Cooper*, 1 Harr. (Del.) 10.

Illinois. — *Tarlton v. Miller*, 1 Ill. 69.

Indiana. — *Spangler v. McDaniel*, 3 Ind. 275; *Brown v. Jones*, 125 Ind. 378.

Iowa. — *Peck v. Schick*, 50 Iowa 281.

Kansas. — *Malott v. Jewett*, 1 Kan. App. 14.

Missouri. — *Jaccard v. Anderson*, 32 Mo. 188.

Tennessee. — *Harlan v. Dew*, 3 Head (Tenn.) 505; *Baxter v. Erwin*, 1 Shannon's Tenn. Cas. 113.

Wisconsin. — *Dolph v. Rice*, 18 Wis. 397.

Want of Funds. — Instead of alleging presentment and demand of payment of the instrument sued on, it may be averred that the defendant had no funds in the bank at which the instrument was payable. *Wilmington Bank v. Cooper*, 1 Harr. (Del.) 10; *Dolph v. Rice*, 18 Wis. 397.

In *Spangler v. McDaniel*, 3 Ind. 275, it was held that an allegation that before the presentment of the order sued on the drawer had withdrawn all his funds from the hands of the drawee, was good.

Waiver of Demand. — An allegation that the defendant has waived demand may be made instead of an allegation of demand. *Cockrill v. Hobson*, 16 Ala. 393; *Peck v. Schick*, 50 Iowa 281.

Variance Between Notice and Allegations. — Where the complaint alleged that the bill sued on "was taken to the place designated in the acceptance as the place of payment, and that the building was unoccupied and closed, and no one could be found to whom presentment for payment could be made," and the notice to the defendant stated that the bill was duly presented for payment, it was held that

ment sued on, no allegation as to presentment is necessary.¹

Proof of Excuse under Allegations of Presentment and Demand. — When it is alleged that presentment and demand were made, facts excusing presentment and demand may be shown in proof without any averment of that character in the declaration or complaint.²

the difference was immaterial. *Brown v. Jones*, 125 Ind. 378.

Search for Maker. — In *Tarlton v. Miller*, 1 Ill. 69, it was held that an averment that at the time the note sued on became due a diligent search was made at the said county for the maker, for the purpose of demanding payment, but that he could not be found, was insufficient, as an averment of excuse for the exercise of due diligence, in an action by an assignee against an assignor. The court said: "It cannot be seriously contended that because the maker of the note does not reside or cannot be found in the county in which the note was made, that therefor the assignor becomes liable. It may be that he may reside in the next adjoining county, or some other part of the state. If so, I conceive it to be the duty of the assignee to seek him."

Statutory Equivalent for Demand. — Where it is provided by statute that the institution of a suit against the maker, and its prosecution to a return of "no property," shall be sufficient to authorize a suit against the indorser, allegations of such a suit will take the place of allegations of presentment and demand. *McDougald v. Rutherford*, 30 Ala. 253.

Law of Another State. — A declaration not averring demand, but in lieu thereof averring that "by the laws of the state of Georgia, where said indorsement was made, the said defendant became liable to pay said sum of money in said note specified to said plaintiff," is but a statement of the pleader's conclusion as to the effect of the law of Georgia, and is insufficient. If the indorsement was made in another state, the law of which dispensed with demand to charge the indorser, the declaration should aver that law. *McDougald v. Rutherford*, 30 Ala. 253.

1. *Henderson v. Ackelmire*, 59 Ind. 540.

2. *Alabama*. — *Kennon v. McRea*, 7 Port. (Ala.) 175; *Taylor v. Branch*, 1 Stew. & P. (Ala.) 249.

Connecticut. — *Norton v. Lewis*, 2 Conn. 478; *Hinsdale v. Miles*, 5 Conn.

331; *Windham Bank v. Norton*, 22 Conn. 213.

Florida. — *Spann v. Baltzell*, 1 Fla. 338.

Illinois. — *Tobey v. Berly*, 26 Ill. 429.

Iowa. — *Knight v. Fox*, 1 Morr. (Iowa) 305.

Massachusetts. — *Jones v. Fales*, 4 Mass. 245; *Harrison v. Bailey*, 99 Mass. 620; *Armstrong v. Chadwick*, 127 Mass. 156; *Kent v. Warner*, 12 Allen (Mass.) 561; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *North Bank v. Abbot*, 13 Pick. (Mass.) 465.

Mississippi. — *Moore v. Ayres*, 5 Smed. & M. (Miss.) 310; *Goodloe v. Godley*, 13 Smed. & M. (Miss.) 233.

Missouri. — *Wolf v. Lauman*, 34 Mo. 575. But see *Pier v. Heinrichhoffen*, 52 Mo. 333.

New York. — *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63; *Paton v. Lent*, 4 Duer (N. Y.) 231; *Stewart v. Eden*, 2 Cai. (N. Y.) 121; *Williams v. Matthews*, 3 Cow. (N. Y.) 252; *Tebbetts v. Dowd*, 23 Wend. (N. Y.) 379; *Cummings v. Fisher*, Anth. N. P. (N. Y.) 1. Compare *Graham v. Machado*, 6 Duer (N. Y.) 514.

Pennsylvania. — *Baumgardner v. Reeves*, 35 Pa. St. 250.

Vermont. — *Farmers', etc., Bank v. Day*, 13 Vt. 36.

England. — *Greenway v. Hindley*, 4 Campb. 52; *Patience v. Townley*, 2 Smith 223, 8 Rev. Rep. 711.

Contra. — *Dolph v. Rice*, 18 Wis. 397.

Written Demand Left at Business House. — It may be shown that a written demand was left at the place of business of the maker, in conformity to the usage of a bank, with which usage the maker was familiar, under an allegation that the note was presented to the maker and payment demanded. *City Bank v. Cutter*, 3 Pick. (Mass.) 414.

Note Payable at a Bank. — In an action on a note payable at a bank, against the indorser, an averment of a presentment and demand of payment on the promisor is supported by evidence that the promisor had notice that the note was at the bank on the day it became due, ready to be deliv-

Thus under such an allegation it may be shown that the defendant promised to pay the instrument, although the proper steps to charge him with liability had not been taken,¹ that the maker could not be found when it was sought to make demand upon him,² that he was out of the jurisdiction at the time the instrument became payable,³ that it was impossible to present the instrument sued on, on account of its loss,⁴ or that presentment and demand had been waived.⁵

Allegation that Payment Was Refused. — Under an allegation that payment of the instrument sued on was refused, the plaintiff may show facts which prevented his presenting the instrument for payment, although by so doing it is made to appear that there was not a direct refusal of payment.⁶ Thus it may be shown that the defendant promised to pay, with full knowledge of laches on the part of the holder in making demand, which would discharge him from liability.⁷

(4) *Time of Presentment and Demand.* — It need not be stated, in declaring on a negotiable instrument, on what day the presentment and demand of payment were made.⁸ In other cases it has

ered upon payment. *North Bank v. Abbot*, 13 Pick. (Mass.) 465.

Payment Forbidden. — It was held in *Child v. Moore*, 6 N. H. 33, that it could not be shown, under an averment that the order sued on was presented to the drawee for payment, that the drawer, who was the defendant in the action, had forbidden such drawee to pay it.

1. *Kennon v. McRea*, 7 Port. (Ala.) 175; *Tobey v. Berly*, 26 Ill. 429; *Moore v. Ayres*, 5 Smed. & M. (Miss.) 310; *Tebbetts v. Dowd*, 23 Wend. (N. Y.) 379; *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63; *Greenway v. Hindley*, 4 Campb. 52.

Promise Before Maturity. — Where the indorser of a promissory note, before it became payable, agreed with the holder, in consideration of time being given, that he would pay the note, it was held that this dispensed with a demand, and that proof of these facts was admissible under an averment of demand. *Norton v. Lewis*, 2 Conn. 478.

2. *Taylor v. Branch*, 1 Stew. & P. (Ala.) 249; *Wolf v. Lauman*, 34 Mo. 575; *Paton v. Lent*, 4 Duer (N. Y.) 231; *Stewart v. Eden*, 2 Cai. (N. Y.) 121; *Baumgardner v. Reeves*, 35 Pa. St. 250.

3. *Cummings v. Fisher*, Anth. N. P. (N. Y.) 1.

4. *Hinsdale v. Miles*, 5 Conn. 331;

Patience v. Townley, 2 Smith 223, 8 Rev. Rep. 711.

5. *Connecticut.* — *Windham Bank v. Norton*, 22 Conn. 213.

Massachusetts. — *Jones v. Fales*, 4 Mass. 245; *Harrison v. Bailey*, 99 Mass. 620; *Armstrong v. Chadwick*, 127 Mass. 156; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436.

Mississippi. — *Goodloe v. Godley*, 13 Smed. & M. (Miss.) 233.

Vermont. — *Farmers', etc., Bank v. Day*, 13 Vt. 36.

Contra. — *Burlington First Nat. Bank v. Hatch*, 78 Mo. 13; *Closz v. Miracle*, 103 Iowa 198; *Lumbert v. Palmer*, 29 Iowa 104.

6. *Shirley v. Fellows*, 9 Port. (Ala.) 300; *Jaccard v. Anderson*, 32 Mo. 188; *Wolf v. Lauman*, 34 Mo. 575; *Stewart v. Eden*, 2 Cai. (N. Y.) 121; *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63.

7. *Clark v. Tryon*, 4 Misc. Rep. (N. Y. C. Pl.) 63.

8. *Alabama.* — *Roberts v. Mason*, 1 Ala. 373; *Montgomery v. Elliott*, 6 Ala. 703; *Irvine v. Withers*, 1 Stew. (Ala.) 234.

Arkansas. — *Holleville v. Patrick*, 14 Ark. 208.

Connecticut. — *Norton v. Lewis*, 2 Conn. 478.

Delaware. — *Martin v. Hamilton*, 5 Harr. (Del.) 314, 329.

been held sufficient to allege that the instrument was presented and payment demanded at maturity, or when it fell due.¹ If the time of presentment is stated with greater particularity than is necessary, no variance is caused by proof of presentment at a different date,² at least when the allegation is made under a *videlicet*.³ But the allegation as to time of presentment should not show that the demand was made prematurely,⁴ and a declara-

Florida. — *Greeley v. Whitehead*, 35 Fla. 523.

Indiana. — *St. James Church v. Moore*, 1 Ind. 289. *Compare Spangler v. McDaniel*, 3 Ind. 275; *Harbison v. State Bank*, 28 Ind. 133; *Glenn v. Noble*, 1 Blackf. (Ind.) 104.

Kentucky. — *Brown v. Hall*, 2 A. K. Marsh. (Ky.) 600.

Maine. — *Bacon v. Dyer*, 12 Me. 19; *McKenney v. Whipple*, 21 Me. 98; *Gammon v. Everett*, 25 Me. 66; *Lyon v. Williamson*, 27 Me. 149; *Patterson v. Vose*, 43 Me. 552.

Massachusetts. — *Carley v. Vance*, 17 Mass. 389; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212.

Michigan. — *Reeve v. Pack*, 6 Mich. 240.

Missouri. — *Mechanics' Sav. Inst. v. Finn*, 1 Mo. App. 36.

New York. — *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271; *Wolcott v. Van Santvoord*, 17 Johns. (N. Y.) 248; *Lefingwell v. White*, 1 Johns. Cas. (N. Y.) 99; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13.

North Carolina. — *Nichols v. Pool*, 2 Jones L. (N. Car.) 23.

Texas. — *Edwards v. Hasbrook*, 2 Tex. 579.

Vermont. — *Hart v. Green*, 8 Vt. 191; *Tarbell v. Downer*, 27 Vt. 509.

Virginia. — *Armistead v. Armisteads*, 10 Leigh (Va.) 536.

West Virginia. — *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

United States. — *Brabston v. Gibson*, 9 How. (U. S.) 263; *Wallace v. M'Connell*, 13 Pet. (U. S.) 136.

Approved Allegation. — It was said in *Mechanics' Sav. Inst. v. Finn*, 1 Mo. App. 36, that "a careful pleader would have alleged that 'at the date of the maturity of the note he presented the same for payment to the maker thereof, at the Mechanics' Savings Institution, and demanded payment of the same.'"

1. *Alabama*. — *Crawford v. Camfield*, 6 Ala. 153; *Crawford v. Branch Bank*, 6 Ala. 574.

Mississippi. — *Wells v. Woodley*, 5 How. (Miss.) 484.

Missouri. — *Block v. O'Hara*, 1 Mo. 145; *Ewing v. Pulitzer*, 12 Mo. App. 578.

New York. — *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402, limited in *Cook v. Warren*, 88 N. Y. 37.

Wisconsin. — *Frankfort Bank v. Countryman*, 11 Wis. 398; *Davis v. Barron*, 13 Wis. 227.

United States. — *Hyslop v. Jones*, 3 McLean (U. S.) 96.

England. — *Bynner v. Russell*, 1 Bing. 23, 8 E. C. L. 383.

Compare Harbison v. State Bank, 28 Ind. 133; *Reale v. Addicks*, 38 W. N. C. (Pa.) 101.

2. *Holleyville v. Patrick*, 14 Ark. 208; *Rozelle v. Pennington*, 24 Ark. 277; *Brown v. Hall*, 2 A. K. Marsh. (Ky.) 600.

3. *Alabama*. — *Crawford v. Camfield*, 6 Ala. 153; *Quigley v. Primrose*, 8 Port. (Ala.) 247; *Smith v. Robinson*, 11 Ala. 270.

Mississippi. — *Wells v. Woodley*, 5 How. (Miss.) 484.

Missouri. — *Block v. O'Hara*, 1 Mo. 145.

Tennessee. — *Frank v. Townsend*, 9 Humph. (Tenn.) 724.

England. — *Bynner v. Russell*, 1 Bing. 23, 8 E. C. L. 383.

4. *Anderson v. Yell*, 15 Ark. 9; *Wards v. Sparks*, 53 Ark. 519; *Beck v. Thompson*, 4 Har. & J. (Md.) 531.

Under a Videlicet. — Where, in an action by the indorsee against the indorser, the declaration alleges that after the note became due and payable according to its tenor, to wit, on, etc., the note was duly presented for payment, the declaration is sufficient, although the time stated under the *videlicet* was a time previous to the maturity of the note. *Smith v. Robinson*, 11 Ala. 270.

Last Day of Grace on Sunday. — An averment that a note dated August 12, 1872, at four months, was presented for payment December 14, 1872, is sufficient to show a presentment at the proper time, because the court will take judicial notice not only of the law mer-

tion is demurrable which apparently shows on its face that the plaintiff has been guilty of laches in making his demand for payment.¹ Where, by a valid custom, four days of grace are allowed instead of three, and a presentment is made on the fourth day, the special custom should be alleged in stating such presentment.²

(5) *Place of Presentment and Demand.* — In an action on an instrument payable at a particular place, a demand of payment at that place must be alleged, in an action against an indorser,³ or a drawer of a bill of exchange.⁴ No allegation of presentment at the place where the instrument is made payable is necessary in an action against the maker of a note or the acceptor of a bill.⁵

Presentment and Demand "Duly" Made. — An allegation that the instrument sued on was presented and payment duly demanded has been held sufficient, although the instrument is payable at a particular place.⁶

b. NONACCEPTANCE. — In an action for the nonacceptance of a foreign bill of exchange, drawn in sets of three, it is not necessary to aver the nonacceptance of the second and third bills of

chant, but also of the almanac, from which it appears that the 15th of December, 1872, fell on a Sunday. *Reed v. Wilson*, 41 N. J. L. 29.

1. *Stapp v. Lapsley*, Litt. Sel. Cas. (Ky.) 238; *Estell v. Vanderveer*, 5 N. J. L. 902; *Lambert v. Oakes*, 1 Ld. Raym. 443.

2. *Garland v. West*, 9 Baxt. (Tenn.) 315; *Jackson v. Henderson*, 3 Leigh (Va.) 196; *Renner v. Columbia Bank*, 9 Wheat. (U. S.) 581.

3. *Alabama.* — *Hazzard v. Shelton*, 15 Ala. 62.

Delaware. — *Wilmington Bank v. Cooper*, 1 Harr. (Del.) 10; *Wilmington Bank v. Simmons*, 1 Harr. (Del.) 331; *Allen v. Miles*, 4 Harr. (Del.) 234.

District of Columbia. — *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

Indiana. — *Hartwell v. Candler*, 5 Blackf. (Ind.) 215, in which case it was held that the Indiana statute excusing averments of demand at a particular place did not apply to actions against indorsers.

Missouri. — *Faulkner v. Faulkner*, 73 Mo. 327.

New York. — *Ferner v. Williams*, 37 Barb. (N. Y.) 10; *Spellman v. Weider*, 5 How. Pr. (N. Y. Supreme Ct.) 5. *Compare Gay v. Paine*, 5 How. Pr. (N. Y. Supreme Ct.) 107.

Pennsylvania. — *Tradesmen's Bank v. Johnson*, 12 Pa. Co. Ct. Rep. 6.

Virginia. — *Watkins v. Crouch*, 5 Leigh (Va.) 522.

United States. — *U. S. Bank v. Smith*, 11 Wheat. (U. S.) 171.

England. — *Bush v. Kinnear*, 6 M. & S. 210; *Boydell v. Harkness*, 3 C. B. 168, 54 E. C. L. 168; *Parker v. Ade*, 1 Dowl. P. C. 643; *Parks v. Edge*, 1 Cromp. & M. 429, 3 Tyrw. 364.

Payable at a Bank, Which Is the Holder.

— Where a bill or note is made payable at a particular bank, and the bank itself is the holder at maturity, an averment of demand of payment at the place designated is unnecessary, since all that is necessary is for the bank to examine the account of the maker or drawer with it, in order to ascertain whether he has any funds in its hands. *Allen v. Miles*, 4 Harr. (Del.) 234; *U. S. Bank v. Smith*, 11 Wheat. (U. S.) 171.

Payable at Any Bank. — In an action on a note payable at "any bank in the state," an averment of presentment at any named bank in the state is sufficient. *Besancon v. Shirley*, 9 Smed. & M. (Miss.) 457.

4. *Ambrose v. Hopwood*, 2 Taunt. 61.

5. See *supra*, a. (1) (a) *In Action Against Maker*, and (b) *In Action Against Acceptor*.

6. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448; *Laferriere v. Bynum*, 12 La. 587; *Ferner v. Williams*, 14 Abb. Pr. (N. Y. Supreme Ct.) 215, 37 Barb. (N. Y.) 9; *Chemical Nat. Bank v. Carpentier*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 301; *Cutler v. Ainsworth*, 21 Wis. 381.

exchange.¹ And in an action for the nonpayment of a bill of exchange it is not necessary to aver nonacceptance.²

c. NONPAYMENT—(1) *Necessity of Alleging.*—In an action on a negotiable instrument it should be alleged that such instrument has not been paid by the defendant.³

1. *Devereux v. Morrissey*, 17 Ir. C. L. Rep. 785.

2. *Brown v. Barry*, 3 Dall. (U. S.) 365. And see *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

3. *Alabama*.—*Mims v. Central Bank*, 2 Ala. 294; *Crenshaw v. M'Kiernan*, Minor (Ala.) 295.

Arkansas.—*Green v. Thornton*, 7 Ark. 385; *Grace v. McDaniel*, 13 Ark. 394; *Matlock v. Purefoy*, 18 Ark. 492; *Rogers v. James*, 33 Ark. 77.

California.—*Eastman v. Turman*, 24 Cal. 379; *Davanay v. Eggenhoff*, 43 Cal. 395; *Scroufe v. Clay*, 71 Cal. 123; *Du Brutz v. Jessup*, 70 Cal. 75; *Morgan v. Menzies*, 60 Cal. 341; *Richards v. Travelers' Ins. Co.*, 80 Cal. 506; *Stanton v. Quinan*, 91 Cal. 1; *Barney v. Vigoreaux*, 92 Cal. 631; *Shasta Bank v. Boyd*, 99 Cal. 604.

District of Columbia.—*Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

Illinois.—*Zimmerman v. Wead*, 18 Ill. 305; *Baldwin v. Banks*, 20 Ill. 51.

Indiana.—*Smith v. Carley*, 8 Ind. 451; *Blackledge v. Benedict*, 12 Ind. 389; *Lawson v. Sherra*, 21 Ind. 363; *Pace v. Grove*, 26 Ind. 26; *Howorth v. Scarce*, 29 Ind. 278; *Shane v. Lowry*, 48 Ind. 205; *Green v. Louthain*, 49 Ind. 139; *Friddle v. Crane*, 68 Ind. 583; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 95. But see *Womack v. Womack*, 9 Ind. 288, wherein it was held that a copy of the note being attached, it was *prima facie* evidence of indebtedness, and dispensed with an averment of nonpayment.

Kentucky.—*Callahan v. Louisville First Nat. Bank*, 78 Ky. 604; *Huffaker v. National Bank*, 12 Bush (Ky.) 287.

Missouri.—*Taylor v. Newman*, 77 Mo. 257; *Mechanics' Sav. Inst. v. Finn*, 1 Mo. App. 36; *Ewing v. Pulitzer*, 12 Mo. App. 578; *Myers v. Commercial Bank*, 72 Mo. App. 4.

New York.—*Keteltas v. Myers*, 3 E. D. Smith (N. Y.) 83; *Cohn v. Husson*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 324, 67 How. Pr. (N. Y.) 461; *Price v. McClave*, 5 Duer (N. Y.) 670, 6 Duer (N. Y.) 544, *affirming* 3 Abb. Pr. (N. Y.) 253; *Graham v. Machado*, 6 Duer (N. Y.) 514;

Wright v. Deering, 2 Misc. Rep. (N. Y. C. Pl.) 296; *Tracy v. Tracy*, 59 Hun (N. Y.) 1, 20 Civ. Pro. Rep. (N. Y.) 98, *overruling* *Salisbury v. Stinson*, 10 Hun (N. Y.) 242; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402. But see *Cook v. Warren*, 88 N. Y. 37.

Ohio.—*Villiers v. Lewis*, 1 Handy (Ohio) 38.

Pennsylvania.—*Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134; *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241.

Texas.—*Fisher v. Phelps*, 21 Tex. 551; *Whitaker v. Record*, 25 Tex. Supp. 382; *Wood v. Evans*, 43 Tex. 176.

Vermont.—*Brooks v. Page*, 1 D. Chip. (Vt.) 340.

West Virginia.—*Somerville v. Grim*, 17 W. Va. 803; *Huntington Bank v. Hysell*, 22 W. Va. 142.

Wisconsin.—*Davis v. Barron*, 13 Wis. 227; *Catlin v. Jones*, 1 Pin. (Wis.) 130.

England.—*Rushton v. Aspinall*, 2 Doug. 679; *Huffam v. Ellis*, 3 Taunt. 415. Compare *Devereux v. Morrissey*, 17 Ir. C. L. Rep. 785, where it was held that the nonpayment of a second of exchange need not be alleged, where the action is for the nonacceptance of a foreign bill drawn in sets.

What Strictness Necessary.—In *Zimmerman v. Wead*, 18 Ill. 305, it was held that allegations of nonpayment need not be made with the same strictness and certainty that was required under the system of pleading at common law; and in *Matlock v. Purefoy*, 18 Ark. 492, an allegation that the defendant "has not paid any of the said money, or any part thereof, or the said ten per cent. interest, or any part of the said interest," was held sufficient as an allegation of a breach, although not absolutely certain to every intent in every particular.

Payments Indorsed on Note.—A petition by the holder of a promissory note alleging the failure to pay the note, except the amount credited thereon, which amount is not stated, is insufficient. The cause of action and the breach should be distinctly averred; the facts sufficient to warrant a judg-

Averring that Instrument Is Due. — An allegation of a breach, or nonpayment of the instrument sued on, in an action on a negotiable

ment should be directly and distinctly set forth. *Wood v. Evans*, 43 Tex. 176. And see, to the same effect, *Barney v. Vigoreaux*, 92 Cal. 631.

Allegation of Defendant's Refusal Insufficient. — An allegation that the defendant has refused and still does refuse to pay the principal or interest of the note, or any part thereof, and that there is now due the plaintiff a certain sum, is not sufficient. It should be alleged that the note is unpaid. *Scroufe v. Clay*, 71 Cal. 123. *Contra*, *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625.

Allegation of Protest. — An averment that the instrument sued on was protested for nonpayment is not equivalent to an allegation that payment has been refused, since there may be a protest without a presentment for payment. *Price v. McClave*, 5 Duer (N. Y.) 670, 6 Duer (N. Y.) 544, *affirming* 3 Abb. Pr. (N. Y.) 253. But see *Eastman v. Turman*, 24 Cal. 379, where it was held that nonpayment was sufficiently implied in the allegation that the instrument sued on "was presented for payment at the banking house where it was payable, and payment thereof demanded, and thereupon the same was duly protested for nonpayment." To the same effect, see *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402. Compare *Cook v. Warren*, 88 N. Y. 37, *limiting* this case.

Under Common Counts. — In an action against a bank for the nonpayment of its notes, where the plaintiff demands ten per cent. interest by way of penalty, it is not necessary to warrant proof of the presentment of the bills and refusal to pay that those facts should be specially averred in the declaration; the evidence is admissible, under the common money counts. *Stowits v. Troy Bank*, 21 Wend. (N. Y.) 186.

Judgment Not Paid. — In an action by an assignee of a promissory note against a remote assignor, it is unnecessary to aver that the note is unpaid, where it is averred that a judgment has been recovered against the maker and that the defendant has not paid it. *Clifford v. Keating*, 4 Ill. 250.

Execution Denied. — In *Wilkins v. Moore*, 20 Kan. 538, it was held that where the defendant denied the execu-

tion of the note sued on, such answer excused the failure of the plaintiff to allege nonpayment.

Payable at Defendant's Dwelling. — In *Brooks v. Page*, 1 D. Chip. (Vt.) 340, in an action on a note payable in specific articles at the defendant's dwelling-house, an allegation that the defendant had not performed, though often requested, was held insufficient; the plaintiff should have averred that he was at the defendant's dwelling-house at the time payment was due, ready to receive payment. In this case, however, the instrument was payable in horses, to be appraised by three men, and in *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, it was said, in commenting on this case, that the fact that appraisers were to be appointed was a material element in the case.

Renewal Note. — In an action on a promissory note, where the defendant pleaded a delivery by him of another note in renewal of the note sued on, and that the latter note was outstanding and constituted a claim against him, it was held that the plaintiff should be allowed to serve a supplemental complaint, alleging that the note pleaded in the answer was not paid, and was in his possession and would be tendered back on the trial. *Cohn v. Husson*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 324, 67 How. Pr. (N. Y.) 461.

Several Counts. — Where the plaintiff inserts several distinct counts in his declaration, each of which is based upon a different instrument, and then postpones an allegation of breach until he concludes his last count, he must negative the payment of the several sums therein demanded. *Green v. Thornton*, 7 Ark. 385. Compare *Baldwin v. Banks*, 20 Ill. 51.

"Did Not" Equivalent to "Has Not." — The allegation that "the defendant did not pay the same" is the equivalent of a statement that the defendant has not paid the same, and is sufficient. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

Objection Raised by Demurrer. — If the plaintiff, in an action on a note, fails to allege nonpayment, an objection for this defect may be taken on demurrer. *Villiers v. Lewis*, 1 Handy (Ohio) 38.

Information and Belief. — It was held

instrument, is such an essential allegation that it is not dispensed with by the plaintiff's averring that such instrument is due.¹

Nonpayment of Interest. — The nonpayment of the interest, as well as the principal, of an instrument sued on, should be alleged.²

(2) *Sufficient Allegations of Nonpayment* — (a) *Inferential Allegation.* — The necessary allegations as to the nonpayment of the instrument sued on may be made in words which show the breach by inference.³

(b) *Instrument Payable in Property.* — Where the instrument sued on is payable in property or in money, it need not be alleged in declaring thereon that it has not been paid in property. An allegation of nonpayment is sufficient.⁴

in *Stanton v. Quinan*, 91 Cal. 1, that in an action by the assignee of a note, alleging nonpayment on information and belief, a general demurrer for uncertainty was improper.

Motion in Arrest. — In *Howorth v. Scarce*, 29 Ind. 278, it was held that a motion in arrest of judgment would not be sustained because of the failure of the complaint, in an action on a note, to aver nonpayment, where the defendant had failed to demur for such defect.

Judgment by Default. — A petition failing to allege the nonpayment of the instrument sued on will not support a judgment by default. *Smith v. Carley*, 8 Ind. 451; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 95.

Not Cured by Verdict. — In *Rushton v. Aspinall*, 2 Doug. 679, it was held that a failure to allege nonpayment was not cured by verdict.

Effect of Proof of Nonpayment. — A complaint on a note must allege nonpayment, but the absence of the averment will be supplied by unchallenged proof of the fact. *Wright v. Deering*, 2 Misc. Rep. (N. Y. C. Pl.) 296. Compare *Lawson v. Sherra*, 21 Ind. 363, where it was held that the proof of nonpayment need not conform strictly to the allegation.

1. *California.* — *Frisch v. Caler*, 21 Cal. 71; *Roberts v. Treadwell*, 50 Cal. 521.

Indiana. — *Stafford v. Davidson*, 47 Ind. 319. *Contra*, *Downey v. Whittenberger*, 60 Ind. 188.

Kentucky. — *Brown v. Brown*, 11 Ky. L. Rep. 579.

Montana. — *Hershfield v. Aiken*, 3 Mont. 442.

Contra. — *Howard v. Richards*, 2 Nev. 128.

An allegation in a petition that the

note sued on "fell due" at a certain time was but the conclusion of the pleader, and not sufficient to show a breach of the contract. *Brown v. Brown*, 11 Ky. L. Rep. 579.

2. *Clary v. Morehouse*, 3 Ark. 261; *Sumner v. Ford*, 3 Ark. 389; *Pitcher v. Morrison*, 4 Ark. 74; *Dickinson v. Tunstall*, 4 Ark. 170; *Jones v. Frost*, 28 Cal. 245; *Notman v. Green*, 90 Cal. 172.

Effect of Omission. — If, in declaring on a negotiable instrument payable with interest, the plaintiff fails to allege the nonpayment of interest, no judgment can legally be given for such interest. *Sumner v. Ford*, 3 Ark. 389; *Dickinson v. Tunstall*, 4 Ark. 170.

3. *Deutsch v. Korsmeier*, 59 Ind. 373; *Friddle v. Crane*, 68 Ind. 583; *Smythe v. Scott*, 106 Ind. 245; *Cummings v. Citizens' Bldg., etc., Assoc.*, 142 Ind. 600.

"Is Indebted." — In an action on a promissory note an averment in the complaint that "the defendant is indebted to the plaintiff by his promissory note," etc., is equivalent to an averment that such note is due and unpaid. *Deutsch v. Korsmeier*, 59 Ind. 373.

"Cause of Action Accrued." — In *Smythe v. Scott*, 106 Ind. 245, it was held that the statement "wherefore a cause of action hath accrued" was insufficient to take the place of an allegation of nonpayment, and could not by inference imply the breach of the note sued on. Compare *Wheeler, etc., Mfg. Co. v. Worrall*, 80 Ind. 297.

4. *Illinois.* — *Evans v. Landon*, 3 Ill. 53.

New York. — *Rockwell v. Rockwell*, 4 Hill (N. Y.) 164.

Oregon. — *Sperry v. Lewis*, 19 Oregon 250.

(c) **Refusal at Particular Place.** — In an action on an instrument payable at a particular place, a refusal of payment at that place need not be alleged.¹

(d) **Nonpayment to Plaintiff's Transferrer.** — Where an instrument is sued on by a person to whom it has been transferred, such holder need not allege, in declaring on the instrument, that it has not been paid to his transferrer.²

(e) **Negating Payment by Persons Not Parties.** — In suing on a negotiable instrument, it is not necessary to allege that the instrument has not been paid by a stranger to it.³ So, nonpayment by a

Texas. — *Stroop v. McKenzie*, 38 Tex. 132; *Hardin v. Titus*, Dall. (Tex.) 622.

Compare Douthitt v. Mohr, 116 Ind. 482; *Dugan v. Campbell*, 1 Ohio 115.

Petition and Summons. — In *Evans v. Landon*, 3 Ill. 53, it was held that in an action by petition and summons on a note payable "in good bank paper," an averment that "the debt remains unpaid" was sufficient without an allegation that it had not been paid in bank bills.

Value of Property. — Where a note is payable in property, in order that the plaintiff may obtain a judgment for money, he must allege and prove a failure to pay, and also the value of the property. *Stroop v. McKenzie*, 38 Tex. 132.

Agreement to Deliver Wool Clip. — In *Sperry v. Lewis*, 19 Oregon 250, it was held in an action on a note, to which was attached an agreement by the defendant to deliver to the plaintiff his wool clip, to be sold by the plaintiff, and the proceeds applied to the payment of the note, an allegation of nonpayment of the note was sufficient, without alleging that the defendant had failed to deliver the wool as agreed in the contract.

1. *Grant v. Groshon*, Hard. (Ky.) 91; *Covington v. Comstock*, 14 Pet. (U. S.) 43; *Butterworth v. Le Despencer*, 3 M. & S. 150.

2. *Arkansas.* — *Marshall v. Hawkins*, 13 Ark. 326.

Illinois. — *Robertson v. Hamet*, 19 Ill. 161.

Indiana. — *Evans v. Secrest*, 3 Ind. 545; *Lowe v. Needham*, 5 Ind. 140.

Kentucky. — *Neal v. Durrett*, 7 J. J. Marsh. (Ky.) 101. *Compare Keeton v. Scantland*, Hard. (Ky.) 156.

Massachusetts. — *Knowles v. Byrnes*, 5 Met. (Mass.) 115.

Mississippi. — *Haynes v. Covington*, 9 Smed. & M. (Miss.) 470.

Contra. — *Norvell v. Hudgins*, 4 Munf. (Va.) 496.

Reason for Rule. — In *Robertson v. Hamet*, 19 Ill. 161, it was said: "Nor was it necessary to specially allege nonpayment to the respective holders of the note, prior to the plaintiff, for the general breach, or allegation of nonpayment of the note, at the conclusion of the declaration, extends to the entire cause of action alleged, and negates payment to all and every person to whom it could lawfully be made."

Nonpayment Before Assignment. — In an action by the assignee of a note it is not necessary to allege nonpayment to the assignee where it is alleged that the note was unpaid at the time of the assignment and that the maker had notice of the assignment. *Neal v. Durrett*, 7 J. J. Marsh. (Ky.) 101.

Surviving Partner. — It was held in *Knowles v. Byrnes*, 5 Met. (Mass.) 115, that in an action by a surviving partner on a note indorsed to a firm it need not be alleged that the instrument had not been paid to the firm before its dissolution, but in this case it was held that no allegation of nonpayment was necessary.

Payment to Husband of Payee. — In *Evans v. Secrest*, 3 Ind. 545, it was held that on a note made to a woman, who had subsequently married, and where the note had been assigned by the husband and wife, a declaration, in an action against the maker, alleging the nonpayment of the note in general terms, was sufficient, although it was not specifically alleged that the note had not been paid to the payee or her husband.

3. *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625; *Giles v. Bourne*, 6 M. & S. 73. *Contra*, *Scroufe v. Clay*, 71 Cal. 123. *Compare Stix v. Mathews*, 63 Mo. 371; *Giles v. Boune*, 2 Chit. Rep. 300, 18 E. C. L. 342.

joint maker who is not sued need not be alleged.¹ The same is held of indorsers who are not joined as defendants.² And in an action against the guarantor of an instrument, nonpayment by the maker need not be alleged.³

d. PROTEST — Necessity of Alleging. — In an action against the drawer of a bill of exchange it should be alleged that the bill sued on has been protested,⁴ and the same is true in an action against the indorser of a bill of exchange or promissory note,⁵ but such allegations are unnecessary in an action against the acceptor of a bill of exchange,⁶ or the maker of a note.⁷

Protest for Nonacceptance. — In an action for the nonpayment of a

1. Perkins v. Conley, 4 Blackf. (Ind.) 187; Newkirk v. Johnson, 5 Blackf. (Ind.) 362; Silver v. Henderson, 3 McLean (U. S.) 165.

Action Against Survivor. — Where an action is brought against two, as the survivors of one who executed a joint note, it is not essential to allege in stating the breach that the note had not been paid by the deceased maker. Silver v. Henderson, 3 McLean (U. S.) 165.

Nor is it necessary to negative payment by the representatives of the deceased maker. Newkirk v. Johnson, 5 Blackf. (Ind.) 362. But see Brown v. Orr, 29 Cal. 120, where it was held that the complaint in an action commenced after the death of the husband, on a note executed by the husband and wife, did not constitute a cause of action unless it averred that the husband in his lifetime had failed to pay such note.

2. Page v. Snow, 18 Mo. 126. In this case the action was against the maker and some of the indorsers.

3. Peddicord v. Whittam, 9 Iowa 471; Crocker v. Gilbert, 9 Cush. (Mass.) 131, where it was held that an insufficient averment of nonpayment in such case was cured by verdict.

4. Wards v. Sparks, 53 Ark. 519; Davies v. Byrne, 10 Ga. 329; Hart v. Otis, 41 Ill. App. 431; Baker v. Gallagher, 1 Wash. (U. S.) 461. Compare Mason v. Franklin, 3 Johns. (N. Y.) 202; Bach v. Bell, 7 Wis. 433. And see Citizens' Bank v. Millett, (Ky. 1898) 44 S. W. Rep. 366, where the words "No protest" were written across the face of the bill. An allegation of waiver of protest was held unnecessary.

"Protest" Includes All Necessary Steps. — When a complaint alleges that the bill was protested for nonpayment, it

will be assumed that all steps necessary to fix the drawer's liability were taken. Wards v. Sparks, 53 Ark. 519.

5. Green v. Thornton, 7 Ark. 385; Turner v. Comstock, 7 N. Y. Leg. Obs. 23, 1 Code Rep. (N. Y. C. Pl.) 102; Tousley v. Schwind, 1 Cleve. L. Rep. (Ohio) 148, 4 Ohio Dec. (Reprint) 235; Fisher v. Phelps, 21 Tex. 551; Williams v. Planters', etc., Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 617; Huntington Bank v. Hysell, 22 W. Va. 142.

England. — Salomans v. Staveley, 3 Doug. 298, 26 E. C. L. 117.

6. Garden City Nat. Bank v. Fidler, 155 Pa. St. 210. Compare Woodbury v. Sackrider, 2 Abb. Pr. (N. Y. Supreme Ct.) 402.

7. Evans v. Gordon, 8 Port. (Ala.) 142; Hardy v. White, 60 Ga. 454; Nashville v. First Nat. Bank, 1 Baxt. (Tenn.) 402; Brown v. Barry, 3 Dall. (U. S.) 365.

Proof Unnecessary. — As protest is not necessary to enable a plaintiff to maintain an action on a promissory note against the maker thereof, if in declaring on such note an allegation of protest is made, it need not be proved. Evans v. Gordon, 8 Port. (Ala.) 142.

To Recover Damages. — "A protest is not the necessary consequence of the nonpayment of a note, and therefore the allegation that the note was not paid when due, although payment was demanded, does not contain within itself, as a consequence, the allegation that the note was protested, for the law will not intend that such was the fact." It was therefore held that such an allegation did not entitle the plaintiff to produce evidence as to the protest fees. Rose v. Perry, 8 Yerg. (Tenn.) 156. But see Jordan v. Bell, 8 Port. (Ala.) 53.

bill of exchange, it is not necessary to allege a protest for non-acceptance.¹

How Objection Raised. — The failure to allege protest seems to be a defect of form which cannot be reached by general demurrer.²

"Duly Protested." — When an allegation of protest is necessary, an allegation that the instrument sued on was duly protested is sufficient.³

Time of Protest. — A mistake in alleging the time of protest is not fatal, at least when the allegation is made under a *scilicet*,⁴ and where protest is made on the second day of grace, because the third day is Sunday, it need not be alleged that such third day of grace was Sunday.⁵

Pleading Matter Excusing Protest. — At common law, matter excusing protest may be shown under an allegation that the bill sued on was protested,⁶ but the rule is otherwise under the codes of several states.⁷ Direct allegations of facts which excuse protest will take the place of allegations of protest.⁸

e. NOTICE OF NONACCEPTANCE. — In an action against a drawer for the nonacceptance of a bill of exchange or check, it is necessary to allege notice of such nonacceptance,⁹ and such allegation is also necessary in an action against an indorser.¹⁰

1. *Cox v. Sims*, 1 Cranch (C. C.) 238; *Nicholson v. Patton*, 2 Cranch (C. C.) 164, in which case it was held that if such an allegation was made it need not be proved. Compare *Wilson v. Lenox*, 1 Cranch (U. S.) 194.

2. *Hart v. Otis*, 41 Ill. App. 431; *Salomons v. Stavelly*, 3 Doug. 298, 26 E. C. L. 117.

3. *Adams v. Sherrill*, 14 How. Pr. (N. Y. Supreme Ct.) 297; *Frankfort Bank v. Countryman*, 11 Wis. 398.

4. *Crawford v. Camfield*, 6 Ala. 153.

5. *Mechanics', etc., Bank v. Gibson*, 7 Wend. (N. Y.) 460.

6. *Shirley v. Fellows*, 9 Port. (Ala.) 300; *Pier v. Heinrichoffen*, 52 Mo. 333; *Greenway v. Hindley*, 4 Campb. 52.

7. *Lumbert v. Palmer*, 29 Iowa 108; *Pier v. Heinrichoffen*, 52 Mo. 333; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665; *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252; *Cole v. Wintercost*, 12 Tex. 118.

8. *Davies v. Byrne*, 10 Ga. 329; *Baker v. Gallagher*, 1 Wash. (U. S.) 461.

9. *Gindrat v. Mechanics' Bank*, 7 Ala. 324; *Spangler v. McDaniel*, 3 Ind. 275; *Ribble v. Jefferson*, 10 N. J. L. 139; *Boot v. Franklin*, 3 Johns. (N. Y.) 207; *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

General Averment of Notice. — In *Boot*

v. Franklin, 3 Johns. (N. Y.) 207, it was said: "Upon the argument the declaration was objected to as bad, in matter of substance, for the want of a distinct averment that the defendant had notice of the nonacceptance. The answer to this objection is that the general averment of notice of all the antecedent premises was sufficient, and is conformable to approved precedents. The reasonableness of the notice, either of the nonacceptance or nonpayment, is a question that cannot arise upon the pleadings. It depends upon the testimony to be disclosed at the trial."

Withdrawal of Funds. — In *Spangler v. McDaniel*, 3 Ind. 275, it was held that an allegation that the drawer had withdrawn all his funds from the hands of the drawee was sufficient to dispense with an allegation of notice of non-acceptance.

Special Custom. — Where the custom of a particular bank to give notice through the post-office of the dishonor of bills held by the bank to parties residing in the same place is relied upon in a suit against such parties, the special custom need not be averred in the declaration. *Gindrat v. Mechanics' Bank*, 7 Ala. 324.

10. *Cullum v. Casey*, 9 Port. (Ala.) 131; *Hill v. Planters' Bank*, 3 Humph. (Tenn.) 670.

f. NOTICE OF DEMAND, NONPAYMENT, AND PROTEST —
(1) *Notice of Dishonor Generally* — (a) *Necessity of Alleging* — *In Action Against Drawer*. — In an action against the drawer of a bill of exchange, it is necessary to allege notice to the defendant of the dishonor of such instrument.¹

In Action Against Indorser. — In an action against the indorser it is also necessary to allege that such indorser had notice of the dishonor of the instrument.² Where there is a failure to make such an allegation the complaint is demurrable,³ and it will not support a judgment by default,⁴ nor is such defect cured by verdict.⁵

Diligence. — It is not sufficient for the holder of a negotiable instrument in an action against an indorser, to allege that he has used due diligence,⁶ but the facts constituting such diligence must

1. *Davies v. Byrne*, 10 Ga. 329; *Frisbee v. Jacobs*, 1 N. Y. City Ct. 235; *Forrest v. Rawlings*, 35 Tex. 626; *Dolph v. Rice*, 18 Wis. 397. *Contra*, *Yale v. Ward*, 30 Tex. 18 (by statute); *Spink, etc., Drug Co. v. Ryan Drug Co.*, (Minn. 1898) 75 N. W. Rep. 18, in an action against the drawer of a check.

2. *Alabama*. — *Mims v. Central Bank*, 2 Ala. 294; *Kennon v. M'Rae*, 3 Stew. & P. (Ala.) 249. *Contra*, by statute, *McDougald v. Rutherford*, 30 Ala. 253.

District of Columbia. — *Bond v. Shepherd*, 3 MacArthur (D. C.) 367.

Illinois. — *Tobey v. Berly*, 26 Ill. 429.

Indiana. — *Hartwell v. Candler*, 5 Blackf. (Ind.) 215; *Goodlet v. Britton*, 6 Blackf. (Ind.) 500.

Missouri. — *Jaccard v. Anderson*, 32 Mo. 188; *State Bank v. Haden*, 35 Mo. 358; *Deitz v. Corwin*, 35 Mo. 376; *Faulkner v. Faulkner*, 73 Mo. 327; *Mechanics' Sav. Inst. v. Finn*, 1 Mo. App. 36.

New Jersey. — *Disborough v. Van-ness*, 8 N. J. L. 231.

New York. — *Marshall v. Rockwood*, 12 How. Pr. (N. Y. Supreme Ct.) 452; *Adams v. Sherrill*, 14 How. Pr. (N. Y. Supreme Ct.) 297; *Conkling v. Gandall*, 1 Keyes (N. Y.) 228, 1 Abb. App. Dec. (N. Y.) 423; *Alder v. Bloomingdale*, 1 Duer (N. Y.) 601.

Ohio. — *Tousley v. Schwind*, 1 Cleve. L. Rep. (Ohio) 148, 4 Ohio Dec. (Reprint) 235.

Pennsylvania. — *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241; *Peale v. Addicks*, 174 Pa. St. 546; *Dilworth v. Hurst*, 1 Phila. (Pa.) 222, 8 Leg. Int. (Pa.) 127.

Texas. — *Fisher v. Phelps*, 21 Tex. 551; *Williams v. Planters', etc., Nat.*

Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 617.

West Virginia. — *Huntington Bank v. Hysell*, 22 W. Va. 142.

Wisconsin. — *Catlin v. Jones*, 1 Pin. (Wis.) 130.

England. — *Carter v. Flower*, 16 M. & W. 743.

Action Against Maker and Indorser. — Where the maker and indorser of a promissory note are joined as defendants, the count against the indorser must aver notice of dishonor to him. *Goodlet v. Britton*, 6 Blackf. (Ind.) 500; *Tousley v. Schwind*, 1 Cleve. L. Rep. (Ohio) 148, 4 Ohio Dec. (Reprint) 235.

Pleading by Copy. — Under a statute permitting an action on a promissory note by the filing of a complaint setting out a copy of the note, and alleging that a certain sum is due, in an action against an indorser on such a note it is necessary to allege that he received notice of dishonor. *Marshall v. Rockwood*, 12 How. Pr. (N. Y. Supreme Ct.) 452; *Conkling v. Gandall*, 1 Abb. App. Dec. (N. Y.) 423, 1 Keyes (N. Y.) 228.

Irregular Indorser. — Where, in an action against an irregular indorser, the petition shows that he is not liable as a maker but as an indorser, it must contain an allegation of notice of dishonor. *State Bank v. Haden*, 35 Mo. 358.

3. *Ford v. Booker*, 53 Ind. 395.

4. *Bosch v. Kassing*, 64 Iowa 312; *Harlan v. Dew*, 3 Head (Tenn.) 505.

5. *Blacklege v. Benedick*, 12 Ind. 389; *Knott v. Hicks*, 2 Humph. (Tenn.) 162; *Baxter v. Erwin*, 1 Shannon's Tenn. Cas. 113; *Rushton v. Aspinall*, 2 Doug. 679.

6. *Wakefield v. Georgetown First*

be stated,¹ or else there must be allegations of facts excusing the plaintiff's lack of diligence.² A complaint is insufficient which shows on its face that the plaintiff has not been diligent.³

In Action Against Acceptor. — In an action against an acceptor of a bill of exchange, it is not necessary to allege notice of dishonor.⁴

In Action Against Maker. — In an action against the maker of a promissory note, it is not necessary to allege notice of dishonor.⁵

In Action Against Guarantor. — In an action against a guarantor of a promissory note, it is not necessary to allege notice of dishonor.⁶

(b) **"Due" Notice of Dishonor.** — Where it is necessary to allege notice of dishonor, an averment that "due" notice was given is sufficient.⁷

(c) **Time of Notice of Dishonor.** — The time at which notice of dishonor was given need not be alleged, although an allegation of such notice is necessary.⁸

(d) **Pleading Matter Excusing Notice of Dishonor.** — Where an allegation of notice of dishonor is necessary in an action on a negotiable instrument, the plaintiff in such action may allege facts excusing such notice.⁹ Where notice of dishonor is waived in the instru-

Nat. Bank, (Ky. 1897) 40 S. W. Rep. 921; *Disborough v. Vanness*, 8 N. J. L. 231. Compare *Blakely v. Grant*, 6 Mass. 386.

1. *Alabama*. — *Nesbit v. Bradford*, 6 Ala. 746; *Alday v. Jamison*, 3 Port. (Ala.) 112.

Connecticut. — *Hall v. Crandall*, Kirby (Conn.) 402.

Illinois. — *Sherman v. Smith*, 20 Ill. 351.

Indiana. — *Frybarger v. Cockefair*, 17 Ind. 405; *Mitchell v. St. Mary*, 148 Ind. 111; *Clark v. Trueblood*, 16 Ind. App. 100.

Missouri. — *Collins v. Warburton*, 3 Mo. 202.

New Jersey. — *Disborough v. Vanness*, 8 N. J. L. 231.

2. *Frybarger v. Cockefair*, 17 Ind. 405; *Clark v. Trueblood*, 16 Ind. App. 100.

3. *Kennedy v. Williams*, 11 Minn. 314.

4. *Garden City Nat. Bank v. Fitler*, 155 Pa. St. 210. In this case the action was against the drawer of a bill, who was also the drawee and acceptor.

5. *Belcher v. Palmer*, 35 Neb. 449; *Hardy v. White*, 60 Ga. 454, in which case the action was against an irregular indorser liable as maker.

6. *Peddicord v. Whittam*, 9 Iowa 471; *Thrasher v. Ely*, 2 Smed. & M. (Miss.) 139, where it was held that if such an allegation was made it was surplusage, and need not be proved.

7. *California*. — *Young v. Miller*, 63 Cal. 302; *Fisk v. Miller*, 63 Cal. 367.

District of Columbia. — *Young v. Warner*, 6 App. Cas. (D. C.) 433.

New York. — *Adams v. Sherrill*, 14 How. Pr. (N. Y. Supreme Ct.) 297; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402, *limited* in *Cook v. Warren*, 88 N. Y. 37; *Spencer v. Rogers Locomotive Works*, 17 Abb. Pr. (N. Y. Super. Ct.) 110.

Utah. — *Smith v. McEvoy*, 8 Utah 58.

Wisconsin. — *Frankfort Bank v. Countryman*, 11 Wis. 398.

United States. — *Dwight v. Wing*, 2 McLean (U. S.) 580.

8. *Crawford v. Camfield*, 6 Ala. 153; *Holleville v. Patrick*, 14 Ark. 208.

Special Demurrer and Arrest of Judgment. — It was held in *Dayton v. Williams*, 2 Dougl. (Mich.) 31, that where the averments in a declaration on a guaranty of notice to defendant of non-performance by his principal omits to state when and where the notice was given, it was no ground for arresting judgment, but only for special demurrer.

9. *Alabama*. — *Cockrill v. Hobson*, 16 Ala. 393; *McDougald v. Rutherford*, 30 Ala. 253.

Georgia. — *Davies v. Byrne*, 10 Ga. 323.

Iowa. — *Peck v. Schick*, 50 Iowa 281.

Kentucky. — *Frazier v. Harvie*, 2 Litt. (Ky.) 180.

ment sued on, no allegation as to notice is necessary.¹ It is held by what seems to be the weight of authority that matter excusing notice of dishonor may be shown under an allegation that such notice was given.²

(2) *Notice of Presentment and Demand* — *Necessity of Alleging* — In accordance with the general rule previously stated that notice of dishonor must be pleaded,³ in an action against the drawer of a bill of exchange, it is necessary to allege that he was given notice of the presentment of such bill and of a demand for payment.⁴ Such an allegation is also necessary in an action against the indorser of an instrument.⁵

Missouri. — Jaccard *v.* Anderson, 32 Mo. 188.

New York. — Conkling *v.* Gandall, 1 Keyes (N. Y.) 228; Frisbee *v.* Jacobs, 1 N. Y. City Ct. 235.

Tennessee. — Harlan *v.* Dew, 3 Head (Tenn.) 505; Baxter *v.* Erwin, 1 Shannon's Tenn. Cas. 113.

Washington. — Loveday *v.* Anderson, 18 Wash. 322.

Wisconsin. — Dolph *v.* Rice, 18 Wis. 397.

England. — Carter *v.* Flower, 16 M. & W. 743.

1. Henderson *v.* Acklemire, 59 Ind. 540.

2. *Alabama.* — Kennon *v.* McRea, 7 Port. (Ala.) 175. *Compare* Mims *v.* Central Bank, 2 Ala. 294.

Connecticut. — Norton *v.* Lewis, 2 Conn. 478; Windham Bank *v.* Norton, 22 Conn. 213.

Illinois. — Tobey *v.* Berly, 26 Ill. 429.

Massachusetts. — Jones *v.* Fales, 4 Mass. 245; Harrison *v.* Bailey, 99 Mass. 620; Armstrong *v.* Chadwick, 127 Mass. 156; Kent *v.* Warner, 12 Allen (Mass.) 561; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; North Bank *v.* Abbot, 13 Pick. (Mass.) 465.

Mississippi. — Moore *v.* Ayres, 5 Smed. & M. (Miss.) 310.

New York. — Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379; Clark *v.* Tryon, 4 Misc. Rep. (N. Y. C. Pl.) 63, *reversing* 2 Misc. Rep. (N. Y. City Ct.) 457. *Compare* Shultz *v.* Depuy, 3 Abb. Pr. (N. Y. Super. Ct.) 252; Garvey *v.* Fowler, 4 Sandf. (N. Y.) 665.

South Carolina. — Hubble *v.* Fogartie, 3 Rich. L. (S. Car.) 413.

Tennessee. — People's Nat. Bank *v.* Dibrell, 91 Tenn. 301; Selby *v.* Brinkley, Jackson (Tenn.) 1875.

England. — Greenway *v.* Hindley, 4

Campb. 52; Firth *v.* Thrush, 8 B. & C. 387, 15 E. C. L. 242. *Compare* Allen *v.* Edmundson, 2 Exch. 719; Burgh *v.* Legge, 5 M. & W. 418.

Contra. — Frazier *v.* Harvie, 2 Litt. (Ky.) 180; Hill *v.* Varrell, 3 Me. 233; Cole *v.* Wintercost, 12 Tex. 118; Dolph *v.* Rice, 18 Wis. 397; Closz *v.* Miracle, 103 Iowa 198; Lumbert *v.* Palmer, 29 Iowa 108; Burlington First Nat. Bank *v.* Hatch, 78 Mo. 13.

3. See *supra*, (1) *Notice of Dishonor Generally.*

4. Jaffray *v.* Krauss, 79 Hun (N. Y.) 449; Requa *v.* Guggenheim, 3 Lans. (N. Y.) 53; Judd *v.* Smith, 5 Thomp. & C. (N. Y.) 255, 3 Hun (N. Y.) 190; Goodwin *v.* Cobe, 24 Misc. Rep. (N. Y. City Ct.) 389, an action against the drawer of a check.

Action Against Drawer and Indorser. — In Judd *v.* Smith, 5 Thomp. & C. (N. Y.) 255, 3 Hun (N. Y.) 190, it was held in an action against the drawer and indorser of a check that a complaint which alleged notice of demand to the indorser, but not to the drawer, was insufficient as to the drawer.

5. Grace *v.* McDaniel, 13 Ark. 394; Mechanics' Sav. Inst. *v.* Finn, 1 Mo. App. 36; Spellman *v.* Weider, 5 How. Pr. (N. Y. Supreme Ct.) 5; Pahquioque Bank *v.* Martin, 11 Abb. Pr. (N. Y. Supreme Ct.) 291; Baldwin *v.* Doying, 5 Civ. Pro. Rep. (N. Y. City Ct.) 300, *disapproving* Price *v.* McClave, 6 Duer (N. Y.) 547; Bonar *v.* Mitchell, 5 Exch. 415, 19 L. J. Exch. 302.

Allegation of Protest Sufficient. — In an action on a promissory note against an indorser, where the complaint alleged due presentation and demand for payment, refusal to pay, and due protest, and notice to the indorser of nonpayment and protest, but did not allege notice to him of presentation and demand, it was held that the allegation

"Due Notice" of Presentment and Demand. — An allegation that due notice of presentation and demand was given is sufficient.¹

Pleading Matter of Excusing Notice of Presentment and Demand. — It has been held that matter excusing notice of presentment cannot be shown under an allegation that due notice was given.²

(3) *Notice of Nonpayment — Necessity of Alleging.* — Under the rule requiring notice of dishonor to be pleaded,³ it is necessary to allege that such defendant had notice of the nonpayment of the instrument in an action against the drawer of a bill of exchange or check,⁴ or against the indorser of a negotiable instrument.⁵

as to notice was sufficient to charge him, since it must be presumed that the notary public properly performed his duty in making the protest. *Baldwin v. Doying*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 300, *disapproving* *Price v. McClave*, 6 Duer (N. Y.) 547. And see *Cook v. Warren*, 88 N. Y. 37.

1. *Brown v. Hall*, 2 A. K. Marsh. (Ky.) 600. Compare *Graham v. Machado*, 6 Duer (N. Y.) 514.

Singular for Plural. — A complaint in an action against several defendants is not fatally defective because it alleges that notice of presentment was given to "defendant," the use of the singular instead of the plural number being merely a clerical error. *German Exch. Bank v. Kroder*, 13 Misc. Rep. (N. Y. C. Pl.) 192, *following* *Chamberlin v. Kaylor*, 2 E. D. Smith (N. Y.) 134.

2. *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665. But see *supra*, 10. a. (3) *Pleading Matter Excusing Presentment and Demand*; 10. d. *Pleading Matter Excusing Protest*; 10. f. (1) (d) *Pleading Matter Excusing Notice of Dishonor*; *infra*, 10. f. (3) *Pleading Matter Excusing Notice of Nonpayment*; 10. f. (4) *Pleading Matter Excusing Notice of Protest*.

3. See *supra*, (1) *Notice of Dishonor Generally*.

4. *Indiana*. — *Griffin v. Kemp*, 46 Ind. 177; *Pollard v. Bowen*, 57 Ind. 232.

New Jersey. — *Ribble v. Jefferson*, 10 N. J. L. 139.

New York. — *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252; *Hirschfelder v. Locey Min., etc., Co.*, (City Ct.) 42 N. Y. St. Rep. 108; *Requa v. Guggenheim*, 3 Lans. (N. Y.) 51; *Judd v. Smith*, 5 Thomp. & C. (N. Y.) 255; 3 Hun (N. Y.) 190; *Goodwin v. Cobe*, 24 Misc. Rep. (N. Y. City Ct.) 389.

Pennsylvania. — *Weigley v. Weir*, 7 S. & R. (Pa.) 309.

South Carolina. — *Treadway v. Nicks*, 3 McCord L. (S. Car.) 195.

Compare *Work v. Tatman*, 2 Houst. (Del.) 304.

Refusal of Payment by Drawer. — An allegation that presentment of a draft to both acceptor and drawer, and refusal by both, was held in *Hirschfelder v. Locey Min., etc., Co.*, (City Ct.) 42 N. Y. St. Rep. 108, a sufficient allegation of notice to the drawer of nonpayment.

Not Cured by Verdict. — In *Weigley v. Weir*, 7 S. & R. (Pa.) 309, it was said that, in an action against the drawer of a bill of exchange, "the omission of the averment of notice of nonpayment by the acceptor is fatal, even after verdict."

5. *Alabama*. — *Gindrat v. Mechanics' Bank*, 7 Ala. 324.

Arkansas. — *Green v. Thornton*, 7 Ark. 385; *Jones v. Robinson*, 8 Ark. 484; *Grace v. McDaniel*, 13 Ark. 394; *White v. Cannada*, 25 Ark. 41; *Rogers v. James*, 33 Ark. 77.

Kansas. — *Malott v. Jewett*, 1 Kan. App. 14.

Michigan. — *Barber v. Taylor*, 1 Mich. 352.

New Jersey. — *Halsey v. Salmon*, 3 N. J. L. 475.

New York. — *Jaffray v. Krauss*, 79 Hun (N. Y.) 449; *Pahquioque Bank v. Martin*, 11 Abb. Pr. (N. Y. Supreme Ct.) 291; *Spellman v. Weider*, 5 How. Pr. (N. Y. Supreme Ct.) 5.

Pennsylvania. — *Cooke v. Addicks*, 5 Pa. Dist. Rep. 388; *Peale v. Addicks*, 174 Pa. St. 543, 38 W. N. C. (Pa.) 101.

Tennessee. — *Tumley v. Clarksville, etc., R. Co.*, 2 Coldw. (Tenn.) 327.

England. — *Bonar v. Mitchell*, 5 Exch. 415, 19 L. J. Exch. 302.

Contra. — *Williams v. Irwin*, 3 Dev. & B. L. (N. Car.) 74; *Dismukes v. Wright*, 3 Dev. & B. L. (N. Car.) 78.

Allegation of Protest Insufficient. — An allegation that the instrument sued on was protested is not sufficient as an averment that notice of nonpayment

But no such allegation is necessary in an action against the acceptor of a bill of exchange,¹ or a guarantor.²

Due Notice. — Where an allegation of notice of payment is necessary, it is sufficient to state that due notice was given.³

Time of Notice. — Where allegations of notice of nonpayment are necessary the time of giving such notice need not be alleged.⁴

Pleading Matter Excusing Notice of Non-payment. — Where a complaint alleges matter of excuse for not giving notice of non-payment, such allegations will take the place of averments of notice of non-payment in an action where such averments are necessary,⁵ or the plaintiff may allege the giving of notice of nonpayment, and prove facts excusing such notice, without causing a material variance.⁶

was given to an indorser. *Peale v. Addicks*, 174 Pa. St. 543, 38 W. N. C. (Pa.) 101. *Compare Bonar v. Mitchell*, 5 Exch. 415, 19 L. J. Exch. 302, in which case an allegation that the instrument was duly presented for payment, and that it was protested for nonpayment, whereof the defendant had notice, was held sufficient on a motion in arrest of judgment, on the ground that the word "whereof" was not confined to the averment of protest only.

Waiver in Note. — Where a note sued on waives notice of nonpayment, protest, etc., a complaint thereon need not aver such notice in an action against an indorser. *Burroughs v. Wilson*, 59 Ind. 536.

Demurrer. — Where the petition fails to make such an allegation, it is demurrable. *Alder v. Bloomingdale*, 1 Duer (N. Y.) 601.

Alder by Verdict. — A failure to make such allegation is not cured by verdict. *Anderson v. Yell*, 15 Ark. 9; *Rushton v. Aspinall*, 2 Doug. 679.

1. *Smith v. Paul*, 8 Port. (Ala.) 503; *State Bank v. Young*, 35 Mo. 371.

Action Against Acceptor and Administrator of Drawer. — Where the acceptor of a bill of exchange and the administrator of the drawer are joined as defendants in an action thereon, a joint demurrer will not lie by the defendants, on the ground that the petition fails to allege notice of nonpayment, as such allegation is unnecessary as to the acceptor. *State Bank v. Young*, 35 Mo. 371.

When Drawer Is Acceptor. — In an action against the drawer of a bill who was also the acceptor, an averment of notice of nonpayment is not necessary. *Smith v. Paul*, 8 Port. (Ala.) 503.

2. *Henderson v. Booth*, 11 Iowa 212; *Marvin v. Adamson*, 11 Iowa 371. *Compare Crocker v. Gilbert*, 9 Cush. (Mass.) 131, where it was held that if such notice was necessary, an objection for want of it came too late after verdict.

3. *Shaler v. Van Wormer*, 33 Mo. 386; *Hill v. Planters' Bank*, 3 Humph. (Tenn.) 670; *Smith v. McEvoy*, 8 Utah 58; *Davis v. Barron*, 13 Wis. 227; *Howard v. Boorman*, 17 Wis. 459.

4. *Jones v. Robinson*, 8 Ark. 484; *Holleville v. Patrick*, 14 Ark. 208; *Rozelle v. Pennington*, 24 Ark. 277; *Henshaw v. Root*, 60 Ind. 220; *Loose v. Loose*, 36 Pa. St. 538. *Compare Halsey v. Salmon*, 3 N. J. L. 475.

Reason of Rule. — An averment in the plaintiff's statement, that notice of nonpayment was given on a wrong date, is but a defect in form, and the subject of amendment. It is not necessary to aver the precise date when the notice was given, the averment in the statement not being inconsistent with the fact that another notice was given at the proper time. *Loose v. Loose*, 36 Pa. St. 538. And see *Rozelle v. Pennington*, 24 Ark. 277.

5. *Spangler v. McDaniel*, 3 Ind. 275; *Pollard v. Bowen*, 57 Ind. 235; *Griffin v. Kemp*, 46 Ind. 177; *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252; *Requa v. Guggenheim*, 3 Lans. (N. Y.) 51; *Goodwin v. Cabe*, 24 Misc. Rep. (N. Y. City Ct.) 389.

6. *Taylor v. Branch*, 1 Stew. & P. (Ala.) 249; *Goodloe v. Godley*, 13 Smed. & M. (Miss.) 233; *Williams v. Matthews*, 3 Cow. (N. Y.) 252; *Farmers', etc., Bank v. Day*, 13 Vt. 36. *Compare Curtis v. State Bank*, 6 Blackf. (Ind.) 314; *Clift v. Rodger*, 25 Hun

(4) *Notice of Protest — Necessity of Alleging.* — In an action against an indorser of a negotiable instrument, it is necessary to allege that the defendant had notice of the protest of the instrument.¹

Pleading Matter Excusing Notice of Protest. — Where an allegation of notice of protest is otherwise necessary the plaintiff may set up in his petition facts excusing the giving of such notice.²

11. *Diligence under Statutory Provisions — a. SUIT AGAINST MAKER.* — In some states, by statute, it is necessary to institute a suit against the maker of a note before an action can be maintained thereon against an assignor or indorser, this method being substituted in place of the usual method of fixing the liability of an indorser by demand, protest, and notice. And in those states, in declaring against an indorser or assignor, it is necessary to allege that such suit has been prosecuted against the maker,³ or

(N. Y.) 39; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665.

1. *Nollen v. Wisner*, 11 Iowa 192; *Malott v. Jewett*, 1 Kan. App. 14; *Pahquioque Bank v. Martin*, 11 Abb. Pr. (N. Y. Supreme Ct.) 291; *Baldwin v. Doying*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 300; *Cook v. Warren*, 88 N. Y. 37, *limiting*; *Woodbury v. Sackrider*, 2 Abb. Pr. (N. Y. Supreme Ct.) 402; *Slacum v. Pomery*, 6 Cranch (U. S.) 221.

When Judgment Has Been Recovered. — After a judgment has been recovered on a promissory note, it is not necessary, in an action by an indorsee against his immediate indorser to recover the amount paid by him to a succeeding holder, to allege that notice of protest had been given, since the recovery of the judgment raises a presumption that necessary notice had been given to all persons entitled to it. *Hamilton v. Veach*, 19 Iowa 419.

Action Raised by Demurrer. — In *Nollen v. Wisner*, 11 Iowa 192, it was held that where the plaintiff failed to allege notice of protest in an action against an indorser, if the defendant failed to raise the objection by demurrer he waived it.

2. *Malott v. Jewett*, 1 Kan. App. 14; *Harwood v. Jarvis*, 5 Sneed (Tenn.) 375.

Want of Funds. — The fact that the drawer or acceptor of a bill of exchange has no funds, or reasonable expectation thereof, at the place of payment, is no excuse for want of notice of protest for nonpayment; and a declaration with such averment is demurrable. The averment and proof should be that the parties had no funds, or the reasonable expectation

thereof, in the hands of the drawee at the maturity of the bill. *Harwood v. Jarvis*, 5 Sneed (Tenn.) 375.

Partnership of Drawee and Acceptor. — To excuse notice of protest for nonpayment, on the ground of a partnership between the drawer and acceptor of a bill of exchange, the declaration must aver it, and such partnership must be clearly established by proof. *Harwood v. Jarvis*, 5 Sneed (Tenn.) 375.

3. *Alabama.* — *Woodward v. Harbin*, 1 Ala. 104; *Ryland v. Bates*, 4 Ala. 342; *Hammett v. Smith*, 5 Ala. 156; *Howze v. Perkins*, 5 Ala. 286; *Miller v. McIntyre*, 9 Ala. 638; *Langdon v. Williams*, 22 Ala. 681. And see *Clancy v. Hilliard*, 39 Ala. 713.

Arizona. — *Daggs v. Phoenix Nat. Bank*, (Arizona 1898) 53 Pac. Rep. 201, where allegations of diligence were held necessary.

Indiana. — *Markel v. Evans*, 47 Ind. 326; *Hanna v. Pegg*, 1 Blackf. (Ind.) 180.

Michigan. — *Bosman v. Akeley*, 39 Mich. 710.

Missouri. — Under the Missouri statute an action cannot be maintained against an assignor, including a transferor by indorsement of a non-negotiable instrument, without alleging "that the assignee in the delinquent prosecution of a suit against the maker had been unsuccessful in making the debt." *Jaccard v. Anderson*, 32 Mo. 190; *Collins v. Warburton*, 3 Mo. 202; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt*, 35 Mo. 461; *Townsend v. Chas. H. Heer Dry Goods Co.*, 85 Mo. 503; *Hart v. Harrison Wire Co.*, 91 Mo. 414; Mo. Rev.

to state facts excusing the bringing of such suit.¹

Insolvency of Maker. — Where the statutes requiring a suit against the maker in order to charge the indorser, make an exception in case of the insolvency of the maker, it is necessary to allege such insolvency, if the payee intends to rely upon it.² But where the

St. 1889, § 733. See also for modifications of the doctrine as to negotiable instruments, *supra*, 4. b. "For Value Received."

Texas. — *Hutchins v. Flintge*, 2 Tex. 473. But see *Fisher v. Phelps*, 21 Tex. 551.

Action on Guaranty. — A declaration on a guaranty of the collection of a note is demurrable if it does not state that legal proceedings have been taken to enforce collection without effect. *Bosman v. Akeley*, 39 Mich. 710. But see *Peddicord v. Whittam*, 9 Iowa 471, where it was held that such an allegation was not necessary.

Reference to Record Insufficient in Action by Assignee. — In an action by the assignee of a note which the assignee has failed to recover from the obligor, the petition must state the reason why the payment of the note by the obligor could not be enforced by the assignee instead of merely referring to the record and proceedings of the suit in which the obligor had been released from its payment. *Elliot v. Threlkeld*, 16 B. Mon. (Ky.) 343.

Time of Instituting Suit. — It was held in *Hanna v. Pegg*, 1 Blackf. (Ind.) 180, that the time when the suit against the maker was instituted and judgment obtained should be alleged.

1. *Alabama.* — *Woodward v. Harbin*, 1 Ala. 104; *Howze v. Perkins*, 5 Ala. 286; *Langdon v. Williams*, 22 Ala. 681; *Winter v. Cox*, 41 Ala. 207.

Indiana. — *Bernitz v. Stratford*, 22 Ind. 323; *Holton v. McCormick*, 45 Ind. 412; *Hanna v. Pegg*, 1 Blackf. (Ind.) 180.

Missouri. — *Hart v. Harrison Wire Co.*, 91 Mo. 414.

Texas. — *Elliott v. Wiggins*, 16 Tex. 596; *Fisher v. Phelps*, 21 Tex. 555; *Vale v. Ward*, 30 Tex. 21; *Kampmann v. Williams*, 70 Tex. 568; *Mullaly v. Ivory*, (Tex. Civ. App. 1895) 30 S. W. Rep. 259.

Maker a Nonresident. — In some of the states it is a sufficient excuse for not suing the maker that he is a nonresident of the state, and an allegation to that effect will be sufficient. *Bernitz v. Stratford*, 22 Ind. 323; *Hart v.*

Harrison Wire Co., 91 Mo. 414; *Holton v. McCormick*, 45 Ind. 412, but in this case it was held that an allegation that the maker had left the state after the indorsement and before the note became due, was not equivalent to an averment that he had become a nonresident of the state.

Note Payable Out of State. — It was held in *Howze v. Perkins*, 5 Ala. 286, and *Woodward v. Harbin*, 1 Ala. 104, that it was not a sufficient excuse for not suing the maker, that the note in suit was payable out of the state.

Note Governed by Commercial Law. — Under the Alabama statute providing that the liability of the indorser of a note governed by the commercial law might be fixed in the usual way, instead of by suit against the maker, it was held in *Winter v. Cox*, 41 Ala. 207, that a declaration on such an instrument, against an indorser, where suit against the maker was not alleged, should show that the instrument was governed by the commercial law.

2. *Alabama.* — *Miller v. McIntyre*, 9 Ala. 638.

Illinois. — *Phillips v. Webster*, 85 Ill. 146.

Indiana. — *Huston v. Centreville First Nat. Bank*, 85 Ind. 25; *Simpkins v. Smith*, 94 Ind. 470; *Smythe v. Scott*, 106 Ind. 245.

Missouri. — *Simmons v. Belt*, 35 Mo. 461; *Hart v. Harrison Wire Co.*, 91 Mo. 414.

Texas. — *Fisher v. Phelps*, 21 Tex. 551.

Evidence Need Not Be Plead. — Where the insolvency of the maker of a promissory note is alleged as the ground of an action by the assignee against the assignor, evidence of the appointment of a receiver is admissible without an averment to that effect, it not being necessary to plead evidence. *Phillips v. Webster*, 85 Ill. 146.

Wholly and Notoriously Insolvent. — In *Indiana*, the plaintiff must follow the wording of the statute, and allege that the maker is wholly insolvent, when he relies upon such insolvency as an excuse for not having sued the maker. *Huston v. Centreville First*

ordinary method of fixing an indorser's liability obtains, no allegation as to the maker's insolvency is necessary.¹

At First Term of Court. — Where these statutes require that the action against the maker be brought at the first term of court after the maturity of the instrument, the bringing of the action at that time must be alleged in an action against an indorser.²

b. DILIGENCE IN SUING OUT EXECUTION. — Under some of these statutes it is necessary also to allege that after recovery of judgment against the maker, the holder was diligent in taking out execution, and in endeavoring to secure payment of the judgment.³

12. Actions Against Guarantor and Surety — Guarantor. — In an action against a guarantor of a negotiable instrument, special averments are necessary showing the defendant's particular liability,⁴ and the special contract of such guarantor must be

Nat. Bank, 85 Ind. 25; *Smythe v. Scott*, 106 Ind. 245. And in *Texas*, it is held that the maker's insolvency must be alleged to have been notorious. *Fisher v. Phelps*, 21 Tex. 551.

Insolvency at Maturity. — In *Jones v. Ritter*, 32 Tex. 717, it was held that under the Texas statute it must be alleged that the maker was insolvent at the time of the maturity of a note, in order to charge the indorser, when such insolvency is relied upon as an excuse for not suing the maker.

1. *Jones v. Robinson*, 8 Ark. 484. Compare *Bolling v. Doneghy*, 1 Duv. (Ky.) 221, where it was held that on a petition by a surety against his co-surety, it was necessary to allege the insolvency of the principal.

2. *Alabama*. — *Ryland v. Bates*, 4 Ala. 342; *Lindsay v. Williams*, 17 Ala. 229.

Indiana. — *Herald v. Scott*, 2 Ind. 55; *Markel v. Evans*, 47 Ind. 326.

Texas. — *Hutchins v. Flintge*, 2 Tex. 473; *Elliott v. Wiggins*, 16 Tex. 596; *Mullaly v. Ivory*, (Tex. Civ. App. 1895) 30 S. W. Rep. 259; *Kampmann v. Williams*, 70 Tex. 571; *Caldwell v. Byrne*, (Tex. Civ. App. 1895) 30 S. W. Rep. 836.

Compare *Walker v. Henry*, 36 W. Va. 100.

Excuse for Want of Diligence. — In an action against the indorser of a promissory note, an averment that the court to which the suit was brought was the first court to which it could be brought, "after the plaintiff by prompt and diligent inquiry ascertained that the maker resided" in the county where the suit was brought, is bad on

demurrer, as the excuse for want of diligence is not distinctly averred. *Lindsay v. Williams*, 17 Ala. 229.

If suit against the maker is not brought at the first term of court after maturity, the reason for so omitting to commence suit before the second term must be alleged, in a subsequent action against the indorser. And such allegation being material, its absence can be taken advantage of in arrest of judgment, or by writ of error. *Caldwell v. Byrne*, (Tex. Civ. App. 1895) 30 S. W. Rep. 836.

3. *Dole v. Watson*, 2 Ind. 177; *Hanna v. Pegg*, 1 Blackf. (Ind.) 180; *Clark v. Spears*, 8 Blackf. (Ind.) 302.

4. *Davis v. Campbell*, 3 Stew. (Ala.) 319; *Lyon v. Chamberlain*, 41 Mich. 119; *Crozer v. Chambers*, 20 N. J. L. 256; *Cawley v. Costello*, 15 Hun (N. Y.) 303; *Cottrell v. Conklin*, 4 Duer (N. Y.) 45. And see *Phelps v. Church*, 65 Mich. 231.

See generally article PRINCIPAL AND SURETY.

Written Guaranty. — If the plaintiff declares upon and sets out a written guaranty, such a count cannot be supported by simply producing the note with the signature of the defendant upon the back of it, and then proving by parol such an agreement as is set out in the declaration. *Crozer v. Chambers*, 20 N. J. L. 256.

Intent. — In an action against a person who indorses a note before delivery to the payee, if it is sought to hold him liable as guarantor, an intention to assume such liability must be averred. *Cawley v. Costello*, 15 Hun (N. Y.) 303.

shown.¹ A guaranty cannot be declared upon as an absolute promise to pay,² nor can a guarantor be declared against as an indorser,³

Money Paid. — In *Cottrell v. Conklin*, 4 Duer (N. Y.) 45, it was held that it was improper to declare against a guarantor in a complaint alleging that the plaintiff had paid, laid out, etc., money for the defendant.

"Should the Maker Fail." — Where a person indorsing a promissory note holds himself liable to the indorsee "should the maker fail," this is a different contract from a general indorsement, and must be specifically declared on. The word "fail" in such indorsement is of larger import than "refuse." *Davis v. Campbell*, 3 Stew. (Ala.) 319.

Action in Justice Court. — Evidence that the defendant, in an action before a justice of the peace on a promissory note, guaranteed the payment of such note, is admissible under a notice that the plaintiff claimed of the defendant "on a promissory note." *Francis v. Bentley*, 50 Iowa 59.

1. *Alabama.* — *Nesbit v. Bradford*, 6 Ala. 746.

Connecticut. — *Castle v. Candee*, 16 Conn. 223.

Georgia. — *Fidelity, etc., Co. v. Van Dyke*, 99 Ga. 542.

Missouri. — *Central Sav. Bank v. Shine*, 48 Mo. 456.

New York. — *Hier v. Staples*, 51 N. Y. 136.

South Carolina. — *Wallace v. Lark*, 12 S. Car. 576.

Texas. — *Washington v. Denton First Nat. Bank*, 64 Tex. 4.

Guaranty by Married Woman. — In an action against a married woman executing a note as a guarantor, it is not necessary to allege that the contract was executed in her business and for the benefit of her separate estate, nor to ask judgment charging her separate estate, but the complaint may be framed as if the defendant was a *feme sole*. *Hier v. Staples*, 51 N. Y. 136.

"Guarantee" for "Guaranteed." — Where it was alleged that the defendant guaranteed the payment of the instrument sued on in these words, "Payment guarantee," and the note offered in evidence had indorsed thereon, over the defendant's name, the words "Payment guaranteed," it was held that the variance between the indorsement pleaded and that produced in evidence was immaterial. *Wash-*

ington v. Denton First Nat. Bank, 64 Tex. 4.

Notice of Acceptance. — In an action against the guarantor, a general averment of notice of acceptance by plaintiff of the defendant's offer to guarantee is sufficient, and the question whether it is reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court. *Central Sav. Bank v. Shine*, 48 Mo. 456.

Allegations Held Sufficient. — An allegation that defendant, by writing his name on the back of the note, became a guarantor for the payment of the same, and that upon the strength of such guaranty B. received the said note for value, is a sufficient statement that defendant guaranteed its payment. *Wallace v. Lark*, 12 S. Car. 576.

2. *Sage v. Wilcox*, 6 Conn. 93, in which case there was an indorsement on the note guaranteeing its payment one year from its date, and it was held that it could not be declared upon as an absolute promise to pay the amount of the note at the end of the year, as the defendant's liability depended on the diligence of the plaintiff.

3. *Newell v. Williams*, 5 Sneed (Tenn.) 208; *Cottrell v. Conklin*, 4 Duer (N. Y.) 45, wherein the court said: "Notwithstanding a partial resemblance, the differences between a contract of guaranty and a contract of indorsement are so wide and essential, that it is impossible to say that the allegation of the one contract as the cause of action is sustained by proof of the existence of the other. In such a case, the variance from the allegation is, in the words of the code, not 'in some particular or particulars only, but in its entire scope and meaning' (Code, § 171); and the judge may properly dismiss the complaint on the ground of 'the failure of the proof' necessary to sustain the action." But see *Holmes v. Preston*, 71 Miss. 541, where the defendant failed to make objection.

Indorsement in Blank. — In *Newell v. Williams*, 5 Sneed (Tenn.) 208, it was held that an instrument indorsed in blank, with a promise superadded to pay the amount thereof unconditionally, was not admissible under a com-

nor as principal debtor.¹

Surety. — In an action against a surety, a special declaration on his contract as surety is necessary,² and the allegations should be sufficient to show a liability as surety.³

13. Stipulation in Note for Attorney's Fees — *a.* **RECOVERY IN ACTION ON NOTE.** — Where a note provides for the payment of attorney's fees which may be incurred in the collection thereof, such fees may be recovered in an action on the note by a person entitled to sue for the debt, and the attorney is not a necessary

plaint alleging that the defendant indorsed in blank.

1. *Lyon v. Chamberlain*, 41 Mich. 119.

2. See in general article **PRINCIPAL AND SURETY**.

Butler v. Rawson, 1 Den. (N. Y.) 105, in which case it was said: "The rule is nearly or quite universal that there can be no recovery against a surety, where his character appears on the face of the instrument, without declaring specially on the contract. It is said that an action against the makers of a promissory note, which one of them has signed as a surety for the other, forms an exception to the rule, and that in such a case the plaintiff may recover on the money counts. But there is a case in point the other way (*Wells v. Girling*, 8 Taunt. 737, 4 E. C. L. 264). This decision stands upon principle. In the common case of a suit against the makers of a promissory note, the instrument may be given in evidence under the money counts, for the reason that the note is evidence of money lent to or had and received by the makers to the plaintiff's use. But when one of them signs as a surety for the other, and that fact appears on the face of the instrument, the note furnishes no evidence that he received the whole or any part of the consideration. Indeed, it proves the contrary, for the principal debtor must have received the whole consideration."

Compare *Bradford v. Corey*, 5 Barb. (N. Y.) 461, where it was held that one of several indorsers who added the word "surety" to his name might be sued on the common counts, without a special declaration on the contract of suretyship.

3. *Montgomery v. Sayre*, 100 Cal. 182; *Ewing v. Logan*, 40 Ind. 342; *Albany Furniture Co. v. Merchants' Nat. Bank* 17 Ind. App. 94; *Biddeford First Nat. Bank v. McKenney*, 67 Me. 272; *McPhillips v. Jones*, 73 Hun (N. Y.)

516; *Schwarzansky v. Averill*, 7 Daly (N. Y.) 254; *Frazier v. Robertson*, 39 Tex. 513.

Joint and Several Note. — It is proper to declare upon a joint and several note signed by the defendant as surety for an individual or a copartnership, as the note of the defendant, in a several action against him, without setting out the joint contract also, and without taking notice of the suretyship, or the copartnership between the principals. *Biddeford First Nat. Bank v. McKenney*, 67 Me. 272. Compare *Frazier v. Robertson*, 39 Tex. 513.

"Signed as Surety." — Where a petition alleges that A made, executed, and delivered the note in suit to B, and that B signed it as surety, it was held that the making of the note by B as surety was sufficiently alleged. *Frazier v. Robertson*, 39 Tex. 513. And see *Ewing v. Logan*, 40 Ind. 342.

Maker Not to Be Liable. — Evidence that the defendant became surety for the maker of a note, by indorsing his name thereon, is admissible in an action against the payee of a note, under allegations that the defendant agreed to pay such note, and that the maker should not be liable. *McPhillips v. Jones*, 73 Hun (N. Y.) 516.

To Obtain Credit for Maker. — An allegation in a complaint, that the indorsement was made "for the purpose of obtaining credit" for the maker, with the payee, is a sufficient allegation of intention on the part of the indorser to become a surety for the maker of the note. *Schwarzansky v. Averill*, 7 Daly (N. Y.) 254.

"Security" Equivalent to "Surety." — An allegation in a complaint on a note which is made an exhibit and is signed by a company and two persons, that the latter two signed the note as "security," will be construed to mean that they signed as "surety." *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 94.

party plaintiff, although the fees have not been paid.¹ If the defendant is not liable for the amount of attorney's fee this will not make the complaint bad on demurrer, but it will be good for the balance of the note.²

Separate Counts. — An agreement to pay an attorney's fee being a part of the contract, it is not necessary to state it in a separate count or paragraph as a separate cause of action.³

b. ALLEGATION OF STIPULATION. — In an action on a note

1. *Johnson v. Crossland*, 34 Ind. 334.
Stipulation for Fee Dependent upon Legal Proceedings. — Where the attorney's fee is conditioned upon the necessity of instituting suit upon the note, such fee is not due until the suit is instituted, and cannot, therefore, be alleged to be due when the complaint is prepared. *Smiley v. Meir*, 47 Ind. 562.

In an action upon a note for ten per cent. attorney's fee if the note is collected by an attorney or by process of law, the action itself proves both conditions have happened. *North Atchison Bank v. Gay*, 114 Mo. 203. See also *Carr v. King*, 2 Tex. App. Civ. Cas., § 557; *Hefley v. Milam County Bank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 325, wherein an amendment was allowed alleging that the note had been placed in the hands of an attorney for collection, with a demand of five per cent. as collection fees, and it was held to be no matter of objection that a judgment by default was rendered without service of the amended petition, because, while the original petition did not in terms declare that the note was placed in the hands of an attorney for collection, it alleged that the defendant had become liable for the attorney's fee stipulated in the note as set out, and the fact that such suit was brought upon the note being one of the contingencies on which the liability rested, the court would know from the record before it that suit was brought.

An action on a note after its maturity proves the condition on which the makers became liable for the attorney's fee stipulated therein, and it is not necessary to allege the necessity of resorting to process of law. *Dignowity v. Staackie*, (Tex. Civ. App. 1894) 25 S. W. Rep. 824.

2. *Taylor v. Hearn*, 131 Ind. 539.

Conversely it is held that a party need not sue upon all the stipulations of a contract. If he sues upon one and neglects to sue upon others contained

in the same instrument, the question might arise as to whether the judgment in the first suit would be a bar to an action on the omitted stipulations, but this would not affect the sufficiency of the pleading upon the stipulations upon which the suit is brought. *Brooks v. Ancell*, 51 Mo. 178. See also *Stingley v. Lafayette Second Nat. Bank*, 42 Ind. 580.

3. *Mathews v. Norman*, 42 Ind. 176.

In Suit on Note or by Separate Suit. — Under a stipulation in a note that the fee may be "recovered as a part of this note or by separate suit," it devolves upon the plaintiff to declare specially for this item if he desires to recover it in the principal suit. He should by clear averments advise the defendant of what he has to meet in this respect, since, as he might sue separately, it will be presumed in the absence of such averment that he so intended, upon the familiar principle that the pleading is always to be taken most strongly against the pleader. *Wolff v. Dorsey*, 38 Ill. App. 304. See also *Nickerson v. Sheldon*, 33 Ill. 372.

Under a General Stipulation for such fees, it is held in *Indiana* that the stipulation for attorney's fees must be included in the action on the note, and that such fee cannot be sued for in a separate action after a judgment has been taken on the note for the amount of the debt. *Smiley v. Meir*, 47 Ind. 562; *Indianapolis First Nat. Bank v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5. See also *Brooks v. Ancell*, 51 Mo. 178.

Counts Considered Together. — If a suit is brought upon a note containing a stipulation for attorney's fees and costs, and one count sets out such stipulation but the other fails to do so, the court will consider the two counts as one, or one as the continuation of the other, and there will be no variance between the note sued on and the count omitting the stipulation. *Brooks v. Ancell*, 51 Mo. 178.

containing a stipulation for the payment of attorney's fees, such stipulation must be alleged in order to entitle the plaintiff to recover upon it.¹

General Allegation of Damages. — Where the note provides for the payment of attorney's fees it is enough to allege the breach of the contract and to state the damages generally, for where damages are expressly provided for in a contract they need not be laid as special damages.²

14. Anticipating Defense. — The legitimate function of the plaintiff's declaration, statement, or complaint is to set up his cause of action, and it is not within the province of such a pleading to anticipate the defendant's answer thereto.³

1. *Mathews v. Norman*, 42 Ind. 176; *Wolff v. Dorsey*, 38 Ill. App. 304; *Mad-dox v. Craig*, 80 Tex. 600; *Lay v. Cardwell*, (Tex. Civ. App. 1896) 33 S. W. Rep. 596, holding that if a note stipulates for the payment of an attorney's fee, if placed in the hands of an attorney for collection, there must be an averment that the note was placed in the hands of an attorney in order to sustain a judgment for attorney's fees.

Notes to Mature at Election. — Where each of several notes stipulated for a certain attorney's fee, if placed in the hands of an attorney for collection or sued on, and that upon a failure to pay according to its terms they should mature at the election of the holder, and the petition charged that one of the notes fell due according to its face and that the defendant failed to pay the same, and that the plaintiff elected that the other two should mature, and that payment of the entire debt had been demanded and refused, and that the notes had been placed in the hands of attorneys for collection, it was held that the objection that the plaintiff was not entitled to judgment for the attorneys' fees on the second and third notes because the petition did not in express terms allege that the plaintiff notified the defendant that he had elected to regard said two notes as due was without merit. *Graham v. Miller*, (Tex. Civ. App. 1894) 24 S. W. Rep. 1107.

Judgment Reformed. — In *Lay v. Cardwell*, (Tex. Civ. App. 1896) 33 S. W. Rep. 596, it was held necessary to allege that the note in suit had been placed in the hands of an attorney for collection in order to recover attorney's fees under a stipulation in the note providing for the payment thereof upon that contingency, and in the absence of

such an allegation the judgment was reformed by striking out the attorney's fee, and as reformed it was affirmed.

Suit by Summons. — In *Georgia* it is held that where a copy of the note is attached to the summons in the county court, no claim for fees stipulated in the note need be expressly set out in the summons; that suit by summons is rather by way of hint or suggestion than by way of full and explicit declaration, and that the debtor having promised to pay counsel fees in case of suit could not be surprised after being refreshed with service of a copy of his note containing the promise. *Kleckley v. Leyden*, 63 Ga. 216.

2. *Harvey v. Baldwin*, 124 Ind. 59; *Starnes v. Schofield*, 5 Ind. App. 4; *Roberts v. Comer*, 41 Ind. 475; *Smiley v. Meir*, 47 Ind. 559.

3. *Latta v. Miller*, 109 Ind. 306; *Miller v. Griswold*, 40 Ind. 209; *Zink v. Dick*, 1 Ind. App. 269; *Bringham v. Leighty*, 61 Ind. 524; *Cox v. Plough*, 69 Ind. 313; *Smith v. Whitaker*, 23 Ill. 367; *Miller v. Wilson*, 146 Ill. 523; *Cooper v. Poston*, 1 Duv. (Ky.) 92; *Ware v. Webb*, 32 Me. 41; *Toms v. Fite*, 93 N. Car. 274; *Carpenter v. McClure*, 40 Vt. 108; *Gittings v. Loper*, 84 Fed. Rep. 103.

Non-negotiability Where Made. — If an instrument is negotiable where the action is brought the declaration need not show its negotiability when it was executed in order to show the plaintiff's right to sue in his own name, as this is a matter of defense to be pleaded. *Hakes v. National State Bank*, 164 Ill. 273.

Action by Payee — Allegation as to Transfer. — In a suit upon a promissory note by a payee against the maker it is not necessary for the plaintiff to allege that he has not transferred it. He is

Effect of Averment. — If a matter of defense is alleged it may be regarded as surplusage, unless by attempting to avoid the defense the plaintiff states facts which are not sufficient for the purpose, because if such defense is not effectively avoided it will constitute a complete bar.¹

Bona Fide Holder. — When an indorsee brings an action on a negotiable instrument he need not allege that he is a holder of such instrument for value, without notice, and that he took it before maturity.²

presumed to remain the holder and owner of the paper until the contrary is made to appear. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

Statute of Fraud. — In declaring on a contract within the statute of frauds it is not necessary that the complaint should show a compliance with the requisitions of the statute. *Rigby v. Norwood*, 34 La. 129. See article FRAUDS, STATUTE OF, vol. 9, p. 700.

Statute of Limitations. — An allegation that the cause of action arose within six years is held to be unnecessary because the statute of limitations does not of its own force cut off claims unless presented to the court as a defense. *Ware v. Webb*, 32 Me. 41; *Carpenter v. McClure*, 40 Vt. 108.

If suit may be brought on a witnessed note within fourteen years, but the plaintiff is required to declare specially thereon, a declaration is good which counts specially upon such a note, although it does not allege it to be witnessed, and if the defendant pleads the ordinary statute of limitations of six years the plaintiff may reply that the note was witnessed. *Carpenter v. McClure*, 38 Vt. 375, 40 Vt. 108.

New Promise. — See article LIMITATIONS, vol. 13, p. 176.

Title — Payee and Payor of Same Name. — Where the payee and maker of a note are of the same name, it is not necessary for the plaintiff to aver that the defendant and the payee are different persons. This averment is dispensed with, not because the law presumes that fact *prima facie*, but because the plaintiff's cause of action is founded not upon that fact but upon the fact that the defendant executed the note, and, as a general rule, the plaintiff is required only to state facts which constitute *prima facie* the cause of action, and need not anticipate matters of defense. *Cooper v. Poston*, 1 Duv. (Ky.) 92.

Negating the Failure of Consideration. — In an action on the note for the purchase price of land the plaintiff need not allege good title in the land or a tender of a deed to the defendant. *Toms v. Fite*, 93 N. Car. 274. See also *Brigham v. Leighty*, 61 Ind. 524; *Cox v. Plough*, 69 Ind. 313.

1. *Latta v. Miller*, 109 Ind. 306.

In an action by the assignee against the maker of a note which stipulated that it was given for the purchase money of certain real estate, and that "if title defective note void," the complaint need not allege that the title to the land was not defective as to the assignor of the note, as this is a matter of defense, and if alleged will be disregarded as surplusage. *Brigham v. Leighty*, 61 Ind. 524.

Effect upon Right to Open and Close. — An averment in a complaint that the plaintiff indorsed the bill before maturity, "by procurement of the defendants," was held to be an averment in anticipation of a defense and no part of the plaintiff's original case, and that where the defendant's answer is altogether in confession and avoidance such an averment could not confer upon the plaintiff a right to open and close the argument. *List v. Korte-peter*, 26 Ind. 27.

2. *Alabama.* — *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 158.

Indiana. — *Miller v. Griswold*, 40 Ind. 209. Compare *Kimble v. Christie*, 55 Ind. 140.

Missouri. — *Clark v. Schneider*, 17 Mo. 295; *Rubelman v. McNichol*, 13 Mo. App. 584.

Ohio. — *Engeld v. Canfield*, 1 Cleve. L. Rep. (Ohio) 196, 4 Ohio Dec. (Reprint) 274.

Texas. — *Smith v. Traders' Nat. Bank*, 74 Tex. 545. And see *Knight v. Holloman*, 6 Tex. 153, the headnote in this case seems to be erroneous.

Contra under Pennsylvania Statute. — *Gere v. Unger*, 125 Pa. St. 644; New-

15. Common and Special Counts — a. USE OF COMMON COUNTS GENERALLY. — It is not necessary to declare specially on a bill or note; suit may be based upon the original consideration;¹ and it is a general rule, uniformly established, that the action may be upon the common counts in assumpsit, and the bill or note is admissible in evidence to sustain the same.²

bold v. Pennock, 154 Pa. St. 591; *Waverly First Nat. Bank v. Furman*, 4 Pa. Super. Ct. Rep. 415; *Louchheim v. Maguire*, 6 Pa. Super. Ct. Rep. 635; *Kahn v. Maguire*, 6 Pa. Super. Ct. Rep. 639; *Press Co. v. City Bank*, 58 Fed. Rep. 321, showing changes in Pennsylvania statute.

In Replication, Not in Complaint. — It was held in *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 158, that when the defendant alleges notice, the plaintiff should set up want of notice in his replication "and not in the complaint."

Effect of Not Alleging Bona Fide Holding. — If the plaintiff does not allege in his declaration that he is a *bona fide* holder without notice and before maturity the defendant can introduce evidence showing the existence of notice, *Commercial Bank v. Burgwyn*, 110 N. Car. 267; or that the plaintiff purchased after maturity without making such allegations in his answer, *Coburn v. Poe*, 40 Tex. 410.

Petition Showing Want of Bona Fides. — Where the petition in an action on a bill of exchange discloses facts from which it may be inferred that the plaintiff was not a holder for value, the defendant is entitled to the benefit of such admissions in the petition, to sustain his answer against a general demurrer. *Gebhart v. Sorrels*, 9 Ohio St. 461.

Recovery of Money Paid by Drawee to Indorsee. — In an action by the drawee to recover back from the indorsee of the payee of a draft, to whom they had paid it, though the plaintiff might state facts sufficient to justify a recovery from the drawer or the payee, it must also be alleged that the defendant indorsee received the note before maturity without paying value for it or with notice of the fact upon which the plaintiff's right to recover depends. *Iselin v. Chemical Nat. Bank*, 6 N. Y. App. Div. 532.

1. *Stevenson v. Dunn*, 3 Misc. Rep. (N. Y. City Ct.) 554; *Jagger Iron Co. v. Walker*, 76 N. Y. 524; *Child v. Moore*, 6 N. H. 33; *Humphreys v.*

Wilson, 43 Miss. 335; *Hilligoss v. Bond*, 4 Blackf. (Ind.) 186; *Hanna v. Pegg*, 1 Blackf. (Ind.) 181.

2. *Alabama.* — *Kirkpatrick v. Bethany*, 1 Ala. 201; *Catlin v. Gilders*, 3 Ala. 536; *Hopper v. Eiland*, 21 Ala. 714; *Espalla v. Wilson*, 86 Ala. 487.

Connecticut. — *Eagle Bank v. Smith*, 5 Conn. 71; *East-Haddam Bank v. Shailor*, 20 Conn. 18; *Farmers', etc., Bank v. Payne*, 25 Conn. 447; *Dean v. Mann*, 28 Conn. 355.

Illinois. — *People v. Pearson*, 2 Ill. 458, 473; *Boyle v. Carter*, 24 Ill. 49; *Johnson v. Stark County*, 24 Ill. 75; *Jacquelin v. Warren*, 40 Ill. 459; *Sturges v. Chicago Fourth Nat. Bank*, 75 Ill. 595; *Mercer County v. Hubbard*, 45 Ill. 142; *Wilson v. King*, 83 Ill. 232.

Indiana. — *Hanna v. Pegg*, 1 Blackf. (Ind.) 180.

Iowa. — *Galloway v. Trout*, 2 Greene (Iowa) 596; *King v. Wall*, 1 Morr. (Iowa) 189.

Maine. — *Fairbanks v. Stanley*, 18 Me. 296; *Sturtevant v. Randall*, 53 Me. 149.

Maryland. — *Beck v. Thompson*, 4 Har. & J. (Md.) 537; *Coursey v. Baker*, 7 Har. & J. (Md.) 28; *Hopkins v. Kent*, 17 Md. 113; *McCann v. Preston*, 79 Md. 231.

Massachusetts. — *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Wild v. Fisher*, 4 Pick. (Mass.) 421; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 319; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Townsend v. Derby*, 3 Met. (Mass.) 364; *Osgood v. Pearsons*, 4 Gray (Mass.) 455; *Barker v. Parker*, 10 Gray (Mass.) 339; *Lincoln v. Butler*, 14 Gray (Mass.) 129.

Michigan. — *Hoard v. Little*, 7 Mich. 470; *Port Huron, etc., R. Co. v. Potter*, 55 Mich. 627; *Rickey v. Morrison*, 69 Mich. 139; *Roberts v. Hawkins*, 70 Mich. 566; *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 191.

Mississippi. — *Hughes v. Grand Gulf Bank*, 2 Smed. & M. (Miss.) 115.

New Hampshire. — *Ruchworth v. Moore*, 36 N. H. 188.

New Jersey. — *New Jersey Mfg., etc., Co. v. Myer*, 12 N. J. L. 141.

Under Statutes Requiring Copies. — The use of the common counts is especially appropriate under statutes which require copies of instruments sued on to be attached to the pleading, and having for their purpose the simplifying of pleadings by avoiding the necessity of special counts, giving the defendant the same information in a less technical way.¹

New York. — *Cayuga County Bank v. Warden*, 6 N. Y. 27; *Black v. Caffé*, 7 N. Y. 281; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 6; *Brown v. Williams*, 4 Wend. (N. Y.) 360; *Hinsdale v. Orange Bank*, 6 Wend. (N. Y.) 378; *Porter v. Cumings*, 7 Wend. (N. Y.) 172; *Halleran v. Field*, 23 Wend. (N. Y.) 39; *Stevenson v. Dunn*, 3 Misc. Rep. (N. Y. City Ct.) 554.

Ohio. — *Colville v. Gilbert*, 10 West. L. J. (Ohio) 324, 1 Ohio Dec. (Reprint) 526.

Wisconsin. — *Dart v. Sherwood*, 7 Wis. 523.

United States. — *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *U. S. Bank v. Moss*, 6 How. (U. S.) 37; *Hopkins v. Orr*, 124 U. S. 510; *Benjamin v. Tillman*, 2 McLean (U. S.) 214.

England. — *Smith v. Kendall*, 6 T. R. 123; *Grant v. Vaughan*, 3 Burr. 1516; *Carter v. Palmer*, 12 Mod. 380; *Starkey v. Cheeseman*, 1 Salk. 128; *Story v. Atkins*, 2 Stra. 725; *Harris v. Huntbach*, 1 Burr 373; *Wagstaffe v. Boardman*, 9 D. & R. 248, 22 E. C. L. 388; *Thompson v. Morgan*, 3 Campb. 101.

Note or Memorandum in Liquidation of Former Debt. — At common law when a debt is liquidated by a note or memorandum in writing it is held that such note or memorandum is self evidence of money due, and may be given in evidence on a count for money had and received. *Lincoln v. Butler*, 14 Gray (Mass.) 129.

Joint Note. — A note made by the defendant and another is admissible under the money counts against the defendant alone, where the nonjoinder of the other is not pleaded in abatement. *Williams v. Allen*, 7 Cow. (N. Y.) 316.

Partnership Note. — A note by a firm executed by one of the partners is admissible against both partners under a count for money lent. *Mack v. Spencer*, 4 Wend. (N. Y.) 411.

But where the note was declared on as that of the individual who signed the name thereto a note signed with the partnership name was held to be

inadmissible under the money counts. *Fant v. Gadberry*, 5 Rich. L. (S. Car.) 10.

Express Promise. — Where a declaration in assumpsit on the common counts does not allege an express promise, or, in other words, omits to state what the law implies, the objection must be raised by special demurrer and the defect is cured after judgment. *Hoard v. Little*, 7 Mich. 470.

A Check may be offered in evidence under the money counts. *Blair v. Wilson*, 28 Gratt. (Va.) 165; *Kelley v. Brown*, 5 Gray (Mass.) 108; *Cushing v. Gore*, 15 Mass. 69; *Turnbull v. Osborne*, 12 Abb. Pr. N. S. (Brooklyn City Ct.) 200; *Howes v. Austin*, 35 Ill. 396.

If there is no other evidence in the case, the check is of itself sufficient to entitle the plaintiff to recover on such counts, but it is only *prima facie* evidence of money lent, paid and advanced, or had and received, and when it is proved that no money had come to the hands of the defendant the presumption raised by the check is rebutted and no recovery can be had on such counts. And it is held that if in an action of assumpsit for goods sold and delivered the declaration contains only the common counts with a bill of particulars and the only count to which the evidence applies is that for goods sold and delivered, and it is shown that the goods were absolutely paid for by the check, the count is extinguished and there is no count in the declaration upon which the plaintiff can recover. *Blair v. Wilson*, 28 Gratt. (Va.) 165.

Conditional Liability. — Where a note conditioned on a certain contingency has become absolutely payable, it may be sued by the payee under the common counts. *Port Huron, etc., R. Co. v. Potter*, 55 Mich. 627; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212.

1. *Wilcox v. Sweet*, 24 Mich. 357; *Hoard v. Little*, 7 Mich. 471; *Michael v. Tuttle*, 37 Mich. 502; *Buhl v. Trowbridge*, 42 Mich. 44; *Phelps v. Church*, 65 Mich. 233; *Cate v. Patterson*, 25 Mich. 191; *Steuben County Bank v.*

The Gist of These Counts being money due, a note is recoverable under them whatever might have been the consideration for which it was given.¹

b. EXTENT OF RULE—APPLICATION TO OTHER THAN ORIGINAL PARTIES—(1) *In General*.—There has been some confusion upon the question of the extent of the rule permitting the use of the common counts,² arising it seems from the restriction of the rule to the original parties or to cases where there is some privity of contract between the plaintiff and the defendant,³ and a want

Stephens, 14 Wend. (N. Y.) 243. See also *Brower v. Rupert*, 24 Ill. 183; *Childs v. Fischer*, 52 Ill. 206; *Kirkpatrick v. Bethany*, 1 Ala. 201, holding that a party may declare for any cause consistent with or embraced by the indorsement on his writ, and that if the writ be indorsed with a bill or note the declaration may embrace the common counts; *Jacobson v. Manning*, 2 Greene (Iowa) 585; *Peck v. Cheney*, 4 Wis. 249, holding that the service of a copy of the note with notice that it is the only cause of action is equivalent to the insertion of a special count. See *infra*, 17. *Pleading under Statutory Regulations—Copies and Exhibits*.

Under a statute which provides that the holder of a bill or note may include in suits against the drawers, makers, and indorsers and acceptors of such bill or note all or any of said parties to the bill or note in one action, instead of suing them separately, and that the plaintiff may declare upon the money counts alone, and the bill or note may be given in evidence thereunder where a copy of the bill or note shall have been served with the declaration, such bill or note cannot be given in evidence under the money counts, unless a copy was served with the declaration, but it is too late to make the objection for want of proof of such service after evidence of the signature of the parties, protest, and notice of nonpayment. *Steuben County Bank v. Stephens*, 14 Wend. (N. Y.) 243. See also *Bradford v. Corey*, 5 Barb. (N. Y.) 461; *Halleran v. Field*, 23 Wend. (N. Y.) 38; *Prosser v. Luqueer*, 4 Hill (N. Y.) 420; *Fuller v. Van Schaick*, 18 Wend. (N. Y.) 547. *Contra*, *Chenango Bank v. Curtiss*, 19 Johns. (N. Y.) 326.

1. *Smith v. Van Loan*, 16 Wend. (N. Y.) 659; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 77; *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Child v. Moore*, 6 N. H. 33.

A note, although given for goods

purchased, may be introduced in evidence under the money counts. *Payson v. Whitcomb*, 15 Pick. (Mass.) 212; *Fairbanks v. Stanley*, 18 Me. 303.

General Indebitatus Assumpsit.—Where a note was given for a principal sum and interest payable half-yearly, and an action was brought before the maturity of the note for the recovery of two half-yearly instalments of interest, it was held that a count in general indebitatus assumpsit without stating the nature of the indebtedness was not proper, such indebtedness not being money of the plaintiffs received by and in the hands of the defendant. *Brooks v. Holland*, 21 Conn. 388.

A general count of indebitatus assumpsit is proper where a surety has been obliged to pay for his principal. *Ward v. Henry*, 5 Conn. 595.

An Accommodation Indorser, before maturity, of a negotiable note given to a mutual insurance company for premiums, who has been obliged to pay the amount thereof to a subsequent indorsee, may recover the amount so paid of the maker, on a count for money paid; or, it seems, as indorsee of the note. *Barker v. Parker*, 10 Gray (Mass.) 339.

Though the Plaintiff Did Not in Fact Intend to Sue upon the Note when the suit was brought, if it was due at that time it may be received under the money count. *Webster v. Randall*, 19 Pick. (Mass.) 13.

2. *Eagle Bank v. Smith*, 5 Conn. 71; *Benjamin v. Tillman*, 2 McLean (U. S.) 213.

3. *Wayman v. Bend*, 1 Campb. 175; *Hanna v. Pegg*, 1 Blackf. (Ind.) 180; *Chitty on Bills* (13th Am. ed.) 579.

Recovery by Assignee on Consideration of Note.—An assignee must recover on the note; he cannot recover the value of the thing for which the note was given. *Congressional Tp. No. 11 v. Weir*, 9 Ind. 226; *Bischof v. Lucas*, 6 Ind. 26.

of such privity is said to exist between the indorsee and the acceptor of a bill, or the indorsee and the maker of the note.¹

1. Chitty on Bills (13th Am. ed.) 579 [citing *Johnson v. Collings*, 1 East 98; *Barlow v. Bishop*, 1 East 432; *Houle v. Baxter*, 3 East 177; *Whitwell v. Bennett*, 3 B. & P. 559]; *Eales v. Dicker*, 1 M. & M. 324, 22 E. C. L. 323.

Indorsee and Drawer.—So it is said that the doctrine does not apply to cases where there is no privity between the plaintiff and the defendant, as between indorsee and drawer. *Beck v. Thompson*, 4 Har. & J. (Md.) 531, citing *Story v. Atkins*, 2 Stra. 719.

A Bill Payable to the Order of the Drawer, in an action by him against the acceptor, is good evidence under the money counts. *Thompson v. Morgan*, 3 Campb. 101.

Review of Authorities.—In *New Jersey Mfg., etc., Co. v. Myer*, 12 N. J. L. 141, *Drake, J.*, adverts to the doctrine laid down by Chitty that "when there is no privity between the plaintiff and the defendant, as between the indorsee and the acceptor of a bill, and the indorsee and maker of a note," a recovery cannot be had for money had and received, and to the cases cited by him as shown in the last preceding note, none of which support that doctrine. In *Johnson v. Collings*, 1 East 98, the principal point was as to the effect of a parol undertaking to accept a bill to be drawn in the future, and the court decided that the indorsee could not recover under the money counts upon such an acceptance. In *Barlow v. Bishop*, 1 East 432, the indorsement was irregular and transferred no interest in the note. In *Houle v. Baxter*, 3 East 177, the decision turned upon other questions, but it appeared that there was no consideration for the defendant's acceptance, and the presumption that he had received money was overcome; and to the same effect is *Gibson v. Minet*, 1 H. Bl. 569. In *Whitwell v. Bennett*, 3 B. & P. 559, it was expressly found that the defendant, when he accepted the bill, had no effects of the drawer in his hands, and here also the presumption arising from the acceptance was destroyed.

In *Waynam v. Bend*, 1 Campb. 175, which was an action by the holder of a promissory note, payable to L. T. or bearer, against the defendant as maker, Lord Ellenborough held "that the plaintiff could not recover under

any of the money counts, as he was not an original party to the bill, and there was no evidence of any value being received by the defendant from him." This *nisi prius* case, together with that of *Barlow v. Bishop*, 1 East 432, *supra*, are the only authorities for another statement of Mr. Chitty (Chitty on Bills, p. 282), that "it seems now to be settled that the plaintiff can in no case recover under this count unless the money has actually been received by the party sued, and for the use of the plaintiff." But in *Pierce v. Crafts*, 12 Johns. (N. Y.) 90, the case of *Waynam v. Bend*, 1 Campb. 175, was considered as opposing the current of English authority.

In *Grant v. Vaughan*, 3 Burr. 1516, which was an action by the bearer of a promissory note against the maker, Lord Mansfield said that upon the count for money had and received the case was clear beyond dispute, that it was certainly money received for the use of the original advancer, and, if so, it is for the use of the person who has the note as bearer.

In *Tatlock v. Harris*, 3 T. R. 174, an indorser for a valuable consideration of a bill of exchange was held entitled to recover on the counts for money had and received against the acceptor, but Lord Kenyon, in delivering the opinion of the court, said: "In making this decision we do not mean to infringe a rule of law which is very properly settled, that a chose in action cannot be transferred; but we consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill. And this will satisfy the justice of the case without infringing any rule of law." The original indebtedness of the defendant, and also the consideration paid by the plaintiff for the bill, appeared in evidence distinctly from the bare acceptance and holding by indorsement of the bill of exchange. But in *Vere v. Lewis*, 3 T. R. 182, the same court decided that "the mere circumstance of the defendant's accepting was evidence that he had received value from the drawers." And in reviewing the effect of these two cases, *Drake, J.*, in *New Jersey Mfg., etc., Co. v. Myer*, 12 N. J. L. 145, said: "I do not understand that the Court of King's

Rule Established by Weight of Authority.— But it seems the authorities now establish the rule that under the money counts a note is admissible in a suit by the indorsee against the maker as evidence of money received by the maker to the use of any one who shall become a lawful holder by indorsement.¹

Bench meant to affect the principle upon which the plaintiffs in the last case were suffered to recover, by what is said in the case of *Johnson v. Collings*, 1 East 98. There the principal point was as to the effect of a parol undertaking to accept a bill to be drawn in future. The court decided that the indorsee of such bill could not recover under the money counts upon such an acceptance. Lord Kenyon, indeed, calls in question the decision in the case of *Fenner v. Meares*, 2 W. Bl. 1269, because he considered the claim of the assignee of the respondentia bond as a mere chose in action, notwithstanding the contract indorsed on the back of the bond. But he had before said that he did not mean to infringe that rule by the decision in *Tatlock v. Harris*, 3 T. R. 174, in relation to bills of exchange and promissory notes. And Grose, Justice, says that 'by the general rule a chose in action is not assignable, except by the custom of merchants. The assignment of a bill of exchange is founded on that law, and cannot be carried farther than that will warrant it.' 'We have no authority to extend the rules which have been hitherto established.'

1. *Connecticut*. — *Eagle Bank v. Smith*, 5 Conn. 74.

Iowa. — *Knight v. Fox*, 1 Morr. (Iowa) 305.

Maryland. — *Hopkins v. Kent*, 17 Md. 113; *Penn v. Flack*, 3 Gill & J. (Md.) 369.

Massachusetts. — *Wild v. Fisher*, 4 Pick. (Mass.) 421; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Goodwin v. Morse*, 9 Met. (Mass.) 279; *State Bank v. Hurd*, 12 Mass. 172; *Ramsdell v. Soule*, 12 Pick. (Mass.) 126.

New Jersey. — *New Jersey Mfg., etc., Co. v. Myer*, 12 N. J. L. 141.

New York. — *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 83; *Pierce v. Crafts*, 12 Johns. (N. Y.) 90; *Brown v. Williams*, 4 Wend. (N. Y.) 360.

United States. — *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385.

England. — *Bentley v. Northouse*, 1 M. & M. 66, 22 E. C. L. 251.

Indorsee Against Acceptor. — *Eagle Bank v. Smith*, 5 Conn. 71; *Raborg v. Peyton*, 2 Wheat. (U. S.) 385.

Difference Between American and English Cases. — In *Benjamin v. Tillman*, 2 McLean (U. S.) 213, the difference between the American and English authorities at that time was thus stated: "There is great contrariety in the authorities as to what shall be evidence under the money counts. The more modern English authorities, which, however, are not altogether consistent, limit the evidence to a money transaction between the parties on the record, whilst the American authorities give a more liberal view, and many of them require nothing more than an indebtedment."

Maker Signing for Accommodation of Payee. — Where the maker of a note signs for the accommodation of the payee an indorsee may nevertheless bring an action against such maker for money had and received. *Cole v. Cushing*, 8 Pick. (Mass.) 48.

Appropriate Count — Money Lent Improper. — The practice of inserting all the money counts has been so general that the question has not often arisen as to which count in particular is the appropriate one in an action by the indorsee against the maker. It has been held, however, that a count for money lent is not the proper mode of declaring in such a case, but that a count for money paid is a more extensive remedy, and, although nothing passes between the indorsee and the maker, the money paid by the former to the person from whom he receives the note may be regarded as money paid to the use of the maker. An action for money lent cannot be an appropriate remedy unless money has actually passed between the parties to the suit, or has been advanced by the plaintiff to a third person on the request of the defendant. *Rockfeller v. Robinson*, 17 Wend. (N. Y.) 208.

Money Laid Out — Action Against Indorser. — It seems that an indorser cannot be charged under a complaint for

The Payment of the Note by a Subsequent Indorser is in like manner in law a payment to the use of each preceding indorser, and a recovery may be had against such prior indorser either in a special action upon the note or in general assumpsit for money paid to his use.¹

(2) *Note Payable to Bearer.* — A note payable to bearer is admissible under the common counts and is evidence that the bearer has lent money to the maker, or has paid money for the use of the maker, for which the law implies a promise to pay.²

(3) *Character of Evidence of Instrument under Common Counts.* — It is held that the bill or note is merely evidence of the general duty to pay, and that the presumption which the writing affords may be rebutted by other evidence.³

c. EXCEPTIONS TO RULE PERMITTING RECOVERY UNDER COMMON COUNTS. — Where a Note Is Payable in Specific Property it is held that a count for money had and received is not proper, but the declaration should count specially, as upon a negotiable cash note,⁴ though in other cases it is held otherwise and the introduc-

money laid out, etc. *Cottrell v. Conklin*, 4 Duer (N. Y.) 45.

1. *Brown v. Torver*, Minor (Ala.) 370; *Bradshaw v. Hubbard*, 6 Ill. 395; *Knight v. Fox*, 1 Morr. (Iowa) 305; *Sturtevant v. Randall*, 53 Me. 149; *Beck v. Thompson*, 4 Har. & J. (Md.) 531; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 319; *Rushworth v. Moore*, 36 N. H. 188; *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *U. S. Bank v. Moss*, 6 How. (U. S.) 37; *Wagstaffe v. Boardman*, 9 D. & R. 248, 22 E. C. L. 388.

In *Mandeville v. Riddle*, 1 Cranch (U. S.) 290, the case arose between an indorsee and a remote indorser of a promissory note in the state of Virginia and was decided with reference to the statute of that state which gave the assignee an action of debt in his own name against the maker, but was silent with respect to the claim of the assignee against the assignor. *Marshall, C. J.*, said: "The implied promise growing out of the indorsement is not considered as having been made assignable by the act of assembly, and, therefore, the assignee of that promise cannot maintain an action of indebitatus assumpsit upon it. The case was argued upon the ground that the Virginia Act varied from the statute of Anne in that particular, and the court intimated that had the statute given an action by the indorsee against remote indorsers, his decision of the case would have sustained the action.

2. *Johnson v. Stark County*, 24 Ill. 75; *Mercer County v. Hubbard*, 45 Ill. 142; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 6; *Pierce v. Crafts*, 12 Johns. (N. Y.) 90; *Wild v. Fisher*, 4 Pick. (Mass.) 421; *Grant v. Vaughan*, 3 Burr. 1516.

In *Carter v. Palmer*, 12 Mod. 380, an action on a note payable to bearer was grounded on the custom of merchants as if it were a bill of exchange and averred no consideration. *Holt, C. J.*, on a motion in arrest of judgment, held that the court would take such a note *prima facie* for evidence of money lent.

3. *Page v. Alexandria Bank*, 7 Wheat. (U. S.) 35; *Brown v. Torver*, Minor (Ala.) 370; *New Jersey Mfg., etc., Co. v. Myer*, 12 N. J. L. 141; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 83; *Gibson v. Minet*, 1 H. Bl. 569.

Note Less Conclusive under Money Count. — Where a note or bill is not declared on, but is used as evidence under the money counts, it is said to be less conclusive than when the action is founded upon it. *Benjamin v. Tillman*, 2 McLean (U. S.) 214; *Story v. Atkins*, 2 Stra. 725.

4. *Tibbets v. Gerrish*, 25 N. H. 41; *French v. Gerrish*, 22 N. H. 97. See also *Wilson v. George*, 10 N. H. 443; *Lansing v. M'Killip*, 3 Cai. (N. Y.) 286. See *supra*, 4. *Consideration — a. Necessity of Alleging.*

If the note does not import that it is given for value received. *Saxton v. Johnson*, 10 Johns. (N. Y.) 418.

tion of a note of this character in support of the money counts is permitted.¹

Where a More Extended Period of Limitation is provided for notes of a certain character, to obtain the benefit of such a statute the note must be specially declared upon, otherwise the period of limitation applicable to all notes in general will apply.²

Recovery Against Surety. — It is held that there can be no recovery against a surety where his character as such surety appears upon the face of the instrument without declaring specially on the contract.³

d. NON-NEGOTIABLE NOTES. — Where the action is between the original parties there is no distinction in respect to the effect of a note as evidence under the money counts arising from its not being negotiable; it is equally evidence of money lent or paid, or of an account stated, whether it is negotiable or otherwise.⁴

Conditional Acceptance. — See *supra*, 9. *Performance of Conditions Precedent.*

1. *Payne v. Couch*, 1 Greene (Iowa) 65; *Crandal v. Bradley*, 7 Wend. (N. Y.) 311, upon the authority of *Smith v. Smith*, 2 Johns. (N. Y.) 235, and *Pierce v. Crafts*, 12 Johns. (N. Y.) 90.

2. *Dana v. McClure*, 39 Vt. 197; *Carpenter v. McClure*, 38 Vt. 375; *Lapham v. Briggs*, 27 Vt. 26.

3. *Butler v. Rawson*, 1 Den. (N. Y.) 105; *Tomlinson v. Willey*, 1 How. Pr. (N. Y. Supreme Ct.) 247; *Balcom v. Woodruff*, 7 Barb. (N. Y.) 13; *Markley v. Withers*, 4 T. B. Mon. (Ky.) 14; *Hatten v. Robinson*, 4 Blackf. (Ind.) 479.

Suit Against Indorsers Jointly. — But under a statute authorizing several indorsers, on a note to be sued jointly, it was held that the note could be given in evidence under the common counts, although one of the defendants signed as "surety." *Bradford v. Corey*, 5 Barb. (N. Y.) 461.

Maker Signing as Surety. — In an action against the makers of a note which one of them has signed as a surety for the other, the plaintiff cannot recover on the money counts. *Butler v. Rawson*, 1 Den. (N. Y.) 105; *Hatten v. Robinson*, 4 Blackf. (Ind.) 479; *Wells v. Girling*, 8 Taunt. 737, 4 E. C. L. 264.

But it is also held that the word "surety" affixed to the name of a maker of a promissory note does not show conclusively such a relation so as to preclude a recovery against him on the money counts, but the note would be admissible in evidence, and if the defendant would avoid its effect he should show that he in fact did not

have the money, or that it was not loaned to him or paid out at his request. *Vaughn v. Rugg*, 52 Vt. 237.

Guarantor — Waiver of Objection. — In an action on a guaranty of a promissory note it cannot be objected that the declaration contained only the money counts, unless that objection was raised in the trial court. *Bickford v. Gibbs*, 8 Cush. (Mass.) 154.

4. *White v. Brown*, 19 Conn. 583; *Conrad Seipp Brewing Co. v. McKlitrack*, 86 Mich. 195; *Saxton v. Johnson*, 10 Johns. (N. Y.) 418; *Smith v. Smith*, 2 Johns. (N. Y.) 235.

An Assignee Suing on a Non-negotiable Instrument cannot introduce it under the common counts if objection is made. *Altman v. Fowler*, 70 Mich. 59; *Altman v. Rittershofer*, 68 Mich. 287.

"Value Received." — It is not necessary to insert in a bill or note the words "value received." See title *Bills and Notes*, Am. and Eng. Encyc. of Law (2d ed.), vol. 4, p. 135. And a note which does not on its face purport to be for value received is admissible under the common counts in an action by the payee against the maker. *Townsend v. Derby*, 3 Met. (Mass.) 364. But a note payable in specific property is held inadmissible under the common counts unless it imports a consideration on its face. *Saxton v. Johnson*, 10 Johns. (N. Y.) 418.

Indorsee Against Maker under Statute. — Although a non-negotiable note may not be admissible under a common count in a suit by an indorsee under a statute which renders all notes negotiable and provides that "anyone to whom such sum of money, or other personal

c. JOINDER OF SPECIAL AND COMMON COUNTS — (1) In General. — It is proper in declaring upon a bill or note to join the common counts with the special count on the bill or note,¹ though it is also held that it is not necessary to declare specially, but that a recovery may be had upon the common counts alone.²

property, is by such indorsement made payable, in case of the death of such assignee, his executor or administrator, may in his name institute and maintain the same kind of action for the money thereof, against the person who made and executed such note, as might have been maintained against him by the payee in case the same had not been assigned," destroys all distinctions between negotiable and non-negotiable notes, and a note of the latter description may be given in evidence under the count for money had and received in a suit by the indorsee against the maker. *King v. Wall*, 1 Morr. (Iowa) 189.

1. *Kirkpatrick v. Bethany*, 1 Ala. 201; *Bogardus v. Trial*, 2 Ill. 63.

Amendment. — It is proper to permit the addition of the common counts by amendment, the identity of the cause of action being preserved. *Libbey v. Pierce*, 47 N. H. 309; *Stevenson v. Mudgett*, 10 N. H. 338; *Burnham v. Spooner*, 10 N. H. 165; *Willis v. Crooker*, 1 Pick. (Mass.) 204.

A Note for a Smaller Amount than that claimed under the common counts is admissible in evidence under the latter. *Story v. Atkins*, 2 Stra. 725. See also *Hodges v. Holland*, 16 Pick. (Mass.) 395.

A money count for \$280 may be joined with a special count on a note for \$4,000. *Dehaven v. Tweed*, 4 Houst. (Del.) 234.

Different Judgments Necessary. — Where the judgment under the special and common counts is essentially different, the counts cannot be joined, as was held where a special count on a promissory note alleging that it contained a waiver of exemptions was united with a common count. Such a misjoinder is demurrable, and the plaintiff should be put to his election. *McCrummen v. Campbell*, 82 Ala. 567.

Not Pros. as to One Class of Counts. — Where a declaration contained special counts upon a check, together with the common counts, and there was a plea of general issue to the whole declaration and a special plea in bar to the special counts, to the latter of which

the plaintiff failed to reply, and judgment was entered that the defendant go without day as to the special counts, it was held that the plaintiff was left at liberty to proceed to a recovery under the common counts upon the check described in the special counts. *Howes v. Austin*, 35 Ill. 396.

Demurrer to Declaration Containing Special and Common Counts. — Where a general demurrer is interposed to a declaration containing special and common counts and the latter are good, the demurrer must be overruled. *Nickerson v. Sheldon*, 33 Ill. 373. See article DEMURRERS, vol. 6.

2. *Beck v. Thompson*, 4 Har. & J. (Md.) 531; *Holleran v. Field*, 23 Wend. (N. Y.) 39; *Ellsworth v. Brewer*, 11 Pick. (Mass.) 319; *Grant v. Vaughan*, 3 Burr. 1516.

Where a statute which allows a plaintiff in a joint action to declare on the money counts alone does not require as a consideration to the right of giving the bill or note in evidence, that other counts shall not be added, it has been held that the plaintiff may count specially on the bill or note, and other special or general counts may be added and pursued to a joint recovery if there be testimony to sustain them. But at any rate they will not vitiate the proceeding where they were abandoned at the trial. *Halleran v. Field*, 23 Wend. (N. Y.) 38; *Steuben County Bank v. Stephens*, 14 Wend. (N. Y.) 243.

Disapproval of Practice. — In an early case in *Virginia* the court animadverted upon this practice as tending to surprise the defendant without giving him an opportunity of preparing for a full defense, saying that in England the usual practice was to insert a special count, and the general money counts were only resorted to on account of some defect of form in the special count, which avoided the inconvenience of surprise, because the adverse party had notice from the special count of the matter with which he was charged. *Wood v. Luttrell*, 1 Call (Va.) 239.

Statute Abrogating Common Count. — In *Pennsylvania*, under a statute (Act of May 25, 1887, P. L. 271), it is held

(2) *Effect of Admission of Instrument under Common Counts.*

— The common counts were originally introduced to afford a greater facility and certainty in actions for a mere money demand, to avoid the prolixity of special counts and the hazard of a variance from a particular description of the contract sued on. Where a note cannot be received in evidence under the special count it may still be admissible under the common count.¹

Variance. — So where there is a material variance between a promissory note described in a special count and the note as given in evidence, it may defeat a recovery under the special count, but it is nevertheless admissible under the common counts.²

(3) *Necessity of Common Counts.* — Where a recovery cannot be had upon the note, there must be a count seeking a recovery of the indebtedness to justify a recovery of the consideration.³

f. **PROOF OF EXECUTION AND CONSIDERATION.** — As a general rule when an instrument is offered in evidence under the common counts in assumpsit its execution must be proved.⁴ But the

that the common count for money had and received with a statement containing a copy of the check sued on is not sufficient, and that since the passage of the above act the common counts have no place to fill in pleading. *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134.

1. *Burnham v. Spooner*, 10 N. H. 165; *Bogardus v. Trial*, 2 Ill. 63; *Wilkins v. Reed*, 6 Me. 220; *Brown v. Torver*, Minor (Ala.) 370.

As where the note is not stamped. *Jacquin v. Warren*, 40 Ill. 459; *Alves v. Hodgson*, 7 T. R. 239; *Humphreys v. Wilson*, 43 Miss. 335. Or where a note is void because it was discounted by a company not authorized to carry on the banking business. *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652; *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664. So where a note was void as to one of two joint makers the recovery was held to be proper under the common counts, both being liable in law for the consideration. *Wilkins v. Reed*, 6 Me. 220.

2. *Alabama.* — *Hopper v. Eiland*, 21 Ala. 714.

Arkansas. — *Jordan v. Ford*, 7 Ark. 416.

Connecticut. — *White v. Brown*, 19 Conn. 583.

Illinois. — *Bradshaw v. Hubbard*, 6 Ill. 390; *Lane v. Adams*, 19 Ill. 167; *Gilmore v. Nowland*, 26 Ill. 200; *Peoria, etc., R. Co. v. Neill*, 16 Ill. 269; *Williams v. Baker*, 67 Ill. 239; *Boxberger v. Scott*, 88 Ill. 477.

Maine. — *Atkins v. Brown*, 59 Me. 90.

Maryland. — *Coursey v. Baker*, 7 Har. & J. (Md.) 28.

Massachusetts. — *Townsend v. Derby*, 3 Met. (Mass.) 364; *Goodwin v. Morse*, 9 Met. (Mass.) 278.

Michigan. — *Roberts v. Hawkins*, 70 Mich. 566.

United States. — *Hopkins v. Orr*, 124 U. S. 510; *Henckley v. Hendrickson*, 5 McLean (U. S.) 170; *Stone v. Lawrence*, 4 Cranch (C. C.) 11.

Stipulation to Rely on Instrument in Special Count. — Where a note was misdescribed in a special count, it was held that the court might admit it under the common count, notwithstanding a stipulation had been entered into for the purpose of avoiding a continuance because there was no account filed with the common count, that the plaintiff would rely upon the instrument described in the special count, it being held to be a matter of discretion with the court to enforce the stipulation according to the strict letter, or according to the spirit and purpose of it. *Jansen v. Grimshaw*, 26 Ill. App. 293, 125 Ill. 468.

3. *Lewis v. Myers*, 3 Cal. 476, where in the declaration was upon a note and there was but one count. The court found that the note was never given, but that the amount of indebtedness was for merchandise sold. It was held that the finding was against the averment, and the judgment could not be supported upon the principle that the *allegata* and *probata* must correspond.

4. *Espalla v. Wilson*, 86 Ala. 487; *Hunley v. Lang*, 5 Port. (Ala.) 154;

execution of a note being first proved, the note is sufficient evidence to authorize a recovery under the common counts without proof of a consideration.¹

16. Bill of Particulars.— Under a statute which requires the plaintiff to file with his declaration a copy of the instrument of writing or account on which his action is brought, a copy of a note filed with the declaration is held to be a sufficient bill of particulars.²

Under Special and Common Counts.— And where a copy of a note is filed with a declaration which contains a special count and the common counts, an account or bill of particulars need not be filed in order to justify the admission of the note in evidence under the common count.³

Hopper v. Eiland, 21 Ala. 714; *Murchie v. Peck*, 57 Ill. App. 396; *Childs v. Fischer*, 52 Ill. 205; *Peake v. Wabash R. Co.*, 18 Ill. 88; *Stull v. Wilcox*, 2 Ohio St. 573; *Somers v. Harris*, 16 Ohio 262; *Dana v. Underwood*, 19 Pick. (Mass.) 99; *Matlock v. Purefoy*, 18 Ark. 492.

Qualification of Rule.— In *Hoard v. Little*, 7 Mich. 470, it is held that where a notice is served with the declaration that a note attached constitutes the cause of action against the defendant, the execution need not be proved, and this rule applies to the common counts.

So in *Childs v. Fischer*, 52 Ill. 206, where the declaration contained a special count and the common counts, and notice was given the defendant that the note sued on would be offered under all the counts, and that no other claim would be asserted under the declaration, it was held that this took the case out of the rule, and *distinguished* *Peake v. Wabash R. Co.*, 18 Ill. 88, *supra*.

1. *Boxberger v. Scott*, 88 Ill. 478; *Nickerson v. Sheldon*, 33 Ill. 372; *Childs v. Fischer*, 52 Ill. 205; *Catlin v. Gilders*, 3 Ala. 536; *Cayuga County Bank v. Warden*, 6 N. Y. 27; *Hughes v. Wheeler*, 8 Cow. (N. Y.) 84.

Where the declaration counts upon a promissory note, or contains the common counts only, and the plaintiff files a copy of the note sued on, with a written statement that he will rely on the note alone for a recovery, the defendant will be required to plead specially a want or a total or partial failure of consideration; but where the common counts alone are relied on without such statement, the defendant may make such defense under the general issue. *Wilson v. King*, 83 Ill. 232.

2. *Galloway v. Trout*, 2 Greene (Iowa) 596; *Low v. Taylor*, 41 Mo. App. 521.

Action by Accommodation Acceptor — Draft as Inducement.— In *Griffin v. Lawton*, 54 Ga. 104, it was held that where a draft was set out as the inducement to an action by accommodation acceptors against the drawers, no bill of particulars was necessary to be filed. The court in this case relied upon the decision in *Turner v. Thompson*, 23 Ga. 49, which was a similar action, and in that case there was no objection for want of a bill of particulars.

Statute Confined to Account.— It is only where an account is the foundation of a suit that the statute provides for a bill of particulars or "a list of the items composing it," and therefore a suit on a promissory note, and not on a mere account, is not affected by the statute. *Doss v. Peterson*, 82 Ala. 256; *People v. Pearson*, 2 Ill. 458.

3. *People v. Monroe*, 4 Wend. (N. Y.) 200; *People v. Pearson*, 2 Ill. 458; *Dean v. Mann*, 28 Conn. 355; *Columbia County v. Branch*, 31 Fla. 62.

New Counts Introduced.— In *Fairbanks v. Stanley*, 18 Me. 296, it is said that the remarks in *Fairfield v. Baldwin*, 12 Pick. (Mass.) 388, respecting the propriety of designating by a bill of particulars annexed the bills or notes to be offered in evidence under the money counts appeared to refer to the necessity of doing so when new counts are to be introduced, that the record may show that the new counts are for the same cause of action.

Instrument in Special Count Admissible under Common Count.— Where a declaration contained a special count with a memorandum check drawn by the defendant, a count upon a promissory

17. Pleading under Statutory Regulations—Copies and Exhibits —
a. GENERALLY. — The method of declaring upon a promissory note or written instrument for the payment of money is now often controlled by statutory regulations made for the purpose of simplifying the ancient rules of pleading.¹

b. SUFFICIENCY OF STATUTORY FORM. — When a statutory form is provided that form may be followed, although, without

note and a common money count, and the defendant demanded a bill of particulars, the plaintiff may give him a copy of the check described in the first count, and such check is admissible in support of a count for money lent. *Dean v. Mann*, 28 Conn. 355.

A bill of particulars cannot be required where the necessary information is contained in a special count, and therefore where the declaration contained a special count on a note and the general counts, and a bill of particulars is furnished which did not contain the note, it was held that the note is inadmissible under the special count because of the variance, but was admissible under the money count. *Vila v. Weston*, 33 Conn. 42; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83; *People v. Monroe*, 4 Wend. (N. Y.) 200.

But it is also held that under a declaration on a bill, by drawer against acceptor, the plaintiff will be entitled to enter the verdict on such common counts as apply to the consideration of the bill, provided the consideration of the bill is stated in the particulars of demand. *Ryder v. Ellis*, 8 C. & P. 357, 34 E. C. L. 426.

Note as Only Demand. — The plaintiff cannot disregard a plea and treat it as a nullity because it is not accompanied with an affidavit of merits, unless it appears by the declaration or the plaintiff's bill of particulars that the written instrument or record declared upon is the only cause of action upon which the plaintiff relies. And a copy of a promissory note attached to a declaration containing the common counts with a notice to the defendant that the suit is brought against him as a party to the note is not enough to authorize the plaintiff to disregard an order for a bill of particulars, but to justify such a course the note must be the only demand upon which the plaintiff claims to recover. *Reynolds v. Woods*, 22 Wend. (N. Y.) 642; *Garrett v. Teller*, 22 Wend. (N. Y.) 643.

Sufficiency of Bill. — A bill of particulars is sufficiently explicit if it fully apprises the defendants of the grounds of the plaintiff's claim. A form is not technically exact which simply gives the copies of the notes instead of saying, so much money due upon them, but in substance it is sufficient, as no one could be misled. *Stowits v. Troy Bank*, 21 Wend. (N. Y.) 187.

Cause Confined to Instruments Filed. — Where a plaintiff takes a default upon a declaration with a definite cause of action filed therewith as a bill of particulars, and standing upon that default causes a final judgment to be entered, he is confined as to the amount of his judgment to the cause of action filed with the declaration, and it will be error for him, after the default has been entered, and while still insisting thereon, to amend the bill of particulars and take judgment for a much larger amount than was due on the original bill of particulars. *Columbia County v. Branch*, 31 Fla. 62.

Bill of Particulars Against Indorser. — In *Mississippi* it was held, under a statute, that though the plaintiff in an action of assumpsit under the common counts might give a note filed with the declaration in evidence against the maker (*Hughes v. Grand Gulf Bank*, 2 Smed. & M. (Miss.) 115), in an action by an accommodation acceptor against the drawer, or in an action against an indorser, the bill or note must be described in a bill of particulars so as to identify it. *Curry v. Kurtz*, 33 Miss. 24; *Jennings v. Thomas*, 13 Smed. & M. (Miss.) 618.

1. *Wilcox v. Sweet*, 24 Mich. 357. See, in connection with this section, the various titles in this article wherein the effect of statutory provisions is pointed out in specific instances.

Statutory or Common-law Liability. — Whether the defendant's liability finds its source in the common-law or statute is immaterial, and need not be averred. *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 326.

the aid of the statute, it might not contain the ingredients of a good common-law declaration.¹

c. PERMISSIVE STATUTES. — Where a statute is merely permissive the plaintiff may proceed at his election under the ordinary form by declaration or under the new form.²

d. CHARACTER OF STATUTES AND PROCEEDINGS THEREUNDER — (1) *Generally.* — The statutes regulating the manner of declaration on notes and written instruments, as above indicated, are of diverse characters, but they all tend to a simple method of describing the instrument sued on, the right of the plaintiff and the liability of the defendant.

(2) *Concise Statement of Cause.* — Thus, under a statutory form of a complaint, the allegations may be no more than that the plaintiff claims of the defendant a certain amount due by note executed by the defendant on a certain day, together with the time of payment.³

(3) *Summary Proceedings.* — Proceedings of a summary character have also been provided, under which no pleadings on behalf of the plaintiff are necessary, as where a notice of a motion for a judgment is assimilated to the declaration and is made to subserve the purpose both of a writ and a pleading.⁴

1. *Beggs v. Arnotte*, 80 Ala. 180; *State Bank v. Dent*, 12 Ala. 187; *Baldwin v. Humphrey*, 75 Ind. 154; *Moore v. Royce*, 10 Allen (Mass.) 556; *Richter v. Kramer*, 1 N. Y. City Ct. 348; *Prindle v. Caruthers*, 15 N. Y. 425. See also *Hamilton v. Black*, Dall. (Tex.) 586.

A Note Payable in Specific Property may be sued upon in the short form authorized by the act of 1874. *Americus Bank v. Rogers*, 55 Ga. 29. *Following Van Buren v. Webster*, 12 Ga. 615, which virtually overruled *Phillips v. Dodge*, 8 Ga. 51.

Form Restricted to Case Provided. — A complaint in the form given by the code or a complaint "on a promissory note by payee against maker," is in legal effect the same as if it contained in express terms an averment that the note described in the complaint was payable to the plaintiff in the action. Under this form of complaint a note which is not payable to the plaintiff would not be admissible in evidence. *Letondal v. Huguenin*, 26 Ala. 552; *Cumming v. Richards*, 32 Ala. 459; *Beggs v. Arnotte*, 80 Ala. 180.

2. *Donough v. Boger*, 10 Phila. (Pa.) 616, 31 Leg. Int. (Pa.) 286; *Collingwood v. Merchants' Bank*, 15 Neb. 120; *Jacobson v. Manning*, 2 Greene (Iowa) 585.

3. *Beggs v. Arnotte*, 80 Ala. 179.

See also *Letondal v. Huguenin*, 26 Ala. 552; *Cumming v. Richards*, 32 Ala. 459; *Americus Bank v. Rogers*, 55 Ga. 29.

4. *For Example*, under an early statute in *Alabama*, a notice might issue at the suit of a bank against its debtor on a note to bring the latter into court to answer a motion for a judgment in favor of the bank on such note. *Griffin v. State Bank*, 6 Ala. 908; *State Bank v. Dent*, 12 Ala. 187; *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 181. See also *State Bank v. Bush*, Walk. (Miss.) 265.

Notice Assimilated to Declaration. — After the motion is made the notice is assimilated to the declaration and subserves the purpose of a writ and declaration, although it may not be so formal as the latter. But it should show the evidence of indebtedness with such precision that the defendant may know from an inspection of the notice itself against what he is called on to make defense, and the defendant may demur thereto or take issue upon it. *Griffin v. State Bank*, 6 Ala. 908; *State Bank v. Dent*, 12 Ala. 187.

Note Payable at Branch Bank. — It was held in *State Bank v. Bush*, Walk. (Miss.) 265, that the act which gave the right to the Bank of Mississippi to commence suits by notice merely against indorsers of notes and bills

Misdescription in Notice. — If a note is misdescribed in such a notice in a material part the variance will be fatal to the motion.¹

Strict Construction of Statute. — The statute prescribing such a summary proceeding should be strictly construed.²

(4) *Note Filed as Substitute for Declaration.* — Under early statutes in some states a plaintiff was permitted to file a note in an action of debt to serve the purpose of a declaration, no other pleading than the note being necessary in such a case.³ Under such a statute it was held that it was not intended that the note should of itself be a sufficient statement where it did not show

payable at the bank, did not apply to indorsers of notes payable at a branch of the bank.

Principal and Surety. — See article PRINCIPAL AND SURETY.

1. *Griffin v. State Bank*, 6 Ala. 908.

A statement in the notice, if not descriptive of the bill sued on, may be rejected as surplusage. *State Bank v. Dent*, 12 Ala. 187.

2. **Record — Certificate.** — Under the Alabama act referred to in the last preceding notes, it is necessary that the president's certificate that the notes were *bona fide* the property of the bank appear by the record to have been made and acted on by the court; the act requiring that the notice shall be accompanied by such certificate, it will not appear that the court has jurisdiction otherwise. *Bates v. Planters', etc., Bank*, 9 Port. (Ala.) 376; *Logwood v. Planters', etc., Bank, Minor* (Ala.) 23; *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 181.

It is not sufficient that the certificate is merely copied and sent up with the papers if it does not appear that the court acted upon it. *Bates v. Planters', etc., Bank*, 9 Port. (Ala.) 380.

Filing Declaration Ineffective to Change Character. — Where the statute requires a certificate of the president of the bank that the note is the *bona fide* property of the bank to accompany the notice, if, after service of the notice, the plaintiff files a declaration, this will not alter the nature of the proceeding so as to excuse the president's certificate. *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 181.

Date of Notice. — A notice at the suit of a bank need not be dated, unless the date is made material by a reference to it as indicating the time when the motion will be made, etc., and although the indorsement of its receipt by the sheriff shows that the notice

was placed in his hands before the maturity of the debt, yet if it is not served until after the debt is due no objection can be made to this defect in the notice. *Griffin v. State Bank*, 6 Ala. 908.

3. *Halsey v. Hazard*, 6 Blackf. (Ind.) 265; *Parry v. Henderson*, 6 Blackf. (Ind.) 72; *Adams v. Kerns*, 11 Ind. 346; *Hauser v. Hays*, 11 Ind. 368; *Hughes v. Walker*, 4 Blackf. (Ind.) 50; *Logan v. Lee*, 10 Ark. 586.

Action Brought Without Attorney. — In *Tennessee*, under an Act of 1811, a plaintiff who prosecuted his own suit in person was permitted to file the note or bond upon which the suit was founded in lieu of a declaration, but it was held that where an attorney was employed a declaration was necessary, or if the note was assigned a declaration could not be dispensed with. *Nichol v. Mebane*, 1 Yerg. (Tenn.) 202.

In the Absence of Statute, a note alone will not serve the purpose of a statement of the cause of action. Thus a delivery to a justice of the peace of the evidence on which the action was founded, instead of a statement of the plaintiff's ground of action, was held not to be such a state of demand as was required by statute. *Longstreet v. Cummings*, 2 N. J. L. 195; *Cowperthwait v. Horner*, 3 N. J. L. 417. See article JUSTICES OF THE PEACE, vol. 12, p. 661.

Restriction of Statute. — Where a note had added to the bottom thereof a condition that the payee was to receive a certain kind of property in payment of the note, provided it was delivered within a certain time, it was held that the statute of 1833 did not apply to such a case, but was restricted to a promissory note not under seal for the payment of money. *Taylor v. Meek*, 4 Blackf. (Ind.) 41; *Dowdel v. Aston*, 3 Blackf. (Ind.) 406.

the names of the persons to whom it was payable.¹

(5) *Statement Instead of Declaration.* — In *Pennsylvania* a statement, together with a copy of the writing, was substituted for a declaration, but it is held that this statement must set forth in clear and concise terms a good cause of action, by which is meant such averments of fact as would, if not controverted, entitle the plaintiff to a verdict for the amount of his claim, and that in this respect there is no substantial difference between a special count in the declaration under the time-honored system of pleading and its legislative substitute,² in order to entitle the plaintiff to a judgment for the want of a sufficient affidavit of defense.³

(6) *Complaint Alleging Amount Claimed upon Copy.* — Under code provisions, a party suing upon a note or an instrument for the payment of money may in several states set forth a copy of the instrument and state that there is due to him thereon a specified sum, and this is a sufficient statement of his cause of action.⁴

1. *Hughes v. Walker*, 4 Blackf. (Ind.) 50, holding that when a suit is brought by persons composing a firm, and a note payable to the firm is filed as the cause of action, a suggestion should be entered on record that the note was made to the plaintiffs by the name of the firm.

Equitable Owner. — Before a holder other than the payee could sue in his own name on a note unindorsed, it was not sufficient to file such a note as a complaint, but afterwards it was held that it could be so filed, the reason for the former rule no longer existing. *Garner v. Cook*, 30 Ind. 331.

2. *Fritz v. Hathaway*, 135 Pa. St. 274; *Byrne v. Hayden*, 124 Pa. St. 170.

3. *Peale v. Addicks*, 174 Pa. St. 546; *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241; *Newbold v. Pennock*, 154 Pa. St. 591.

Effect upon Common Counts. — Since the statute referred to in the text (Act May 25, 1887, P. L. 271) it is held that the common counts have no place in pleadings in *Pennsylvania*, and that a statement containing merely a copy of the check sued on, with a common count for money had and received, was wholly insufficient to put the defendant on a statement of his defense. *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. St. 134. See also under earlier statutes, *U. S. Bank v. Thayer*, 2 W. & S. (Pa.) 444; *Church v. Feterow*, 2 P. & W. (Pa.) 301; *Epler v. Funk*, 8 Pa. St. 468; *Camp v. Owego Bank*, 10 Watts (Pa.) 130.

Copies Indispensable. — In an action of assumpsit the procedure act in express

terms requires that the statement "shall be accompanied by copies of all notes, contracts, etc., * * * upon which plaintiff's claim is founded." This is not merely directory; it is absolutely imperative; and if a copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or the substance of the missing paper, except where the papers are shown to have been lost or destroyed. *Acme Mfg. Co. v. Reed*, 181 Pa. St. 385.

Sufficiency of Statement. — In an action commenced by summons in assumpsit by a bank, statement of claim signed by the cashier without designating his official capacity and without any averment thereof in the statement is sufficient to sustain a judgment for want of sufficient affidavit of defense. *Brooks v. Merchants' Nat. Bank*, 125 Pa. St. 394.

4. *New York.* — *Smith v. Fellows*, 26 Hun (N. Y.) 384; *Richter v. Kramer*, 1 N. Y. City Ct. 348; *Butchers', etc., Bank v. Jacobson*, 9 Bosw. (N. Y.) 595; *Spear v. Downing*, 34 Barb. (N. Y.) 522; *Prindle v. Caruthers*, 15 N. Y. 425; *Andrews v. Astor Bank*, 2 Duer (N. Y.) 629; *Hendricks v. Wolff*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 428; *Phelps v. Ferguson*, 9 Abb. Pr. (N. Y. Super. Ct.) 208; *Darling v. Powell*, 20 Misc. Rep. (N. Y. Supreme Ct.) 240; *Appleby v. Elkins*, 2 Sandf. (N. Y.) 673.

Alleging Execution. — In *Vogle v.* Volume XIV.

(7) *Declaration with Copy Annexed or Inserted.* — Analogous to the code provisions last above mentioned are statutes obviating the necessity of such counts by permitting declarations with general counts to be filed with copies of the instruments sued on and annexed.¹

Instrument Copied in Declaration. — Under other statutes a declaration

Kirby, 15 Civ. Pro. Rep. (N. Y. City Ct.) 332, it was held that the complaint should allege the making of the note by the defendant in addition to setting out the copy in order to afford the defendant an opportunity of putting in issue the execution of the instrument.

Instrument Must Show Liability. — The copy set forth under such a statute must be a *prima facie* valid obligation. If the consideration is not implied or a request is essential to the defendant's liability, it must be averred, and the court will not extend the application of the statute so as to give a party a cause of action by an indirect mode of averment when he would not have such a cause of action if his allegation had been put into proper form. *Spear v. Downing*, 34 Barb. (N. Y.) 522. See also *Duffield v. Johnston*, 96 N. Y. 369; *Titlow v. Hubbard*, 63 Ind. 6.

Condition Precedent. — If the copy set forth in the complaint shows a condition precedent to the defendant's liability, the happening of a contingency must be averred. *Tooker v. Arnoux*, 76 N. Y. 397.

The Exact Words of the Statute Need Not Be Adopted. — The allegation that "there is now due and owing from the defendant to the plaintiff the sum of," etc., was held to be sufficient under the provision that "the complaint shall contain a plain and concise statement of the facts constituting the cause of action," over the objection that it should have alleged that "there is now due and owing on said note," or that "there is now due and owing the plaintiff thereon." *Smith v. Fellows*, 26 Hun (N. Y.) 384. See also *Hendricks v. Wolff*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 428.

Wisconsin. — *Leggett v. Jones*, 10 Wis. 34; *Veeder v. Lima*, 11 Wis. 419; *Strunk v. Smith*, 36 Wis. 631.

Copy Indorsed as Notice. — Where a copy of a note is indorsed upon a declaration and served therewith as the cause of action under the statute, such copy becomes a part of the declaration, and the plaintiff is confined to the cause thus set out. That statute was

said to strip the declaration of its function of informing the defendant of the matter of complaint, and to transfer it to the copy of the note served as the notice which informs the defendant of the cause of action. *Markoe v. Seaver*, 2 Wis. 151; *Cooper v. Blood*, 2 Wis. 70.

Kansas. — *State v. School Dist. No. 3*, 34 Kan. 237.

Nebraska. — *Collingwood v. Merchants' Bank*, 15 Neb. 118.

Statute Permissive. — The provision of the code permitting an action to be brought by giving a copy of the instrument sued on, with all credits and indorsements thereon, and stating that there was due to the plaintiff on such instrument a specified sum, is held to be permissive merely, and if the defendant so desires he may state the facts in a different form. *Collingwood v. Merchants' Bank*, 15 Neb. 118.

Amount Gathered from Other Pleadings. — It must be alleged that there is due upon the instrument from the adverse party to the plaintiff a specified sum, unless this may be gathered from the other pleadings. *Gage v. Roberts*, 12 Neb. 276.

South Carolina. — *Watson v. Barr*, 37 S. Car. 463, holding that a complaint stating that "this action is founded upon an instrument for the payment of money only, made and delivered by the defendants to the plaintiff, of which the following is a copy: * * * 'One day after date I promise to pay W. B. Watson, or bearer, five hundred and sixty-two and 60-100 dollars, for value received. Witness my hand and seal, W. F. Barr, [L. s.] J. Feaster Brown, W. D. Brown' — the last two names being signed on back of said note," complies with all the requirements of the code and is good against the defendants named.

South Dakota. — *Scott v. Esterbrooks*, 6 S. Dak. 253.

1. *People v. Pearson*, 2 Ill. 458; *Benjamin v. Delahay*, 3 Ill. 574; *Brower v. Rupert*, 24 Ill. 183; *Chumasero v. Gilbert*, 26 Ill. 39; *Phelps v. Church*, 65 Mich. 233; *West v. Darcy*, 20 R. I.

may set out an exact copy of the note sued on in the words and figures which appear upon the face thereof and claim the amount of the note and interest in the form authorized.¹

(8) *Petition with Copy.* — So, under other statutes, a brief mode of pleading in the place of a declaration has been provided by petition with the instrument annexed to or set out therein.²

(pt. ii.) 70; *Cooper v. Blood*, 2 Wis. 62; *Markoe v. Seaver*, 2 Wis. 148; *Peck v. Cheney*, 4 Wis. 249.

The Original Note may be filed with the declaration instead of a copy. *Davis v. Cosnahan*, 1 Hill L. (S. Car.) 373.

Sufficiency of Copy. — A receipt on the back of a note for a part payment, and a memorandum that the note had been protested for nonpayment, are not parts of the note, and need not appear in the copy served with the declaration in an action on the note. Such a variance will not exclude the note. *Buhl v. Trowbridge*, 42 Mich. 44.

Inaccurate Copy. — The purpose of a copy is to notify the defendant of the particular claim in suit in order that he may determine whether or not he has a defense and make or omit to make his affidavit accordingly. If it is sufficiently accurate to identify the claim and not mislead the defendant its purpose is fulfilled. An exact copy is not necessary, for to insist upon this would be to require a facsimile or reproduction of the original, a degree of strictness which it is said would render the provision of the statute impracticable and inoperative. *West v. Darcy*, 20 R. I. (pt. ii.) 70.

In *Chumasero v. Gilbert*, 26 Ill. 39, it was held that the omission to file an accurate copy, or the want of any copy, was waived by going to trial without objection.

Party Not Misled. — A note sued on contained the words "secured by mortgage," but the copy served with the declaration did not contain these words. An objection to the admission of the note in evidence because it varied from the copy set out in the declaration was overruled, the counsel making the objection admitting that he was not misled by the omission. *Howry v. Eppinger*, 34 Mich. 29.

Description of Instrument Instead of Copy. — In *Benjamin v. Delahay*, 3 Ill. 574, it was held that the object of the statute requiring the plaintiff to file with his declaration a copy of the instrument sued on, being to notify the

defendant of the particular demand sought to be recovered, was as fully attained by a literal description of the instrument in the declaration as by the filing of a detached copy.

1. *Hall v. Foster*, 114 Mass. 18; *Lincoln v. Butler*, 14 Gray (Mass.) 129; *Osgood v. Pearsons*, 4 Gray (Mass.) 455.

In *Moore v. Royce*, 10 Allen (Mass.) 556, the defendant demurred to the declaration on the ground that the allegation that the defendant owed the balance due on the note, was uncertain, informal, and insufficient, but the objection was overruled, the court saying: "The declaration is almost in the words of the form prescribed by the statute. It sets forth with substantial precision and certainty the facts relied upon in support of the action."

Sufficiency of Copy—Variance. — A declaration alleged that "the defendants made a promissory note, a copy whereof is hereto annexed, payable to one Betsey S. Besse, or order, and the same was duly indorsed and transferred to the plaintiff." At the trial the plaintiff offered in evidence a note precisely corresponding with the copy annexed to the declaration, save that it bore an indorsement by Besse, and on its face a revenue stamp, and a memorandum of protest and notice, signed by a notary, none of which were in the copy; and it was held that the declaration in this case set out a copy of the note made by the defendant, and the legal effect of its indorsement to the plaintiff, and that the note and indorsement offered in evidence corresponded with the declaration. *Clary v. Thomas*, 103 Mass. 44.

2. *Jacobson v. Manning*, 2 Greene (Iowa) 585; *Myers v. Miller*, 2 Ohio Dec. (Reprint) 319, 2 West. L. M. (Ohio) 420; *Sargent v. Steubenville, etc.*, R. Co., 32 Ohio St. 452; *Ingersoll v. Craw*, 1 Cleve. L. Rep. (Ohio) 1, 4 Ohio Dec. (Reprint) 76.

The Petition in Debt. — Under Arkansas Rev. Stat., p. 152, which provide that "any person, being the legal owner or holder of any bond, bill, or note for the

(9) *Exhibits* — (a) *Requirement.* — In some states it is required that an instrument which is the foundation of the case must be annexed to the complaint as an exhibit by copy or original, or a copy thereof set out in the complaint,¹ and the failure to comply with such a statute will render the complaint bad on demurrer,² where the instrument is not alleged to be lost

payment of money or property, may sue thereon in any circuit court having jurisdiction thereof by petition in debt," it is held that the object of the act was to give the party by petition and summons a summary mode of recovery and debt, and that the new proceeding is a new and more simple manner of suing in that form of action and will lie only in such cases where by the common law debt could be maintained. By petition and summons the copy of the instrument is required to be inserted. *Mitchell v. Walker*, 4 Ark. 145; *Yell v. Snow*, 24 Ark. 554. See also *Jacobson v. Manning*, 2 Greene (Iowa) 585.

Statute Permissive. — In *Jacobson v. Manning*, 2 Greene (Iowa) 585, it was held that the statute permitting a suit upon a note or bond to be commenced by filing the same with the clerk, together with the petition setting forth the substance of the note or bond, and concluding with a prayer for judgment for the debt, did not prevent a suit upon the note in the ordinary form.

1. *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73; *Prince v. State*, 42 Ind. 315; *Roche v. Moffitt*, 107 Ind. 58; *Barnes v. Van Keuren*, 31 Neb. 165; *Arkansas City First Nat. Bank v. Jones*, 2 Okla. 353. See article EXHIBITS, vol. 8, p. 736.

2. *Arkansas City First Nat. Bank v. Jones*, 2 Okla. 353; *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73; *Roche v. Moffitt*, 107 Ind. 58; *Prince v. State*, 42 Ind. 315; *McCarn v. Rivers*, 7 Iowa 404; *Mainer v. Reynolds*, 4 Greene (Iowa) 187.

Waiver of Objection. — Where a defendant pleads to the merits, a motion in arrest of judgment will not lie on the ground that the note sued on was not filed with the petition and that the petition neither alleges filing nor any statutory excuse for the failure to file, because if the petition is in other regards sufficient these averments are not necessary in order to constitute the cause of action. Such a pleading, though defective on demurrer, states a good cause of action, however defect-

ive, and the defect is cured by verdict. *Burdsal v. Davies*, 58 Mo. 138; *Fenwick v. Bowling*, 50 Mo. App. 516; *Peake v. Bell*, 65 Mo. 224; *Andrews v. Alcorn*, 13 Kan. 351; *McCarn v. Rivers*, 7 Iowa 404.

Fatal After Verdict. — In *Indiana* it is held that a pleading is demurrable if this rule is not complied with, and that, on failure to demur, the defect is not cured by the verdict, but may be reached by motion in arrest of judgment. *Johnson School Tp. v. Citizens Bank*, 81 Ind. 517.

Comparison with Former System. — Under the former system of procedure it was sufficient for a pleader to set forth the written instrument sued on according to its legal effect and operation. The statutes requiring the original instrument or a copy to be filed with the pleading are therefore amendatory of that practice. See *Price v. Grand Rapids, etc.*, R. Co., 13 Ind. 58.

Description and Legal Effect Instead of Copy. — If a note is not copied in the complaint but the material substance and legal effect of the note are stated, showing its date, consideration, parties, principal sum and rate of interest, and the amount due and unpaid, and it is averred that the defendant refused to pay the same, or any part thereof, and that the plaintiff is still the owner and holder thereof, the complaint is not subject to general demurrer on the ground that a copy of the note is not embodied in it. *Ward v. Clay*, 82 Cal. 502; *Schuttler v. King*, 13 Mont. 228. Nor objectionable because a copy is not filed as an exhibit. *Mercer v. Hebert*, 41 Ind. 460; *Budd v. Kramer*, 14 Kan. 101; *Lyon v. Kempinski*, 1 Tex. App. Civ. Cas., § 79; *Gunter v. Lillard*, 1 Tex. Civ. App. 325; *Hamilton v. Black*, Dall. (Tex.) 586. And a substantial copy is sufficient when the note is declared on according to its legal effect. *Dewees v. Lockhart*, 1 Tex. 535.

And in such a case if a petition purports to make a copy a part thereof, the statement to that effect may be re-

or destroyed, or a sufficient excuse alleged for the failure to file the same.¹

(b) **Character of Instrument Necessary to Be Filed** — *aa. GENERALLY.* — An instrument required to be filed under such provisions is only such as is the foundation of the action, and none of any other character need be filed.² Thus, the copy of an acceptance in an action

jected as surplusage. *Gunter v. Lillard*, 1 Tex. Civ. App. 325; *Lyon v. Kempinski*, 1 Tex. App. Civ. Cas., § 79.

Under earlier statutes in *Indiana*, it was held that the instrument sued on must have been set forth in the complaint according to its legal effect and the original instrument or a copy must be filed with the pleading. *Conwell v. Hill*, 14 Ind. 131; *Price v. Grand Rapids, etc., R. Co.*, 13 Ind. 58.

Where the Instrument Is Copied into the Pleading it need not be attached as an exhibit. *Barnes v. Van Keuren*, 31 Neb. 165.

1. *Cleveland v. Roberts*, 14 Ind. 511; *Blasingame v. Blasingame*, 24 Ind. 86, holding that the allegation of loss need not be under oath.

See article **LOST INSTRUMENTS AND RECORDS**, vol. 13, p. 349.

Subscription Paper. — Such a statute does not embrace within its meaning a subscription paper. *Workman v. Campbell*, 46 Mo. 305.

Defendant in Possession. — An averment that the defendant is in the possession of the note is a sufficient excuse for a failure to file a note or a copy thereof with the complaint. *Keesling v. Watson*, 91 Ind. 578; *Walter A. Wood Mowing, etc., Mach. Co. v. Irons*, 10 Ind. App. 454.

Where the maker of a note obtains possession thereof he is estopped from objecting that the note is not filed with the petition. *Bank of Commerce v. Hoeber*, 8 Mo. App. 171.

An averment that the defendant "by trick, connivance, and fraudulent pretenses obtained possession of said notes," is a sufficient averment to excuse the nonfiling of the notes, or copies of them, with the complaint, but it does not authorize the plaintiff to prove that a settlement made by him with the defendant, in pursuance of which the notes had been surrendered, was brought about by fraud, mistake, or error, for the purpose of setting aside such settlements, but the averment means that the defendant has possession of the notes without right, and not

that he has possession by virtue of an agreement fraudulently procured; proof of the latter would not support an averment of the former. *Timmons v. Wiggins*, 78 Ind. 297.

Third Person in Possession. — An allegation that a note is wrongfully held by a third party is no excuse for non-compliance with the statutory provision. *Hook v. Murdoch*, 38 Mo. 224. See also *Conwell v. Hill*, 14 Ind. 131, holding that in a suit against a bank for failure to pay notes on demand, the notes, or copies thereof, should be filed with the complaint, and the fact that they were deposited in an auditor's office did not excuse the failure to file them.

Insufficient Excuse. — Where a party in attempt to excuse the nonfiling of a note proffers in his pleading an excuse not warranted by statute, his pleading is demurrable. *Hook v. Murdoch*, 38 Mo. 224.

Waiver of Objection. — If there is a failure to allege an excuse for not filing an exhibit, the petition is defective and is subject to demurrer, but being the mere defective statement of a good cause of action is cured by verdict. *Burdsal v. Davies*, 58 Mo. 138.

2. *Clark v. Trueblood*, 16 Ind. App. 100; *Seawright v. Coffman*, 24 Ind. 414; *Porter v. Waltz*, 108 Ind. 40; *Copeland v. Philadelphia, etc., Coal, etc., Co.*, 13 Phila. (Pa.) 8, 36 Leg. Int. (Pa.) 202.

Note on Back of Agreement. — A note, written on the back of an agreement, being the foundation of the cause of action, the agreement constitutes no part of the note and need not be made a part of the petition. *Dunning v. Rumbaugh*, 36 Iowa 566.

A Protest of a check is not necessary in case of its nonpayment, but if it were necessary it would only afford evidence of the matters properly embraced within it, and would not constitute the foundation of the action. A protest, in other words, is only to be used as evidence on the trial concerning the instrument in writing to which it relates, and not as a written instru-

against the drawer is no part of the pleading.¹ But if the note is subject to conditions contained in a contemporaneous writing, it is held that the latter should also be made a part of the complaint by copy, and that a copy of the note showing the existence of such writing will render the complaint demurrable.²

bb. COPY OF INDORSEMENT OR ASSIGNMENT. — Only such indorsements need be copied or attached as are material to plaintiff's title.³ In some cases it is held that an indorsee or assignee may sue the maker without setting out a copy of the indorsement to himself, though such copy is necessary where the action is against the indorser.⁴ In other cases, however, it is held that it is necessary to set out a copy of an indorsement, even in an action against the maker.⁵

(c) *Several Counts or Paragraphs — On Instrument Sued On.* — Several counts or paragraphs of a complaint may be based upon the same

ment constituting the basis of the action. *Pollard v. Bowen*, 57 Ind. 234.

1. *Brown v. Jones*, 125 Ind. 375.

2. *Titlow v. Hubbard*, 63 Ind. 6; *Busch v. Columbia City German Bldg.*, etc., Assoc. No. 2, 75 Ind. 348.

Conditional Promise. — Where the copy of an instrument exhibited shows a promise to pay under certain conditions, a complaint in the ordinary form on a promissory note to pay unconditionally is not sufficient. *Titlow v. Hubbard*, 63 Ind. 6.

3. *Plaintiff's Indorsement.* — In an action by one who had paid and taken up a note indorsed by him, against the maker and prior indorser, it is not necessary to copy into the petition the indorsement from the plaintiff. *Fox v. Sayre*, 6 Dana (Ky.) 312.

4. *Treadway v. Cobb*, 18 Ind. 36; *Tillman v. Harter*, 38 Ind. 1; *Keller v. Williams*, 49 Ind. 504; *Keith v. Chamber*, 69 Ind. 477; *Hill v. Shalter*, 73 Ind. 459; *Fordyce v. Nelson*, 91 Ind. 448; *Thomson v. Madison Bldg.*, etc., Assoc., 103 Ind. 279; *Simpkins v. Smith*, 94 Ind. 471; *Short v. Kerns*, 95 Ind. 432; *Eichelberger v. Old Nat. Bank*, 103 Ind. 402; *Bascom v. Toner*, 5 Ind. App. 229.

Action on Indorsement. — Where the action is on an indorsement against an indorser, it is held that the indorsement is the cause of action, and must be set out by original or copy. *Treadway v. Cobb*, 18 Ind. 36; *Sinker v. Fletcher*, 61 Ind. 276; *Williams v. Osbon*, 75 Ind. 280; *Rairden v. Winstandley*, 99 Ind. 600, holding that the defect is not cured by verdict; *Eichelberger v. Old Nat. Bank*, 103 Ind. 402; *Smythe v.*

Scott, 106 Ind. 245; *Bascom v. Toner*, 5 Ind. App. 229; *Woodruff v. Leonard*, 4 *Thomp. & C.* (N. Y.) 208.

Common Counts with Notice. — In *Hamilton v. Powers*, 80 Mich. 313, it was held that in assumpsit on the common counts, with copy of the note served with the declaration, under the statute, such copy should show the indorsement through which plaintiff acquired title, but an amendment should be allowed in this respect in furtherance of justice.

Allegation of Indorsement. — There must also be an allegation referring to the indorsement, as well as a copy of the indorsement. *Sinker v. Fletcher*, 61 Ind. 276.

In *Drumm v. Bradfute*, 18 La. Ann. 680, it was held that where the indorsement was set out in the petition, it was a part thereof, and the absence of an allegation of indorsement was cured.

Against Maker and Surety. — In *Smith v. Hunter*, 33 Ind. 106, it was held that in an action by an assignee against the maker and surety, the latter could not object that the complaint did not set out the assignment, as the action was not based on the assignment.

5. *Arkansas City First Nat. Bank v. Jones*, 2 Okla. 353; *Mainer v. Reynolds*, 4 *Greene* (Iowa) 187; *Gray v. Phillips*, 1 *Morr.* (Iowa) 430.

Protection as Bona Fide Holder. — In *Ohio* it was held that in a petition framed under the code in an action by one other than the payee, against the maker, a copy of an indorsement by the payee must be set out in order to entitle the plaintiff to protection as a *bona fide*

writing, and a single copy referred to in each paragraph will be sufficient.¹

Several Instruments Sued On. — But where several instruments are declared on, it has been held that a copy of each must be exhibited with the paragraph counting upon it, notwithstanding all the instruments are identical in terms.²

(d) **Identification.** — The mere filing of an instrument without any reference to it in the pleading is not sufficient.³ The instrument must in some manner be referred to so as to identify it with reasonable certainty.⁴

(e) **Effect of the Exhibit or Copy — Part of Pleading.** — The effect of exhibits and copies depends upon the purpose for which they are required and permitted. Where a strict rule prevails requiring an

indorsee for value before maturity. *Tisen v. Hanford*, 31 Ohio St. 193.

Omission — Objection. — It has been held, however, that the omission to annex a copy of an assignment can only be taken advantage of by demurrer. *McCarn v. Rivers*, 7 Iowa 404.

1. *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 517; *Peck v. Hensley*, 21 Ind. 344; *Maxwell v. Brooks*, 54 Ind. 98; *Scotten v. Randolph*, 96 Ind. 581.

Where a petition sued on one instrument in several counts, the instrument being annexed to the petition as a part thereof, it was not error to strike out all the counts except that which properly described the action. *Beal v. Alexander*, 6 Tex. 531.

2. *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 517.

In an Action on a Number of Warrants purchased by the plaintiff, the petition alleged the purchase for a valuable consideration by the plaintiff, and that a full description of the warrants was attached as an exhibit to the petition. Instead of describing the warrants in the petition the description was given in an exhibit, as above stated, setting forth the date of each claim, the name of each payee, and the amount of each claim, and it was held that all the necessary averments in the petition in such a case having been made, the exhibit was attached only as a more explicit description of the warrants, and the aggregate sum thereof being stated in the petition, it was sufficient. *Sherwood v. La Salle County*, (Tex. Civ. App. 1894) 26 S. W. Rep. 650.

In a Suit on Several Bank Bills of different denominations it was held to be sufficient to attach a copy of one bill of each denomination with an allega-

tion that the others of each denomination were exactly like those exhibited, except in letters and numbers which are given. *Tarbell v. Stevens*, 7 Iowa 163. See also *Conwell v. Hill*, 14 Ind. 131.

3. *Hiatt v. Goblt*, 18 Ind. 494; *Stafford v. Davidson*, 47 Ind. 319, holding that the averment, "a copy of which note is now due and remains wholly unpaid," is insufficient.

4. *Peoria M. & F., etc., Ins. Co. v. Walser*, 22 Ind. 73; *Davisson v. Wilson*, 80 Ind. 391; *Bennett v. Wainwright*, 16 Ind. 211; *Williams v. Osborn*, 75 Ind. 280.

Sufficiency. — When a note is filed with a pleading with an averment that the defendant is indebted to the plaintiff "in the sum of \$—, due by note herewith filed," this is held sufficient to identify the note and make it part of the petition. *Totten v. Cooke*, 2 Metc. (Ky.) 275.

So it is held that if a complaint after describing the instrument sued on alleges that "a copy is herewith filed," and a copy of the instrument marked "exhibit" immediately follows, this is sufficient. *Carper v. Kitt*, 71 Ind. 24; *Gish v. Gish*, 7 Ind. App. 104; *Mercer v. Hebert*, 41 Ind. 460; *Triddle v. Crane*, 68 Ind. 583; *Reed v. Broadbelt*, 68 Ind. 91; *Whitworth v. Malcomb*, 82 Ind. 454; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; *Blackburn v. Crowder*, 108 Ind. 238.

So where the reference was made that "said note is in the words and figures following: to wit (here insert Exhibit A, which is filed herewith and made a part hereof)," it was held to appear with reasonable certainty that the note was filed as an exhibit and was the one upon which the complaint

exhibit to be filed with the pleading if a copy is not set out, the proper filing of such an exhibit makes it a part of the pleading and the contents of the instrument need not be further or otherwise set out.¹ It becomes a part of the pleading to the same extent as if copied at length therein and is held to be sufficient to cure uncertainties in the pleading itself.² But this is only the case where the paper filed is such as is required to be made a part of the complaint because it is the foundation of the action, and if an instrument is unnecessarily filed as an exhibit it will not thereby become a part of the pleading but may be disregarded.³

Not a Part of Pleading. — In other cases, however, it is held that

was based, though it was not made in the most appropriate method. *Dunkle v. Nichols*, 101 Ind. 473.

1. *Mercer v. Hebert*, 41 Ind. 459.

2. *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 95; *Blount v. Rick*, 107 Ind. 238; *Jaqua v. Woodbury*, 3 Ind. App. 289; *Lucas v. Baldwin*, 97 Ind. 471; *Kunkler v. Turnting*, 10 Ind. 418.

In *Oklahoma* the rule in *Indiana*, under provisions similar to those in the latter state, was adopted. *Arkansas City First Nat. Bank v. Jones*, 2 Okla. 353.

In *Georgia* a copy under the statute providing a brief statutory form, it has been held that the copy is a part of the pleading and aids defective allegations. *Atkins v. Cobb*, 56 Ga. 86.

In *Kansas* it is also held that upon an objection to the introduction of evidence upon the ground that the petition did not state facts sufficient to constitute a cause of action the direct allegations in the body of the petition might be taken into consideration in connection with the contents of bonds and coupons as contained in the copies attached to the petition, being taken as a part of the petition. *State v. School Dist. No. 3*, 34 Kan. 237; *Budd v. Kramer*, 14 Kan. 101.

In *Wisconsin*. — The service of a copy of the note is equivalent to the insertion of a special count. *Peck v. Cheney*, 4 Wis. 249.

Copy Indorsed on Declaration. — Where a copy of the note was indorsed upon a declaration and served therewith as a cause of action, it was held that the copy became a part of the declaration to which the defendant might plead, and that the plaintiff would be confined to the cause thus set out; the court holding that the statute stripped the declaration of the function of inform-

ing the defendant of the matter of complaint, and that the copy of the note thus indorsed was the notice which informed the defendant of the cause of action; that because of the inadequacy of a declaration in the common money counts to perform this function without the service of such a copy it seems necessarily to follow that the copy must, in such cases, be taken as a part of the declaration. *Cooper v. Blood*, 2 Wis. 70; *Markoe v. Seaver*, 2 Wis. 148.

Variance Between Copy Annexed and Declaration in Complaint. — Where an exhibit filed is a part of the complaint, if there is a variance between it and the description in the complaint, the exhibit will control the statements of the complaint. *Clark v. Trueblood*, 16 Ind. App. 98; *Goodbub v. Scheller*, 3 Ind. App. 318; *Carper v. Garr*, 70 Ind. 212; *Burroughs v. Wilson*, 59 Ind. 536; *Arkansas City First Nat. Bank v. Jones*, 2 Okla. 353.

Reference to Copy for Particular Purpose. — In other cases it is held that a copy of the note referred to in the body of a complaint may be looked to by the court for the purpose of ascertaining the exact words and figures and the form of the note. *Ward v. Clay*, 82 Cal. 505; *People v. De la Guerra*, 24 Cal. 78; *Hall v. Foster*, 114 Mass. 18; *Clary v. Thomas*, 103 Mass. 44.

The copy being annexed to the complaint for the purpose of informing the defendant of its form and contents, its genuineness and due execution in the form exhibited are admitted for all purposes of the trial, unless denied under oath. *Ward v. Clay*, 82 Cal. 505.

3. *Brown v. Jones*, 125 Ind. 375; *Clark v. Trueblood*, 16 Ind. App. 100; *State v. Helms*, 136 Ind. 122. See also *Huseman v. Sims*, 104 Ind. 317; *Dumbould v. Rowley*, 113 Ind. 353.

the cause of action must be set forth by proper averments, independently of any copy annexed to the pleading, and that if there is a failure of such averment the pleading cannot be aided by reference to the copy.¹

(f) **Amendment of Copy.** — A copy of a note annexed to or copied in a pleading may be amended.²

18. Trover — **General Sufficiency of Allegations.** — An action of trover for a promissory note, or other instrument in writing for the payment of money, is different from an action of assumpsit on the same instrument as to the necessity of particular allegations and proof in the description of the instrument. In this form of action a general description only is required to be averred and proved.³

1. *Bogardus v. Trial*, 2 Ill. 63; *Blackwell v. Reid*, 41 Miss. 102; *Marshall v. Hamilton*, 41 Miss. 233; *Dyer v. Krayner*, 37 Mo. 603; *Deitz v. Corwin*, 35 Mo. 376; *Chambers v. Carthel*, 35 Mo. 374; *Schultz v. Herndon*, 32 Tex. 390; *Morris v. Fort*, 2 McCord L. (S. Car.) 397.

Cannot Supply Omissions to Defeat Action. — On the other hand, it was held that where a complaint contained the ordinary allegations in an action on a promissory note, a clause at the end of a note, "this note secured by mortgage of even date herewith," would not support the contention that it appeared by the complaint that the note was secured by a mortgage, and therefore that the complaint failed to show a right to maintain a separate action upon the note where there was no averment in the pleading itself to show that the note was secured by a mortgage, and the recital to that effect in the note should not be treated as the equivalent of such an averment. Matter of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibit merely attached to the pleading. *Hibernia Sav., etc., Soc. v. Thornton*, 117 Cal. 481.

Direct Averment Whether Note Copied or Attached. — For the purposes of pleading, the rule requiring direct averments is the same whether the instrument is set forth by copy in the body of the complaint or is attached thereto as an exhibit. *Hibernia Sav., etc., Soc. v. Thornton*, 117 Cal. 481.

In *Brown v. Weldon*, 71 Cal. 393, the note was set forth in the complaint *in hæc verba*, but there was no allegation as to when and where the note was made. It was held that the complaint, although inartificially drawn, was sufficient to state a cause of action, but

that it so far departed from the established precedents and so nearly approached the line which separates pleading which may be tolerated, although not approved, from pleading radically defective, that the court refused to treat the bill as frivolous.

Part of Record. — Under the former mode of pleading the plaintiff was required to make proof of the writing on which the action was founded, but unless oyer was craved, or it was used upon the trial as evidence, it did not become a part of the record. Now, however, it is expressly made a part of the record by statute when filed with the pleading, but it is not a part of the pleading so as to dispense with allegations which are necessary to set forth a sufficient cause of action. *Dodd v. King*, 1 Metc. (Ky.) 430.

2. *Chapman v. Skellie*, 65 Ga. 124; *Tillou v. Hutchinson*, 15 N. J. L. 178.

3. *Ewell v. Gillis*, 14 Me. 74, holding that if the declaration contains a general description of a note and further describes the amount of the note, for what property it was given, and other matters of immaterial description, it will not defeat the action if there is an entire failure of proof, but if there is proof in relation to them it must conform to the allegation. *Bissel v. Drake*, 19 Johns. (N. Y.) 66.

In an Action for Moneys Collected, and also for the value of certain notes and other evidence of debt delivered by the plaintiff to the defendant for safekeeping and collection, an allegation that the plaintiff delivered to the defendant "the following list of promissory notes," etc., is not obnoxious to the objection that the allegation is of the delivery of a mere list of notes, and not of the notes themselves, as such a criticism would be too refined under

A complaint, however, must be sufficiently certain to show whether the action is for a recovery on the note or of damages for its conversion.¹ And if the right to maintain the action depends upon the performance of a condition, such performance must be alleged.²

Value. — In an action for the misappropriation or non-return of a promissory note, the presumption is that the value of the note was the face thereof, and no more specific allegation of damage is necessary.³

Ownership and Finding. — Under the strict rules of pleading, a count in trover for the conversion of a promissory note which fails to state that the plaintiff was possessed of the note, as of his own property, or that it came to the defendant by finding, is fatally defective on general demurrer.⁴

X. USE OF SEVERAL COUNTS — 1. In General. — A plaintiff is not confined to a single count, but he may join as many counts as are necessary to meet the exigencies of the testimony as to the right which he claims.⁵

the provision of the code that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." *Horton v. Horton*, 66 Wis. 32.

Evidence of Property in Plaintiff. — In an action of trover for a note, under proper allegations in such an action, evidence that the defendant received the note from the plaintiff and promised to collect it for his use is sufficient evidence of property in the plaintiff. *Ewell v. Gillis*, 14 Me. 74.

Notice to Produce Note Alleged to Have Been Converted. — It is not necessary to give notice to produce a note which is alleged to have been converted. If the note is in the defendant's possession or under his control, the action is a sufficient notice. *Bissel v. Drake*, 19 Johns. (N. Y.) 66; *McClean v. Hertzog*, 6 S. & R. (Pa.) 154. See also *People v. Holbrook*, 13 Johns. (N. Y.) 90; *Ross v. Bruce*, 1 Day (Conn.) 100.

1. *Genin v. Schwenk*, 62 Hun (N. Y.) 574.

Waiver of Tort. — While a party cannot declare in tort and recover on a contract, nor *vice versa*, he may waive the tort and sue in an action *ex contractu*, and an action will not be defeated because supported by facts which would also sustain an action in tort. Thus where a defendant found and converted coupons belonging to the plaintiff it was held that in an action for money had and received it was no

objection that the evidence showed the finding and conversion. *Rittenhouse v. Knoop*, 9 Ind. App. 126.

2. *Genin v. Schwenk*, 62 Hun (N. Y.) 574, holding that if the defendant was entitled to hold the note for the retention of which the plaintiff was seeking to recover damages, until the payment of a certain amount by the plaintiff to the defendant, there must be an allegation of the tender of that amount.

3. *Loomis v. Mowry*, 8 Hun (N. Y.) 312; *Potter v. Merchants' Bank*, 28 N. Y. 655, holding that in an action in the nature of trover the value of the note need not be proved as in ordinary actions of this kind; that the face value is *prima facie* evidence of its value, which alone the plaintiff must show; but the defendant may show the pecuniary conditions of the parties liable thereon in order to reduce the recovery.

In an action for the conversion of a note, if the party is not able to state the date and amount thereof, he will not be required to make such statements, but it will be sufficient to allege that the note is of great value, laying the value under a *videlicet*, but he must not undertake to state the precise amount for which the note was given. *Bissel v. Drake*, 19 Johns. (N. Y.) 66.

4. *Sevier v. Holliday*, 2 Ark. 576, holding, however, that the omission of such statements may be cured by verdict.

5. *Birdseye v. Smith*, 32 Barb. (N. Y.) 217. See also *Hill v. Hill*, 51 S.

Conversion. — So in an action for the wrongful conversion of notes, counts may be joined to set up different methods by which the wrong was accomplished.¹

2. Counts on Separate Notes for Same Consideration. — Where an action is brought on a note in which it appears that another note of later date had been executed a count may be added on the

Car. 134; *supra*, 15. *e. Joinder of Special and Common Counts.*

Thus in *Barclay v. Moore*, 17 Ala. 634, it was held that an action of debt might be maintained by the indorsee of a note under a statute which provides that "the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit," and that there is no error in joining a count upon a promissory note with a count upon the writing obligatory.

In *Pennsylvania* it was held that the Act of May 25, 1887, which provided that a declaration in an action of assumpsit "shall consist of a concise statement of the plaintiff's demand, * * * accompanied by copies of all notes," did not prevent the plaintiff from adding a count containing a statement of the original consideration of the note. *Winters v. Mowrer*, 1 Pa. Super. Ct. Rep. 58. But see *Penn Nat. Bank v. Kopitzsch Soap Co.*, 61 Pa. St. 134, holding that under the above statute the common counts have no place in pleadings in that state.

Counts on Judgment and Note. — In an action on a judgment recovered on a note in another state it was held that the declaration could be amended by adding a count on the note. *Downer v. Shaw*, 23 N. H. 125.

In *Thompson v. Minford*, 11 How. Pr. (N. Y. Supreme Ct.) 273, a complaint of a note was amended after an answer showing a recovery in another state of a judgment in favor of the plaintiff against the defendant on the same note, by setting forth both the note and the judgment on it and claiming only the sum demanded in the original complaint, and it was held that this was not a new count, but one detailing, as was frequently done in a bill in chancery, and sometimes in an action on the case, facts constituting the plaintiff's case instead of the final agreement alone, and was proper.

But where the cause of action on a promissory note against one maker was, prior to the commencement of

an action against the other makers, merged in a judgment in a court of competent jurisdiction of the state, it was held to be a misjoinder of actions to unite in an action upon the note against the makers not before sued an action against the party upon the judgment rendered. *Lindh v. Crowley*, 26 Kan. 47.

Election. — In *Hill v. Hill*, 51 S. Car. 134, the complaint set up one cause of action evidenced by note, and another by the note, the promise to pay implied from payments thereon, and written acknowledgments by letters and in the Circuit Court; the plaintiffs were required to elect upon which cause they would go to trial, and upon electing to proceed upon the second cause it was ordered by the court that the allegations of the complaint be allowed to remain unchanged, but that no proof be adduced, except such as would support the second cause of action, and it was held that if there was error in this action it was rather in requiring the election than in ordering the complaint to remain unchanged, both causes of action being for the same debt, but that allowing the first cause to remain amounted to no more than allowing the allegations of the second cause to be amended by an insertion therein of a copy of the note declared on in the first, the execution of which was admitted in the answer, because every allegation, except the copy of the note, contained in the first cause of action was contained in the second cause of action.

Necessity of Separate Counts — Different Liabilities. — Where, under statute, an assignor who guarantees the payment of a non-negotiable note may be joined as a party defendant with the maker, the contract of the maker and guarantor being different contracts, and furnishing different causes of action against each, cannot be united in one count, but should be stated in separate counts. *Tucker v. Shiner*, 24 Iowa 334.

1. *Brown v. Carbonate Bank*, 34 Fed. Rep. 777.

last note, though the recovery must be restricted to one note.¹

XI. JOINDER OF CAUSES OF ACTION — 1. In General. — The owner of several notes made by the same person may embrace them all in one action against such person.² So it seems that a count on

1. *Gisriel v. Burrows*, 72 Md. 366, holding that an amendment permitting the addition of such a count is proper.

2. *Wurlitzer v. Suppe*, 38 Kan. 31, *Welles v. Webster*, 9 How. Pr. (N. Y. Supreme Ct.) 251; *Myers v. Miller*, 2 West. L. M. (Ohio) 420, 2 Ohio Dec. (Reprint) 319.

Assignee of Non-negotiable Instruments.

— Where several non-negotiable instruments are united in one person by assignment, he may bring a single action on them, as where the several persons entitled to recover on an insurance policy assign their claims to one of their number. *Watertown F. Ins. Co. v. Grover, etc., Sewing Mach. Co.*, 41 Mich. 131.

Negotiable and Non-negotiable Notes.

— In *Myers v. Miller*, 2 West. L. M. (Ohio) 420, 2 Ohio Dec. (Reprint) 319, it was held that an action on a non-negotiable note which the plaintiff had acquired by assignment was properly joined with a count on a negotiable note, of which the plaintiff was payee and the defendant maker.

Consolidation. — Where separate suits are brought on several notes made by the same person at the same time, and it appears that the same defense must be set up in each suit, the actions will be consolidated, but where the notes are for different sums, made at different times, and it does not appear that the same defense may be set up in each case, no order of consolidation will be issued. *Thompson v. Shepherd*, 9 Johns. (N. Y.) 262. See also *Wurlitzer v. Suppe*, 38 Kan. 31.

If a party sue on a bill, and after the action is commenced, another bill, accepted by the same defendant, of which he is the holder, is dishonored, and he brings a second action on that, a judge at chambers would, on application being made, direct the two actions to be consolidated. *Oldershaw v. Tregwell*, 3 C. & P. 58, 14 E. C. L. 209.

Consolidation Refused. — "The notes in suit, originated at different times, were due at different times; two of them are due to the plaintiff in his own right, two as the guardian of one family of children, and three as the guard-

ian of another. With this diversity of claim, it is probable the matter of defense, if there be any, is different, and consequently the replication and proof in each will be different. To compel a consolidation under such circumstances would not be in accordance with any practice in the courts of North Carolina, or elsewhere, that we are aware of." *Buie v. Kelly*, 7 Jones L. (N. Car.) 267. See also *Gaulden v. Shehee*, 24 Ga. 438. Compare III. *Simultaneous and Successive Suits.*

Due Bills. — It was held in *Smith v. Bowell*, Term (N. Car.) 200, that the courts would not consolidate several actions on due bills, because it was the policy in that state to suppress the practice of issuing due bills, and therefore the court would do nothing to save the defendant's costs.

Individual and Representative Capacity.

— It has been held that a single action cannot be maintained on an instrument payable to the plaintiff in a representative capacity, and on another due him personally. *Picquet v. Swan*, 3 Mason (U. S.) 469. But see *Welles v. Webster*, 9 How. Pr. (N. Y. Supreme Ct.) 251, where it was held, against such an objection, that the claims in suit were all due the plaintiff in his representative capacity.

Promises to Testator and to Executor.

— Counts on promises to a testator may be joined with counts on promises to an executor, if the damages recovered under the latter would be assets in the hands of the executor. *Powley v. Newton*, 6 Taunt. 453, 1 E. C. L. 449.

Promise by Testator and by Executor.

— In assumpsit against an executor, a count on a promise by the testator may be joined with a count for the funeral expenses, alleging that they were incurred at the request of the executor, and that he as executor promised to pay therefor. But it seems that a count on a promissory note of the executor, given in payment of the funeral expenses, cannot be joined with a count upon a promise of the testator. *Hapgood v. Houghton*, 10 Pick. (Mass.) 154.

It was held in *Wiltzie v. Beardsley, Hill & D. Supp.* (N. Y.) 386, that an action on a note against executors liable

a promissory note is properly joined with one on an account, if both the note and the account are due at the time of the commencement of the action,¹ or with a count on a ratification of a forged instrument,² or on a bond,³ or a judgment,⁴ or with a count upon an agreement to indorse.⁵ It has also been held that an action of debt on a promissory note may be joined with a count on a sealed instrument,⁶ or with a proceeding to foreclose a mortgage securing the note.⁷

as indorsers should not be joined with an action against them for a claim due the plaintiffs from their testator.

Trover for Several Bank Notes.—A declaration in trover for divers bank notes and checks may contain many counts, all the counts being alike except as to the time of the several conversions, the plaintiff expecting to prove as many distinct acts of conversion as there are counts. *Dows v. Davis*, 5 Hill (N. Y.) 512. It was held in *Lash v. Christie*, 4 Neb. 262, that the objection that an action of trover had been improperly joined with one on a promissory note would not be sustained where the petition did not allege a wrongful conversion of property, but merely recited the consideration of the note and the disposition of the property for which the note was given.

1. *Thorpe v. Dickey*, 51 Iowa 676; *Wurlitzer v. Suppe*, 38 Kan. 31; *Sullivan v. Sullivan Mfg. Co.*, 14 S. Car. 494; *Ralston v. Aultman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 746.

Due at Same Time.—In *Wurlitzer v. Suppe*, 38 Kan. 31, it was held that only such claims or demands as are due at the time of the commencement of the suit could be joined in one action, and in that case the account which it was attempted to join was not due.

For and Against Same Person.—A cause of action upon an account may be joined in the same petition with a cause of action upon a promissory note, if the causes of action are in favor of the same person or persons, and against the same person or persons. *Thorpe v. Dickey*, 51 Iowa 676.

Consolidation.—That an action on an account and on a note may be consolidated, see *Ralston v. Aultman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 746.

2. *Ohio Valley Nat. Bank v. Rousheim*, (Cinc. Super. Ct.) 31 Ohio Wkly. L. Bul. 99.

3. *Lamkin v. Nye*, 43 Miss. 241.

4. *De Proux v. Sargent*, 70 Me. 266.

5. *Wilmington Bank v. Houston*, 1 Harr. (Del.) 225.

6. *Mardis v. Terrell*, Walk. (Miss.) 327. But see *Gaines v. Craig*, 24 Ark. 477, where it was said: "The court below properly struck out the sealed agreement for another reason. Covenant would be the proper form of action upon it, while debt or assumpsit only could be brought upon the note, and it would be such a disregard of the rules of pleading as the statute hardly contemplated to permit them to be joined in one suit. See *Gatton v. Walker*, 9 Ark. 199."

7. *California*.—*Eastman v. Turman*, 24 Cal. 379.

Indiana.—*Jaseph v. Peoples' Sav. Bank*, (Ind. 1889) 22 N. E. Rep. 980; *Pate v. Aurora First Nat. Bank*, 63 Ind. 254.

Ohio.—*Howlett v. Martin*, 3 Wkly. L. Gaz. (Ohio) 266, 3 Ohio Dec. (Reprint) 113; *Turner v. Frost*, 3 West. L. M. (Ohio) 213, 2 Ohio Dec. (Reprint) 477; *Burdell v. Reeder*, 2 Cinc. Super. Ct. Rep. 94; *King v. Safford*, 19 Ohio St. 587.

Contra.—*Doan v. Holly*, 26 Mo. 188, where the parties to both suits are not the same.

Foreclosure and Attachment.—"The action upon the note and for foreclosure of the mortgage was properly joined. The plaintiff was not required to bring two actions. Having the right to join the action on the note with the action to foreclose the mortgage, the plaintiff was entitled to judgment on the note, although it failed to establish its right to a foreclosure. It being a proper suit upon the note, it is manifestly true that the plaintiff would have the right to institute any auxiliary proceedings for the collection of the note which it would have the right to do if the suit was upon the note alone, and not coupled with the suit to foreclose the mortgage; and therefore it was proper, and the plaintiff had the right, to institute

Equitable and Legal Causes. — An equitable cause of action for the reformation of a written instrument may be joined with one for the collection of money due thereon.¹

Counts Against Different Makers. — But counts cannot be joined so as to embrace in the same action independent notes executed by different persons.²

2. Several Notes in One Count. — In an action by the owner of several notes made by the same person, all of such notes may be joined in a single count.³

One of Two Notes in Same Paragraph Not Due. — And it is held that

proceedings in attachment and garnishee the defendant Joseph. The plaintiff did so, and the defendant Joseph answered to the proceedings in garnishment, and the cause proceeded to trial." *Joseph v. People's Sav. Bank*, (Ind. 1889) 22 N. E. Rep. 980.

Lienholders. — In *Howlett v. Martin*, 3 Wkly. L. Gaz. (Ohio) 266, 3 Ohio Dec. (Reprint) 113, it was held that the fact that lienholders, not parties to a note, were parties to an action to foreclose a mortgage, would not prevent the consolidation of such foreclosure proceedings with an action on the note.

Ohio Statute. — Under the Ohio Act of February 19, 1864, the holder of a note secured by mortgage may, in a single action, demand and have a judgment against all the makers of the note, and a sale of the mortgaged premises, although the mortgage is executed by only a part of the makers of the note. *King v. Safford*, 19 Ohio St. 587.

1. *Rigsbee v. Trees*, 21 Ind. 227; *Harrison v. Juneau Bank*, 17 Wis. 340.

2. *Claremont Bank v. Wood*, 12 Vt. 255, holding that a count declaring against four persons on a note cannot be joined with other counts declaring on notes executed by three of them.

Descriptio Personæ. — But where an action is brought upon a promissory note executed by the defendant as trustee of a company, whereby he promised to pay, and also upon another note which he subscribed with his own proper name, but adding his representative name of trustee, it was held that a general demurrer to the declaration will not be sustained, because the addition in the body of the notes, as appended to the name of the maker subscribed thereto, is a mere *descriptio personæ* of the party making the note, and cannot be so construed as to exempt him from personal liability. The description which he gives of himself,

either in the notes or in subscribing the same, is to be regarded as merely descriptive of his person, but cannot be construed as relieving him from personal liability. *Rupert v. Madden*, 1 Chand. (Wis.) 146.

3. *Dade v. Bishop*, Minor (Ala.) 263; *Bird v. Daniel*, 9 Ala. 302; *Godfrey v. Buckmaster*, 2 Ill. 447; *Firestone v. Klick*, 67 Ind. 309; *Ragan v. Day*, 46 Iowa 239; *Merritt v. Nihart*, 11 Iowa 57; *Stadler v. Parmlee*, 10 Ohio 23.

Practice Deprecated. — In *Dawson v. Lail*, 1 Arizona 491, the complaint set forth three promissory notes of different dates and amounts, and the court said that while it would be better practice to make a separate statement on each note or bill, yet, where the bills all bear the same date and are made payable to the same party at the same time, they would not feel inclined to disturb the judgment because the separate statements were not made.

Coupon. — A declaration which sets out in one count eight interest coupons distinguished from each other by reference to the number of the bond to which each belonged is not bad for duplicity. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.

Under a Code Provision which permits a plaintiff to unite in the same petition several causes of action, but expressly requires that they shall be stated separately, it is held that a demurrer should be sustained to a petition which contains but one count declaring upon two notes. *McCoy v. Yager*, 34 Mo. 135.

But it is also held that if a complaint is demurrable for this reason the objection is waived if not taken by demurrer, and advantage cannot be taken of the defect by a motion to set aside the complaint. *Van Namee v. People*, 9 How. Pr. (N. Y. Supreme Ct.) 200. See also *Ball v. Nash*, 55 Ind. 9.

where two notes are included in one paragraph of a complaint the fact that one of them is not due will not render the paragraph bad as to the note which is due.¹

XII. PLEA OR ANSWER — 1. General Issue, General Denial, Denial of Indebtedness or Promise. — The Common Law General Issues that are applicable in actions on contracts, such as *non assumpsit*,² *nil debet*,³ and *non est factum*,⁴ have been described in preceding articles,⁵ and their propriety and scope are further considered in connection with the particular defenses discussed in other parts of this article.⁶

General Denials in Code Pleading have received a general treatment in the article ANSWERS IN CODE PLEADING, vol. 1, p. 777, and are

1. *Simpkins v. Smith*, 94 Ind. 472.

2. *Non Assumpsit*. — See article ASSUMPSIT, vol. 2, p. 1027.

In *Heaton v. Myers*, 4 Colo. 59, it was held that under the general issue in an action on a note against the maker by an assignee after maturity, the defendant might prove a subsequent written agreement showing a contingency upon which payment of the note was to depend. The court said: "It was held in the case of *Munro v. King*, 3 Colo. 238, that a written agreement, contemporaneous with the note declared on, and the effect of which was to prescribe a contingency until the happening of which no action could be maintained, was admissible under the general issue. We are unable to see any sufficient reason for saying that a subsequent written agreement, making the payment of a note conditional, should not likewise be admitted under the general issue. Under the authorities the fact that it is a subsequent agreement would not operate to exclude it. Payment, release, a specialty given for the debt, a judgment rendered for either party in a former action for the same cause, an award of arbitrators deciding the right in question, and accord and satisfaction, all imply subsequent matter, and yet are all good defenses under the plea of *non assumpsit*. Gould's Plead., § 47 *et seq.* The few defenses which are held not admissible under this issue, are such as admit the debt, but go in denial of the remedy only. Gould's Plead., § 57. The written agreement offered in evidence does not admit the debt; on the contrary it excludes any liability on the part of the defendant, except upon a condition precedent. The question in *assumpsit* upon the general issue

is, was there a subsisting debt or cause of action at the time of commencing the suit? * * * Under it the defendant may show performance of the contracts declared upon, or any legal excuse for nonperformance. 2 *Tidd's Prac.* 647." See also *Herrick v. Swomley*, 56 Md. 456.

Nonjoinder of Party Defendant. — Where a promissory note is declared upon and there is no allegation showing that the defendant executed the note jointly with another, the defendant cannot under the general issue object to the introduction of a joint note in support of the declaration. The nonjoinder can be taken advantage of only by plea in abatement. *Hyde v. Lawrence*, 49 Vt. 361. See also *Swigart v. Weare*, 37 Ill. App. 258; *Brown v. Warram*, 3 Har. & J. (Md.) 572; *Sittig v. Birkestack*, 38 Md. 158; *Evans v. Lewis*, cited in *Mountstephen v. Brooke*, 1 B. & Ald. 226.

3. *Nil Debet*. — See article DEBT, vol. 5, p. 922.

Where a declaration on a note makes profert of the same, a plea of *nil debet* makes a direct and general issue as to any indebtedness at all on the note described and devolves upon the plaintiff to produce his evidence of debt. "The plea is adapted to almost any defense which tends to deny an existing debt as charged — as a release, satisfaction, arbitrament, partial payment — or that the note is void on its face." *Jewett v. Graham*, 3 Baxt. (Tenn.) 19.

4. *Non Est Factum*. — See articles BONDS, vol. 3, p. 663; COVENANT, vol. 5, p. 378; DEBT, vol. 5, p. 923.

5. See also articles GENERAL ISSUE, vol. 9, p. 881, and PLEAS AT LAW.

6. See the following sections in this division.

also noticed in the following divisions of this article.¹

Denial of Indebtedness. — In the code states,² and in some other states where the plea of the general issue is abolished,³ a plea or answer denying any indebtedness without setting out any facts which constitute a legal defense is not a denial of the plaintiff's right to recover.⁴

Denial of Promise. — A denial that the defendant promised to pay, etc., is insufficient in code pleading.⁵

2. Denial of Execution of Instrument — Indorser's Denial —
a. NECESSITY OF PLEA OR ANSWER. — Where there is no plea of *non est factum* or the making of the instrument is not denied by the defendant by some appropriate plea or answer, the allegations of the declaration or complaint as to the execution of the instrument stand admitted, and it is permissible to read the instrument in evidence without proof of its execution.⁶

1. Consistency with Special Defense. — In some states inconsistent defenses are allowed. See article ANSWERS IN CODE PLEADING, vol. I, p. 855. Thus in *New York* a general denial will not be stricken out because it is inconsistent with other defenses interposed in the answer. *Sheldon v. Heaton*, 78 Hun (N. Y.) 50.

2. Taylor v. Purcell, 60 Ark. 611; *Kinney v. Osborne*, 14 Cal. 112; *Watson v. Lemen*, 9 Colo. 200; *Stucksleger v. Smith*, 27 Iowa 286; *Callanan v. Williams*, 71 Iowa 363; *Haggard v. Hay*, 13 B. Mon. (Ky.) 175; *Clarke v. Finnell*, 16 B. Mon. (Ky.) 335; *Berrigan v. Oviatt*, 3 How. Pr. N. S. (N. Y. Supreme Ct.) 199; *Metzger v. Carr*, 79 Hun (N. Y.) 258; *Spencer v. Turney*, 5 Okla. 683.

Denial on Information and Belief. — In *New York* under the provisions of the Code Civ. Pro., § 500, subd. 1, an answer denying any knowledge or information sufficient to form a belief of the truth of the material allegations of the complaint presents an issue such as was raised by the plea of the general issue before the code and cannot be stricken out on motion as frivolous. *Sheldon v. Heaton*, 78 Hun (N. Y.) 50. See generally as to denials on information and belief, article ANSWERS IN CODE PLEADING, vol. I, p. 810.

3. Johnson v. Cobb, 100 Ga. 139; *Bruce v. Mathews*, 101 Mass. 64; *Hawes v. Ryder*, 100 Mass. 216.

In *Texas* a general denial in a suit on a note can at most effectuate nothing more than the production of the note on the trial. "It cannot put the plaintiff on proof of the signature of

the defendant, nor will it authorize the defenses which the latter might set up under the general issue of *non assumptum* at common law; and at best, it cannot be regarded as a substantial plea where there is any good ground of defense." *Lewin v. Houston*, 8 Tex. 96; *Bond v. Mallow*, 17 Tex. 636. But the plaintiff must produce the note in evidence. *Davis v. Marshall*, 25 Tex. 372; *Bedwell v. Thompson*, 25 Tex. Supp. 245; *Matossy v. Frosh*, 9 Tex. 610; *Kinnard v. Herlock*, 20 Tex. 48; *Able v. Chandler*, 12 Tex. 88; *Lewin v. Houston*, 8 Tex. 94; *Robinson v. Brinson*, 20 Tex. 438. So that the general denial prevents a judgment by *nil dicit*. *Kinnard v. Herlock*, 20 Tex. 48; *Robinson v. Brinson*, 20 Tex. 438; *Hurt v. Blackburn*, 20 Tex. 601; *Bedwell v. Thompson*, 25 Tex. Supp. 245; *Able v. Chandler*, 12 Tex. 88.

4. See generally article ANSWERS IN CODE PLEADING, vol. I, p. 805.

5. *Clark v. Gramling*, 54 Ark. 525.
6. *Rauer v. Broder*, 107 Cal. 282; *Bethune v. Dougherty*, 30 Ga. 770; *Union Nat. Bank v. Lec*, 33 La. Ann. 301; *Way v. Richardson*, 3 Gray (Mass.) 412; *Hayward v. Grant*, 13 Minn. 165; *Freeman v. Curran*, 1 Minn. 169; *Temple v. Murray*, 6 How. Pr. (N. Y. Supreme Ct.) 329; *Graves v. Bonham First Nat. Bank*, 77 Tex. 555.

Denial of Consideration Insufficient. — An answer denying that an indorsement was made by the defendant for value received as stated in the petition is not sufficient to put in issue the making of the indorsement. *Foot v. Sprague*, 13 Kan. 155.

b. STATUTES AND RULES OF COURT — DENIALS UNDER OATH — (1) In General. — At the Common Law a denial of the execution of the instrument by the plaintiff by an appropriate plea, usually the general issue, need not be under oath in order to cast upon the plaintiff the burden of proving the execution of the instrument.¹

Statutory Provisions. — In the *United States* statutes have been quite generally enacted, varying somewhat in their provisions in the different states, curtailing the right of the defendant to thus impose upon the plaintiff the necessity of proving the execution of the instrument and requiring a sworn plea or answer to be put in by the defendant.²

Nonperformance of Contemporaneous Agreement. — The defense that it was agreed that the defendant was not to be liable unless other parties executed similar instruments, and that the other instruments were not executed, cannot be made where the answer presents no such defense. *Gipson v. Williams*, (Tex. Civ. App. 1894) 27 S. W. Rep. 824.

1. *Zuel v. Bowen*, 78 Ill. 234; *Evans v. Southern Turnpike Co.*, 18 Ind. 101, *per Perkins, J.*

2. *Alabama*. — *Smith v. Hiles-Carver Co.*, 107 Ala. 272; *Dexter v. Ohlander*, 89 Ala. 262; *Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158; *Campbell v. Larmore*, 84 Ala. 499; *Walker v. Bentley*, 64 Ala. 92; *McCoy v. Harrell*, 40 Ala. 232; *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476; *Drake v. Flewellen*, 33 Ala. 106; *McDougald v. Rutherford*, 30 Ala. 253; *Bryan v. Wilson*, 27 Ala. 208; *May v. Miller*, 27 Ala. 515; *Miller v. McIntyre*, 9 Ala. 638; *Knapp v. McBride*, 7 Ala. 19; *Barclift v. Treece*, 77 Ala. 528; *Montgomery v. Elliott*, 6 Ala. 701; *Sorelle v. Elmes*, 6 Ala. 706; *Turner v. Lazarus*, 6 Ala. 875; *Crow v. Decatur Bank*, 5 Ala. 249; *Mauldin v. Branch Bank*, 2 Ala. 502; *Fowlkes v. Baldwin*, 2 Ala. 705; *Lazarus v. Shearer*, 2 Ala. 718; *Adams v. Moore*, 9 Port. (Ala.) 406; *Dew v. Garner*, 7 Port. (Ala.) 503; *Hunley v. Lang*, 5 Port. (Ala.) 154; *Martin v. Dortch*, 1 Stew. (Ala.) 479.

Arkansas. — *Frits v. Frits*, 32 Ark. 327; *Fowler v. Bender*, 18 Ark. 262; *Alexander v. Foster*, 16 Ark. 660; *State Bank v. Kerby*, 9 Ark. 345; *Ferguson v. State Bank*, 8 Ark. 416; *Trowbridge v. Pitcher*, 4 Ark. 157. See also *Stroud v. Harrington*, *Hempst.* (U. S.) 116, decided under a statute of Arkansas Territory.

California. — *Shasta Bank v. Boyd*, 99 Cal. 604; *Low v. Warden*, 77 Cal. 94; *Waldrip v. Black*, 74 Cal. 409; *Brown v. Weldon*, 71 Cal. 393; *Mahe v. Reynolds*, 38 Cal. 560; *Corcoran v. Doll*, 32 Cal. 83; *Hastings v. Dollarhide*, 18 Cal. 390; *Horn v. Volcano Water Co.*, 13 Cal. 62; *Brooks v. Chilton*, 6 Cal. 640; *Grogan v. Ruckle*, 1 Cal. 193.

Colorado. — *Lothrop v. Roberts*, 16 Colo. 250; *Parkison v. Boddiker*, 10 Colo. 503; *Assig v. Pearsons*, 9 Colo. 587; *Heaton v. Myers*, 4 Colo. 59; *Thackaray v. Hanson*, 1 Colo. 365.

Delaware. — *Vandergrift v. Hollis*, 6 Houst. (Del.) 90; *Hollis v. Vandergrift*, 5 Houst. (Del.) 521; *Pusey v. Pyle*, 4 Houst. (Del.) 98; *Wilmington v. Hedges*, 5 Harr. (Del.) 421.

Florida. — *Sinclair v. Gray*, 9 Fla. 71; *White v. Camp*, 1 Fla. 109.

Georgia. — *Kelly v. Keese*, 102 Ga. 700; *Lester v. McIntosh*, 101 Ga. 675; *Heath v. Achey*, 96 Ga. 438; *Wingate v. Atlanta Nat. Bank*, 95 Ga. 1; *Matthews v. Bates*, 93 Ga. 317, 319; *Fowler v. Gate City Nat. Bank*, 88 Ga. 29; *Habersham v. Lehman*, 63 Ga. 380; *Bethune v. Dougherty*, 30 Ga. 770; *Moore v. Morris*, 26 Ga. 649; *Strauss v. Waldo*, 25 Ga. 641; *Lane v. Harris*, 16 Ga. 217; *Cleghorn v. Robison*, 8 Ga. 559.

Illinois. — *Frankland v. Johnson*, 147 Ill. 520; *Chapman v. Chapman*, 129 Ill. 386, 27 Ill. App. 487; *Bailey v. Valley Nat. Bank*, 127 Ill. 332, 21 Ill. App. 642; *Zuel v. Bowen*, 78 Ill. 234; *Dewey v. Warriner*, 71 Ill. 198; *Walker v. Krebaum*, 67 Ill. 252; *Templeton v. Hayward*, 65 Ill. 178; *Murchie v. Peck*, 57 Ill. App. 396; *Hunt v. Weir*, 29 Ill. 83; *Lockridge v. Nuckolls*, 25 Ill. 178; *Frye v. Menkins*, 15 Ill. 339; *Reed v. Phillips*, 5 Ill. 39; *Hinton v. Husbands*, 4 Ill. 187; *Longley v. Norvall*, 2 Ill. 389;

Mississippi. — Wanita Woolen Mills
v. Rollins, (Miss. 1897) 22 So. Rep. 819;
Patrick v. Carr, 50 Miss. 199; Goss v.
Whitehead, 33 Miss. 213; Thornton v.
Alliston, 12 Smed. & M. (Miss.) 124;
Hemphill v. Alabama Bank, 6 Smed.
& M. (Miss.) 44; Cook v. Martin, 5
Smed. & M. (Miss.) 379; Henderson v.
Wilson, 6 How. (Miss.) 65; Wade v.
Staunton, 6 How. (Miss.) 631; Fair-
child v. _____ Bank, 5 How.
(Miss.) _____; _____
(Miss.) _____; _____
How. _____

davit, that no proof of the execution of the instrument declared on shall be required unless an affidavit be filed with the pleading putting it in issue, or that where a copy of the instrument declared upon is annexed to the pleading or copied therein the signature thereto shall be deemed genuine and admitted unless the party whose signature it purports to be shall deny it under oath.¹

Co., 91 Mo. 414; *Moore v. Hutchinson*, 69 Mo. 429; *Anderson v. Hance*, 49 Mo. 159; *Kinman v. Cannefax*, 34 Mo. 147; *Snowden v. McDaniel*, 7 Mo. 313; *Bates v. Hinton*, 4 Mo. 78; *Payne v. Snell*, 4 Mo. 238; *Parker v. Simpson*, 1 Mo. 539; *Law v. Crawford*, 67 Mo. App. 150; *Edmonston v. Henry*, 45 Mo. App. 346; *Zervis v. Unnerstall*, 29 Mo. App. 474; *George T. Smith Middlings Purifier Co. v. Rembaugh*, 21 Mo. App. 390; *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462.

New Mexico. — *Oak Grove, etc., Cattle Co. v. Foster*, 7 N. Mex. 650.

Ohio. — *Palmer v. Yarrington*, 1 Ohio St. 253. See also *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, decided under a statute of Ohio.

Oklahoma. — *Spencer v. Turney*, 5 Okla. 683.

Tennessee. — *Rye v. Adkins*, (Tenn. 1897) 46 S. W. Rep. 458; *Johl v. Fernberger*, 10 Heisk. (Tenn.) 37; *Memphis German Sav. Inst. v. Hargan*, 9 Heisk. (Tenn.) 496; *Lambden v. Sharp*, 9 Humph. (Tenn.) 224; *Richardson v. Cato*, 9 Humph. (Tenn.) 464; *Stephenson v. Landis*, 14 Lea (Tenn.) 433; *Carter v. Turner*, 5 Sneed (Tenn.) 178; *Bumpass v. Timms*, 3 Sneed (Tenn.) 459; *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Texas. — *Scoggins v. Thompson*, (Tex. Civ. App. 1898) 45 S. W. Rep. 216; *Stephens v. Anderson*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1000; *Graves v. Bonham First Nat. Bank*, 77 Tex. 555; *San Antonio, etc., R. Co. v. Cockrill*, 72 Tex. 613; *Wagoner v. Ruply*, 69 Tex. 700; *Smyth v. Caswell*, 67 Tex. 567; *White v. Tudor*, 32 Tex. 758; *Johnston v. Jefferson*, 31 Tex. 332; *Lewis v. Lowery*, 31 Tex. 663; *Sawyer v. Dulany*, 30 Tex. 479; *Barnett v. Logue*, 29 Tex. 282; *Ferguson v. Wood*, 23 Tex. 177; *Ersline v. Wilson*, 20 Tex. 77; *Kinnard v. Herlock*, 20 Tex. 48; *Drew v. Harrison*, 12 Tex. 279; *Persons v. Frost*, 25 Tex. Supp. 129; *Reid v. Reid*, 11 Tex. 585; *Dial v. Taylor*, 8 Tex. 267; *Lewin v. Houston*, 8 Tex. 94.

Virginia. — *Clason v. Parrish*, 93 Va. 24, *per* Harrison, J.; *Simmons v. Simmons*, 33 Gratt. (Va.) 451; *James River, etc., Co. v. Littlejohn*, 18 Gratt. (Va.) 53; *Archer v. Ward*, 9 Gratt. (Va.) 622; *Phaup v. Stratton*, 9 Gratt. (Va.) 615; *Kelly v. Paul*, 3 Gratt. (Va.) 182; *Shepherd v. Frys*, 3 Gratt. (Va.) 422; *Franklin v. Cox*, 4 Rand. (Va.) 448.

Wisconsin. — *Ludlow v. Berry*, 62 Wis. 78; *Wallis v. White*, 58 Wis. 26; *Nielson v. Schuckman*, 53 Wis. 638; *Smith v. Ehnert*, 47 Wis. 479; *Austin v. Austin*, 45 Wis. 523.

Rules of Court. — In *Maine* a rule has been adopted which does not permit the counsel for the defendant to deny the genuineness of his client's signature, unless he has been specially instructed to do so. *McDonald v. Bailey*, 14 Me. 101, in which case it was held that the rule applies to instruments which have a subscribing witness.

In *New Hampshire* a rule has been adopted providing that the defendant's signature shall be deemed admitted unless he gives notice within the first four days of the first term that it is disputed; but it has been held that this rule has no application where an instrument is offered under a specification in support of a general count in assumpsit. *Benedict v. Swain*, 43 N. H. 33. See also *Williams v. Gilchrist*, 11 N. H. 535.

In *Pennsylvania* it has been provided by a rule of court that the plaintiff shall be relieved of the necessity of proving the execution of the instrument, unless the defendant "by affidavit filed at or before the time of filing his or her plea shall have denied" that the instrument was duly executed. *Reiter v. Fruh*, 150 Pa. St. 623; *Canfield v. Ditman*, (Pa. 1889) 16 Atl. Rep. 739; *Woods v. Watkins*, 40 Pa. St. 458; *Black v. Halstead*, 39 Pa. St. 64; *Hogg v. Orgill*, 34 Pa. St. 345; *Montour Iron Co. v. Coleman*, 31 Pa. St. 80; *Miller v. Weeks*, 22 Pa. St. 89; *Ballentine v. McGeagh*, 4 Brews. (Pa.) 95.

1. **The Earliest Statute** requiring a sworn plea denying the execution of

The United States Courts have in some instances adopted a rule of similar import, requiring the denial of the execution of the instrument to be under oath in order to cast the burden of proof upon the plaintiff,¹ and it would seem that United States courts where no such rule has been adopted govern themselves by the statutes or rules of court which obtain in the respective states in which they are sitting.²

In Louisiana it has been provided that where the defendant denies the genuineness of his signature, and it is proved to be genuine, he shall be debarred from every other defense, and judgment shall be given against him without further proceedings.³

In Massachusetts it has been provided by statute that the defendant's signature shall be taken as admitted, unless within the time allowed for an answer he files in court a special denial of the genuineness thereof and a demand that it shall be proved at the trial.⁴

Design of Statutes.—The statutes requiring a denial under oath were not designed to interfere with or control the rules of evi-

the instrument was enacted in *Virginia*. *Evans v. Southern Turnpike Co.*, 18 Ind. 101, *per* Perkins, J.

1. *Thomas v. Clark*, 2 McLean (U. S.) 194; *Pratt v. Willard*, 6 McLean (U. S.) 27. These cases were cited in *Pegg v. Bidleman*, 5 Mich. 26. See also *Owosso Sav. Bank v. Walsh*, 65 Fed. Rep. 783; *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, in which latter case it was held that such a rule is in compliance with Act Cong. March, 1793, c. 22, requiring the courts of the United States "to regulate the practice thereof as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."

2. *Sebree v. Dorr*, 9 Wheat. (U. S.) 558; *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431. See also article UNITED STATES COURTS.

3. Code Prac. La. 326; *Cochran v. Perry*, 12 La. 11; *Ware v. Elam*, 8 Martin N. S. (La.) 329.

Admission of Signature on Trial.—In *Ware v. Elam*, 8 Martin N. S. (La.) 329, it is said that it is questionable whether a defendant who has pleaded falsely that he did not execute the instrument can relieve himself of the penalty and retain the right to insist upon other defenses by admitting the execution of the instrument on the trial.

Denial on Belief.—An answer in which the defendant does not expressly acknowledge his signature, and in

which he alleges that the signature looks like a genuine signature but that he believes it to be a forgery, has the effect of limiting the inquiry to the genuineness of the signature. *Pinckard v. Hampton*, 22 La. Ann. 439.

Express Denial Necessary.—Code Prac. La., arts. 324, 326, provide that the denial of the signature must be express and that the general denial is not sufficient to put the execution of the instrument in issue. *Hyde v. Brown*, 5 La. 33; *Stockton v. Truxton*, 8 La. 224; *Hughes v. Harrison*, 8 Martin N. S. (La.) 297.

Signature Must Be Denied Rather than Execution.—A denial by the defendant that he made or executed the instrument is not an express denial of his signature and is not sufficient to preclude the defendant from availing himself of other defenses. *Stockton v. Truxton*, 8 La. 224.

Denial of Signature of Partnership.—Where a partner denies the signature of the partnership of which he is a member, which signature was made by another partner, he is not precluded from making other defenses. *Mutual Nat. Bank v. Richardson*, 33 La. Ann. 1312, *affirming* *Bayly v. Givens*, 29 La. Ann. 546.

4. Pub. Stat. Mass., c. 167, § 21; *True v. Dillon*, 138 Mass. 347; *Spooner v. Gilmore*, 136 Mass. 248; *Haskins v. D'Este*, 133 Mass. 356; *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596; *Holden v. Jenkins*, 125 Mass. 446; *Lincoln v.*

dence. They do not deny the defendant the right to demand proof of the execution of the instrument declared upon, but require in effect that he shall give notice by an affidavit accompanying his plea that he means to contest the execution of the instrument.¹ It was intended to prevent sham defenses or surprises and to prevent unnecessary expense and useless delays from objections at the trial which are frivolous and unconnected with the merits,² and it has been declared that the purpose of the enactments was to save the plaintiff the trouble and expense of proving in the first instance a fact necessarily within the knowledge of the defendant.³

A Rule of Pleading. — Although the statute does not declare a rule of pleading, but one of evidence,⁴ it has no effect upon the rules of evidence, or upon the evidence which is essential to prove the execution of the instrument.⁵

Construction of Statute. — The statute is an encroachment on the common law and should not, therefore, be extended beyond the

Lincoln, 12 Gray (Mass.) 45; Framingham Bank v. Gay, 9 Gray (Mass.) 241; Estabrook v. Boyle, 1 Allen (Mass.) 412; Boston Relief, etc., Co. v. Burnett, 1 Allen (Mass.) 410.

1. *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, in which case Story, J., declared that there is no hardship in the rule and that it subverses the purpose of justice and prevents the accumulation of costs. See also *Wimberly v. Dallas*, 52 Ala. 196; *Sankey v. Trump*, 35 Iowa 267; *McMillen v. Beach*, 38 Mich. 397; *Black v. Halstead*, 39 Pa. St. 64; *Barrrett v. Hambricht*, 4 Sneed (Tenn.) 586.

2. *George T. Smith Middlings Purifier Co. v. Rembaugh*, 21 Mo. App. 390, in which case it was said that the statute "was probably designed to cut off, as far as possible, frivolous and insincere defenses to suits founded on instruments of writing by compelling the party who comes in with a concealed hand under the general denial to purge himself by affidavit before he can secure the delay and produce the annoyance too often incident to such pleas." See also to the same effect, *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, and *Wren v. McLaren*, 48 Mich. 197, in which latter case, however, it was declared that the regulation was not intended to entrap the defendant into responsibilities which he had never incurred.

3. *McCormick Harvesting Mach. Co. v. Doucette*, 61 Minn. 40. See also *Zuel v. Bowen*, 78 Ill. 234, and *Mast v. Matthews*, 30 Minn. 441.

The Massachusetts Statute requiring the plaintiff to file a special denial and demand of proof was likewise enacted for the purpose of saving trouble and expense. *True v. Dillon*, 138 Mass. 347; *Holden v. Jenkins*, 125 Mass. 446.

4. *McCormick Harvesting Mach. Co. v. Doucette*, 61 Minn. 40. See also *True v. Dillon*, 138 Mass. 347, in which case it was declared that the statute referred to in the next preceding note describes a rule of evidence and practice rather than a rule of pleading.

5. *Shepherd v. Royce*, 71 Ill. App. 321, in which case the plaintiff insisted that the defendant's plea contained a charge of the crime of forgery and that it was necessary for the defendant to prove beyond a reasonable doubt that the signature was forged. The court, however, held that the only effect of the plea was to cast upon the plaintiff the burden of proving the execution of the instrument, and that the plaintiff was required to make out his case by a preponderance of the evidence. See also *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, in which case Story, J., declared that if the statute were intended to interfere with or control the rules of evidence it could not be supported.

Question for Jury. — When an instrument, the execution of which is denied under oath, is read to the jury, the question of its authenticity must then be decided by the jury as in other similar cases. *Pate v. Aurora First Nat. Bank*, 63 Ind. 254.

fair import of its terms, but it should not be literally interpreted so as to make it fall short of effecting the intention of the legislature.¹

(2) *Pleadings and Instruments to Which Statutes Apply*—
(a) *In General*.—The statutes, being general in their terms, apply to all negotiable instruments, without regard to the place where or the persons by whom they purport to have been executed.²

1. *Lazarus v. Shearer*, 2 Ala. 718; *Grogan v. Ruckle*, 1 Cal. 158, in which latter case the court cited *Hardman v. Chamberlin*, 1 Morr. (Iowa) 104. See also *Wren v. McLaren*, 48 Mich. 197.

2. *Miller v. McIntyre*, 9 Ala. 638, holding that the statute applies to instruments executed without the state; *Clark v. Polk County*, 19 Iowa 248, holding that the statute applies to instruments executed by municipal corporations; *Clark v. Des Moines*, 19 Iowa 199, holding that the statute applies to city warrants which are in the nature of notes.

Lost Instruments.—In *Texas* the statute by its terms does not apply where an action is brought on a lost instrument. *Erskine v. Wilson*, 20 Tex. 77.

Conditional Undertaking.—The defense that the defendant's undertaking was conditional, which does not appear from the instrument declared on, must be set up by a sworn plea. *Dexter v. Ohlander*, 89 Ala. 262.

Duress.—In *Colorado* an answer setting up duress of the defendant as a defense should be verified, because it amounts to a denial of the execution and delivery of the instrument, and the statute provides that "the genuineness and due execution" of the instrument are deemed to be admitted unless the same be denied by a verified answer. *Parkison v. Boddiker*, 10 Colo. 503, in which case the court said: "It will be observed that we hold the statute to require verification only when the plea challenges the manner of the execution of the instrument. If the signature was forged, if the instrument was never delivered, or if the signature and delivery were compelled, against defendant's objection, by threats and duress, the defense is within the statute and must be sworn to. Not so with the defenses of fraud, want of consideration, and kindred defenses, connected with the inducement acting upon defendant's mind in voluntarily executing the instrument, even though thereby the instrument might be rendered of

no binding force as between him and the original payee."

Infancy.—Proof that the defendant was an infant when the instrument was executed cannot be made under a general denial. *La Grange Collegiate Institute v. Anderson*, 63 Ind. 367. See also article INFANTS, vol. 10, p. 692.

Insanity.—A plea that the maker was insane at the time he gave the instrument is a plea of *non est factum*, and as such is bad unless it is sworn to. *Milligan v. Pollard*, 112 Ind. 465.

Intoxication.—A denial that the defendant ever, at any time or place, made, executed, and delivered the instrument, and that it was obtained from him while intoxicated and deprived of his reason, is not a denial of its execution, and does not impose upon the plaintiff the burden of proving its execution. *Henry v. Hinman*, 21 Minn. 378.

Instrument Not Purporting to Be Defendant's.—In *Wimberly v. Dallas*, 52 Ala. 196, it was held that if the complaint avers that the instrument was executed by the defendant, though it does not purport on its face to have been so executed, it will be regarded as the act of the defendant in the absence of a plea under oath putting its execution in issue.

Denial that Instrument Is Defendant's Act in Law.—A plea which denies that the instrument declared on is the defendant's act in law, or, in other words, that it was not intended to impose a legal obligation or duty upon him, is within the spirit and intention of the statute and must be verified by affidavit. *Tarver v. Nance*, 5 Ala. 712, citing *Lazarus v. Shearer*, 2 Ala. 718.

Summary Proceedings under Alabama Statute.—In *Mauldin v. Branch Bank*, 2 Ala. 502, it was held that in a summary proceeding against an indorsee, by notice and motion, since the form of the action is not characterized, the plea of *non assumpsit* supported by affidavit will throw upon the plaintiff the necessity of showing that the indorse-

Replication. — It has been held that where the defendant pleads an instrument in writing as the basis of a set-off against the plaintiff's demand, a replication denying the execution of such instrument must be sworn to in order to impose upon the defendant the burden of proving the execution of the instrument.¹

Denial of New Promise. — Where the declaration alleges that the defendant made a new promise in writing, which is relied upon to take the case without the statute of limitations, such new promise is admissible in evidence without any proof of its execution, unless the defendant puts in a denial under oath.²

ment was made by the defendant or his authority, but the defendant is not obliged thus to deny the indorsement, and may interpose a formal denial, tendering an issue and verified by affidavit. It was held that the court erred in striking out the following plea: "That the indorsement on which he is charged in said plaintiff's notice is not his indorsement, nor made by him, or his authority, and of this he puts himself upon the country."

Actions Against Strangers — Assignee for Benefit of Creditors. — Where the maker has made an assignment for the benefit of creditors, and an action is brought against the assignee, he must put in a plea of *non est factum* under oath, or the plaintiff will not be bound to prove the execution of the instrument. *Bethune v. Dougherty*, 30 Ga. 770.

Person Who Assumes to Pay Instrument. — Rev. Stat. Ind. (1843), § 216, which provided that any pleading denying or requiring proof of the execution or assignment of any instrument of writing which is the foundation of the action, and which is specially set forth in the declaration, should not impose the burden of proof upon the plaintiff, unless verified by oath, was construed to be broader and more comprehensive than Code Ind., § 80, which provided that where the writing purporting to have been executed by one of the parties is the foundation of the instrument, it may be read in evidence without proof of its execution unless its execution is denied under oath; and it was held that under the first mentioned statute, in an action against the maker of a note and mortgage securing the note, and persons who, after the execution of the note and mortgage, purchased the mortgaged premises and agreed to pay off the note and mortgage, the note and mortgage are admissible in evidence against the

purchasers, without proof of their execution, in the absence of a plea under oath denying their execution. *Belton v. Smith*, 45 Ind. 291.

To Enforce Collateral Liability. — The execution of the instrument need not be denied on oath by a defendant who is not alleged to have executed the instrument, but who is alleged to be liable collaterally. *Lane v. Harris*, 16 Ga. 217, wherein the action was against a stockholder of a corporation, to charge him with liability for the ultimate redemption of bills issued by such corporation.

Time of Execution. — In an action against the makers, one of whom signed the instrument on the back thereof, notwithstanding his failure to deny under oath the execution of the instrument, he may show that he signed the instrument after it had become operative and without any consideration, and that he was not notified of its nonpayment. *Freeman v. Ellison*, 37 Mich. 459.

1. *Walker v. Bentley*, 64 Ala. 92; *Simmons v. Simmons*, 33 Gratt. (Va.) 451, which was a suit in equity.

Instruments Set Up in Bar. — In *Waller v. Nelson*, (Ala. 1895) 18 So. Rep. 154, the defendant relied on a written transfer to him by the plaintiff of the instrument upon which the plaintiff had declared. It was held that the plaintiff could deny the execution of such transfer without denying its execution under oath, as the transfer was not the foundation of the suit, but an instrument of defense collateral to the instrument on which the suit was based. See also *Parks v. Greening, Minor* (Ala.) 178, to the same effect.

2. *Heath v. Achey*, 96 Ga. 438. See also article LIMITATIONS, vol. 13, pp. 256, 257.

Signature of Attesting Witness. — In *Massachusetts* it has been held, under a statute providing that the defendant's

(b) **In Suits in Equity.** — The statutes providing that the execution of the instrument shall stand admitted unless it is put in issue by a plea or an answer under oath apply to suits in equity based upon negotiable instruments.¹

(c) **In Justices' Courts.** — Although pleadings before justices of the peace are *ore tenus*, yet such pleas as are required to be under oath must, as a general rule, be in writing and be sworn to, and it is held that statutes requiring the execution of written instruments to be sworn to are applicable to actions in justices' courts.²

signature shall be deemed as admitted unless he files a special denial of the genuineness thereof, and a demand that it shall be proved, that where the instrument is attested by a witness, and the effect of such attestation is to prevent the running of the statute of limitations for a number of years, the defendant's failure to specially deny his own signature does not constitute an admission of the genuineness of the signature of the attesting witness. *Holden v. Jenkins*, 125 Mass. 446.

1. *Smith v. Hiles-Carver Co.*, 107 Ala. 272, which was a bill in equity to enforce a vendor's lien and to collect the amount of a note secured by such lien; *Waldrip v. Black*, 74 Cal. 409, which was an action to foreclose a mortgage given to secure the payment of a note; *Wanita Woolen Mills v. Rollins*, (Miss. 1897) 22 So. Rep. 819; *Rye v. Adkins*, (Tenn. 1897) 46 S. W. Rep. 455; *Simmons v. Simmons*, 33 Gratt. (Va.) 451; *James River, etc., Co. v. Littlejohn*, 18 Gratt. (Va.) 53.

A Sworn Answer to a Bill in Equity will serve the purpose of a plea where the statute requires a denial "by a plea verified by the oath of the party pleading the same." *Wanita Woolen Mills v. Rollins*, (Miss. 1897) 22 So. Rep. 819.

Waiver of Answer under Oath. — The fact that the plaintiff in a bill in equity waives an answer under oath does not relieve the defendant of the necessity of filing a sworn denial of the execution of the instrument, if he desires to cast the burden of proof upon the plaintiff. *Wanita Woolen Mills v. Rollins*, (Miss. 1897) 22 So. Rep. 819.

Necessity to Verify Replication. — Where in a suit in equity the defendant files a written instrument with his answer as the basis of a set-off, a replication denying the execution of the instrument must be verified. *Simmons v. Simmons*, 33 Gratt. (Va.) 451.

2. *Judd v. Cralle*, 37 Ill. App. 149 [in

which case the court cited *Griswold v. Peoria University*, 26 Ill. 41; *Zuel v. Bowen*, 78 Ill. 234; *Hudson v. Dickinson*, 12 Ill. 407; *Evans v. Fisher*, 10 Ill. 569, and *Foy v. Blackstone*, 31 Ill. 538]; *Burson v. Huntington*, 21 Mich. 415; *Chicago, etc., R. Co. v. Edson*, 41 Mich. 673. See also *Stephenson v. Landis*, 14 Lea (Tenn.) 433; *Stebbins v. Goldthwait*, 31 Ind. 159.

Affidavit Sufficient Without Plea. — In *Indiana* it has been held that an affidavit denying the execution of the instrument will, in a justice's court, answer every purpose, and will be considered a plea. *Zuel v. Bowen*, 78 Ill. 234.

On Appeal from Justice's Court. — In *Missouri* the statute applies not only to trials before a justice, but also to the trials of appeals from justices of the peace. *Chicago, etc., R. Co. v. Edson*, 41 Mich. 673.

Plea Filed in Appellate Court. — In *Colorado*, under the statutes of that state, the defendant may be allowed to file an affidavit denying his signature on appeal from a justice's court to a County Court, although no such affidavit was filed in the justice's court. *Assig v. Pearsons*, 9 Colo. 587.

In *Missouri* a sworn plea of *non est factum* may be filed in the court to which an appeal is taken, though no such plea was filed in the justice's court, as on such appeal the trial is *de novo*. *Moore v. Hutchinson*, 69 Mo. 429.

Discretion of Court. — Where the defendant in an action before a justice does not deny the execution of the instrument and appeals from a judgment against him, it is altogether within the discretion of the court to grant or deny the defendant leave to file an affidavit denying the execution of the instrument. *Chicago, etc., R. Co. v. Edson*, 41 Mich. 673.

Failure of Plaintiff to File Instrument with Justice. — In *Michigan*, if the

(d) **Where Instrument Is Not Declared On.**—In some states it has been held, under the peculiar wording of the statutes, that where the instrument is not made the foundation of the action, and is sought to be introduced under the common counts in *assumpsit*, no sworn plea denying the execution of the instrument is necessary in order to require the plaintiff to prove the execution of the instrument, and a plea of *non assumpsit* is sufficient.¹

(e) **Actions Against Executors and Administrators.**—Where the statute provides that when the instrument purports to have been executed by one of the parties it may be read in evidence without proving its execution, unless its execution be denied under oath, or that, unless the person whose signature the same purports to be shall deny the genuineness of such signature under oath, it shall be held as admitted, an executor or administrator in an action upon an instrument executed by his decedent need not file a sworn answer in order to require the plaintiff to prove the execution of the instrument.²

plaintiff does not file the instrument with the justice, and the defendant has no opportunity of denying its execution until it is offered in evidence, the plaintiff, notwithstanding the defendant's failure to deny its execution under oath, is required to prove its execution. *Newton v. Principaal*, 82 Mich. 271; *Colbath v. Jones*, 28 Mich. 280.

Massachusetts Statute.—Where the defendant in a police court pleads orally, and in compliance with the statute files a written special denial and demand of proof, upon an appeal no additional denial and demand need be filed in order to deprive the plaintiff of the advantage he would have had if it had not been filed. *True v. Dillon*, 138 Mass. 347, citing *Manson v. Arnold*, 126 Mass. 399.

1. *Hunley v. Lang*, 5 Port. (Ala.) 154; *May v. Miller*, 27 Ala. 515; *Newton v. Principaal*, 82 Mich. 271; *Colbath v. Jones*, 28 Mich. 280; *McMillen v. Beach*, 38 Mich. 397; *Kelly v. Paul*, 3 Gratt. (Va.) 182. See also *Hall v. Freeman*, 59 Ill. 55, holding that a statute providing that the plaintiff shall not be bound to prove the signature of any assignor unless the fact of assignment be put in issue by plea, accompanied by an affidavit, applies only to cases where the plaintiff declares specially upon the instrument; citing *Peake v. Wabash R. Co.*, 18 Ill. 88.

In *Texas* it was contended, in an action to recover a balance due on a statement of indebtedness including, among other items, certain notes, that the ac-

tion was not in whole or in part brought upon the notes; but it was held that this contention was untenable, and that notes not specially counted on were in part the foundation of the action, and therefore might be read without proof of their execution, where the defendant had filed no denial under oath. *Dial v. Taylor*, 8 Tex. 267. See also *Lewis v. Lowery*, 31 Tex. 663.

Amendment of Declaration.—In *McMillen v. Beach*, 38 Mich. 397, it was held that the filing of an amended declaration, with a copy of the instrument appended to it, which was not served on the defendant or his attorney, or brought to the attention of either until the case was on trial, and which was not brought to the attention of the court, did not make it necessary for the defendant to file a denial under oath.

2. *Barnett v. Cabinet Makers' Union*, 28 Ind. 254, following *Riser v. Snoddy*, 7 Ind. 442, and *Mahon v. Sawyer*, 18 Ind. 73; *Cawood v. Lee*, 32 Ind. 44; *Ashworth v. Grubbs*, 47 Iowa 353. See also *Zervis v. Unnerstall*, 29 Mo. App. 474.

In *Alabama*, under a statute providing "that no plea of *non est factum* shall be admitted to be pleaded but when accompanied with an affidavit of its truth," it has been held that a personal representative who is sued upon a paper executed by his decedent must put in a sworn plea, and that if he does not possess information which will enable him to deny the fact of execution absolutely he should swear to the facts

(2) **Defenses Not Embraced in Statutes.** — A plea or answer which does not put in issue the execution of the instrument, but sets up extrinsic matters in avoidance, is not within the statute providing that the execution of the instrument or the genuineness of the defendant's signature shall not be questioned except under a plea or answer accompanied by an affidavit of its truth, and it may be stated broadly that any plea or answer which does not deny the execution of the instrument or the genuineness of the defendant's signature is not within the statute.¹

(3) **Effect of Failure to Deny Execution under Oath — Execution of Instrument Admitted.** — Under the various statutes requiring the execution of the instrument or the genuineness of the defendant's signature to be denied by a plea or an answer under oath, unless a proper plea or answer, verified by affidavit, is interposed, the due execution of the instrument and the genuineness of the defendant's signature are admitted, and the instrument may be introduced in evidence without proof of its execution or of the genuineness of the defendant's signature, and the defendant will not be permitted to offer evidence to disprove the facts so admitted.²

according to the best of his information and belief. *Martin v. Dortch*, 1 Stew. (Ala.) 479.

In Louisiana it has been held, in an action upon an instrument executed by a decedent, that an administrator is not within the statute providing that if the genuineness of the signature be denied falsely the defendant shall be precluded from making other defenses. *Bradford v. Cooper*, 1 La. Ann. 325, in which case the court said: "We cannot extend this penalty, by implication, to parties not comprehended in its terms, to wit, the heirs or representatives of a deceased signer. The distinction between the party who has himself signed, and an heir or administrator, is obvious. The one may be well supposed to know with certainty his own signature, and whether he made the contract on which he is sued. But no such supposition necessarily attaches to an heir or administrator, who may never have seen the party write, and may have had no knowledge of the transaction in which the note originated."

Indiana Statute Excepting Personal Representatives. — Since the enactment of the statute (Code 1852, § 80) under which *Riser v. Snoddy*, 7 Ind. 442, and cases following it, were decided, a statute has been enacted (Code 1881, § 115) expressly providing that executors, administrators, and guardians

need not deny under oath the execution of an instrument upon which they are sued, but that its execution must be proved as if it were so denied. *Jennings v. McFadden*, 80 Ind. 531.

1. *Turner v. Lazarus*, 6 Ala. 875; *Vandergrift v. Hollis*, 6 Houst. (Del.) 90; *Cleghorn v. Robison*, 8 Ga. 559; *O'Bryan v. Standiford*, 47 Kan. 24, holding that the statute does not require that an answer setting up payment shall be sworn to; *Freeman v. Ellison*, 37 Mich. 459. See also *Waller v. Nelson*, (Ala. 1895) 18 So. Rep. 154.

Consideration Given Married Woman. — In *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, which was an action against a married woman, it was held that her failure to file an affidavit denying the execution of the instrument did not prevent her from defending on the ground that it had not been given on such a consideration as would bind her; there being a statute which prevented a married woman from becoming liable on executory contracts, except where they concerned her separate estate.

2. *Alabama.* — *McDougald v. Ruth-erford*, 30 Ala. 253; *Dew v. Garner*, 7 Port. (Ala.) 503. See also *Miller v. McIntyre*, 9 Ala. 638.

Arkansas. — *State Bank v. Kerby*, 9 Ark. 345, holding that an unverified plea of *nil debet* is insufficient to put the execution of the instrument in

General Issue Without Affidavit.—It has been held, uniformly it would seem, that a plea of the general issue or a general denial, unaccompanied by any affidavit of its truth or by an affidavit, denying the execution of the instrument or the genuineness of

issue; *Trowbridge v. Pitcher*, 4 Ark. 157.

California.—*Brown v. Weldon*, 71 Cal. 393; *Hastings v. Dollarhide*, 18 Cal. 390; *Horn v. Volcano Water Co.*, 13 Cal. 62.

Illinois.—*Lee v. Mendel*, 40 Ill. 359; *Underhill v. Kirkpatrick*, 26 Ill. 84; *Lockridge v. Nuckolls*, 25 Ill. 178; *Reed v. Phillips*, 5 Ill. 39; *Murchie v. Peck*, 57 Ill. App. 396.

Indiana.—*Pattison v. Shaw*, 82 Ind. 32; *Coen v. Funk*, 18 Ind. 345 [in which latter case the court cited *Evans v. Southern Turnpike Co.*, 18 Ind. 101; *Denny v. North Western Christian University*, 16 Ind. 220, and *Unthank v. Henry County Turnpike Co.*, 6 Ind. 125]; *Bates v. Hunt*, 1 Blackf. (Ind.) 67, in a note to which case is cited *Parry v. Henderson*, 6 Blackf. (Ind.) 72.

Iowa.—The plaintiff is not bound to prove the execution of the instrument unless the defendant denies its execution under oath. *Sankey v. Trump*, 35 Iowa 267; *Douglass v. Matheny*, 35 Iowa 112; *Loomis v. Metcalf*, 3 Iowa 382; *Thompson v. Abbott*, 11 Iowa 193; *Partridge v. Patterson*, 6 Iowa 514. In the last case the court cited *Seachrist v. Griffith*, 6 Iowa 390; *Lyon v. Bunn*, 6 Iowa 48; *Chambers v. Games*, 2 Greene (Iowa) 320; and *Steinhelber v. Edwards*, 2 Greene (Iowa) 366.

Maryland.—*Banks v. McCosker*, 82 Md. 518.

Mississippi.—*Wade v. Staunton*, 5 How. (Miss.) 631; *Green v. Robinson*, 3 How. (Miss.) 105; *Hemphill v. Alabama Bank*, 6 Smed. & M. (Miss.) 44; *Cook v. Martin*, 5 Smed. & M. (Miss.) 379; *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373.

Tennessee.—*Eakin v. Burger*, 1 Sneed (Tenn.) 417; *Knott v. Planters' Bank*, 2 Humph. (Tenn.) 493.

Texas.—*Lewin v. Houston*, 8 Tex. 94; *Johnston v. Jefferson*, 31 Tex. 332.

Louisiana Statute.—Under Code Prac., art. 324, requiring a special denial of the genuineness of the defendant's signature, it has been held that a general denial amounts to an admission of the defendant's signature. *Boulin v. Rainey*, 21 La. Ann. 335, in which case, however, it was held that

a general denial does not constitute an admission of an agreement on the back of the instrument, signed by the maker; *Beach v. Wagner*, 19 La. 86; *Austin v. Latham*, 19 La. 88; *Florance v. McFarlane*, 15 La. 231; *Vairin v. Palmer*, 14 La. 361; *Bennett v. Allison*, 2 La. 419; *Miller v. Cohea*, 1 La. 486; *Carmena v. Peroux*, 2 Rob. (La.) 303.

Proof by Defendant under Denial Not under Oath.—In *Illinois*, *Iowa*, and *Ohio* it has been held, under the statutes of those states, that the effect of the defendant's failure to file an affidavit of the truth of an answer denying the execution of the instrument, or of a plea of the general issue, is to enable the plaintiff to introduce the instrument in evidence without proof of its execution; and in these states, under a proper plea or answer, not sworn to, evidence that the instrument was not executed may be introduced by the defendant. *Kripner v. Lincoln*, 54 Ill. App. 675, in which case the court cited *Frankland v. Johnson*, 147 Ill. 520, and *Stevenson v. Farnsworth*, 7 Ill. 715; *Terhune v. Henry*, 13 Iowa 99; *Sheldon v. Middleton*, 10 Iowa 17, holding that even for this purpose the defendant's answer must be explicit; *Fannon v. Robinson*, 10 Iowa 272; *Chambers v. Games*, 2 Greene (Iowa) 320; *Palmer v. Yarrington*, 1 Ohio St. 253. In the last case the court said: "At common law, and without the act referred to, the plaintiff, upon offering his note in evidence, must prove its execution; and this statute, as its title implies, merely dispenses with such proof, unless the plea which puts its execution in issue is verified by affidavit, and makes no other or further change in the rules of evidence; so that, although, since the statute, a party may offer his note in evidence without proof of its execution, yet he offers it just as he offers any other item of evidence—liable to be met and defeated by such evidence as the defendant may be liable to produce." *Overruling Taylor v. Colvin*, *Wright* (Ohio) 449. See also *Lyon v. Bunn*, 6 Iowa 48; *Seachrist v. Griffith*, 6 Iowa 390; *Wolff v. Hagensick*, 10 Iowa 590.

In *Minnesota* it has been held that,

the defendant's signature, is insufficient to prevent the introduction of the instrument, without proof of its execution or of the genuineness of the defendant's signature, or, except in *Illinois, Iowa, Minnesota, and Ohio*, to authorize the defendant to introduce evidence in rebuttal.¹

Reasonable Intentments. — Not only will the execution of the instrument be admitted by failure to put in a plea or answer denying its execution, but all that the instrument will reasonably prove by way of inference, presumption, or implication must be taken as

although a general denial, even under oath, is not sufficient to impose upon the plaintiff the burden of proving the execution of the instrument, it is sufficient to authorize the introduction of evidence against the instrument by the defendant. *McCormick Harvesting Mach. Co. v. Doucette*, 61 Minn. 40, in which case the court *disapproved* what was inadvertently said to the contrary in *Bausman v. Credit Guarantee Co.*, 47 Minn. 377.

Affidavits of Merits Not Dispensed With. — In *Illinois*, in which state it is provided by statute that if the plaintiff, in a suit upon a contract for the payment of money, shall file an affidavit verifying his declaration, he shall be entitled to a judgment by default, unless the defendant shall file with his plea an affidavit stating that he verily believes that he has a good defense, where the declaration contains a special count on a promissory note, and also the common counts, a plea verified by affidavit, denying the execution of the instrument, does not fulfil the requirements of the statute as to an affidavit of merits, because, although the defendant may not have executed the instrument, the plaintiff may nevertheless be entitled to recover under the common counts. *Chicago, etc., R. Co. v. Bank of North America*, 82 Ill. 493.

Instrument Executed in Another State. — Where a plea of *non est factum* accompanied by an affidavit is not interposed in accordance with the provisions of the statute, proof of the execution of the instrument is dispensed with, although the instrument was made in another state. *McDougald v. Rutherford*, 30 Ala. 253.

Illegible Signature. — In the absence of a plea denying the execution of the instrument duly verified, no proof of its execution is necessary, even where the defendant's signature is illegible, and is so badly written that it has little or no resemblance to the defendant's

name. *Dew v. Garner*, 7 Port. (Ala.) 503.

1. *McDougald v. Rutherford*, 30 Ala. 253; *State Bank v. Kerby*, 9 Ark. 345, holding that an unverified plea of *nil debet* is insufficient to put the execution of the instrument in issue; *Brown v. Weldon*, 71 Cal. 393, holding that an unverified answer denying generally the allegations of the complaint is insufficient; *Hastings v. Dollarhide*, 18 Cal. 390; *Horn v. Volcano Water Co.*, 13 Cal. 62; *Murchie v. Peck*, 57 Ill. App. 396, holding that an unverified plea of *non assumpsit* does not put in issue the execution of the instrument; *Pattison v. Shaw*, 82 Ind. 32, holding that an unverified general denial admits the execution of the instrument; *Bates v. Hunt*, 1 Blackf. (Ind.) 67; *Banks v. McCosker*, 82 Md. 518; *Wade v. Staunton*, 5 How. (Miss.) 631; *Green v. Robinson*, 3 How. (Miss.) 105, holding that an unverified plea of *non assumpsit* admits the execution of the instrument; *Hemphill v. Alabama Bank*, 6 Smed. & M. (Miss.) 44; *Cook v. Martin*, 5 Smed. & M. (Miss.) 379; *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373; *Eakin v. Burger*, 1 Sneed (Tenn.) 417, holding that under an unverified plea of *non assumpsit* the defendant cannot deny the execution of the instrument; *Knott v. Planters' Bank*, 2 Humph. (Tenn.) 493; *Johnston v. Jefferson*, 31 Tex. 332; *Lewin v. Houston*, 8 Tex. 94.

Illinois, Iowa, Minnesota, and Ohio. — As to the construction that has been placed upon the statutes of these states, see the note to the next preceding paragraph of the text.

Failure to Verify Complaint. — Even where the complaint is not sworn to, an unverified general denial is not sufficient to put the plaintiff upon proof of the genuineness and due execution of the instrument. *Per Cope, J.*, in *Hastings v. Dollarhide*, 18 Cal. 390.

true, unless the contrary is shown.¹

Insufficiency of Declaration or Complaint. — The defendant's failure to deny the execution of the instrument under oath does not entitle the plaintiff to a judgment by confession, where his declaration or complaint is fatally defective and insufficient to support a judgment by reason of its failure to allege facts sufficient to constitute a cause of action.²

Refusal of Continuance. — The court will not grant a continuance in order to enable the defendant to procure evidence that he did not execute the instrument, where his answer is not sworn to.³

Defenses Nevertheless Available. — The statutes were not intended to deprive the defendant of any good defense, and consequently a plea of the general issue, such as *non assumpsit* or *nil debet*, according to the form of the declaration, or an answer denying each and every allegation of the complaint, even though it be accompanied by no affidavit of its truth, although it relieves the plaintiff from the necessity of proving the execution of the instrument or the genuineness of the defendant's signature, is sufficient to prevent the court from rendering judgment for the want of a plea or answer, and will enable the defendant to make such defenses therein, except that he did not execute the instrument, as might have been made had the statute not been enacted.⁴

1. *Per* Valentine, J., in *Eggar v. Briggs*, 23 Kan. 710.

2. *Hart v. Harrison Wire Co.*, 91 Mo. 414. See also *Villiers v. Lewis*, 1 Handy (Ohio) 38, wherein it is said that unless the plaintiff's petition states a good cause of action, the defendant is not called upon to deny or avoid under oath; *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Affidavit of Defense Unnecessary. — In *Pennsylvania*, to entitle the plaintiff to a judgment for want of an affidavit of defense, or for want of a sufficient affidavit of defense, the statement of his demand must set forth a good cause of action, by which is meant that the plaintiff's averments must be such as to entitle him, if not controverted, to a verdict for the amount of his claim. *Louchheim v. Maguire*, 6 Pa. Super. Ct. Rep. 635, *citing* *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241.

Failure to Allege that Defendant Signed by Initials. — When a defendant who is sued as the maker of an instrument does not file a plea under oath denying its execution, and on the trial the instrument described in the declaration is offered in evidence, with the Christian name of the defendant signed only by its initial letter, it is admissible, even without an averment in the dec-

laration that the defendant signed by the initial of his Christian name. *Lee v. Mendel*, 40 Ill. 359, *per* Lawrence, J.

3. *Thackaray v. Hanson*, 1 Colo. 365.

4. *Brooks v. Chilton*, 6 Cal. 641, holding that an answer denying generally all the allegations of the complaint should not be stricken out as sham and frivolous; *Longley v. Norvall*, 2 Ill. 389; *Kripner v. Lincoln*, 54 Ill. App. 675, holding that an unsworn plea of *non assumpsit* should not be stricken out; *Wade v. Mussleman*, 14 Ind. 362; *Bates v. Hunt*, 1 Blackf. (Ind.) 67, holding that the defendant may plead *nil debet* or *non assumpsit*, either with or without an oath, at his election; *Wolff v. Hagensick*, 10 Iowa 590; *Lyon v. Bunn*, 6 Iowa 48, holding that an answer not under oath, denying that the defendant is indebted to the plaintiff in the sum claimed, or in any less sum, and denying that he made and executed the instrument, is responsive, and is not improper or impertinent; *Chambers v. Games*, 2 Greene (Iowa) 320; *Eggar v. Briggs*, 23 Kan. 710, holding that the defendant's failure to file an affidavit denying the execution of the instrument did not constitute an admission of the plaintiff's ownership of the instrument; *Freeman v. Ellison*, 37 Mich. 459; *Hart*

Whether Instrument Must Be Produced. — It would seem, according to some authorities, that although a denial of the execution of the instrument or of the genuineness of the defendant's signature, unless it is sworn to, does not cast the burden of proof upon the plaintiff or permit the defendant to make the defense that he did not execute the instrument, yet it is sufficient to preclude the plaintiff from taking judgment by default and to require the plaintiff to produce the instrument, but there is a difference of opinion upon this question.¹ And it has been declared that it is the safer practice to require the production and cancellation of the instrument before the rendition of judgment whether there is a defense or default.²

(4) *Effect of Denial under Oath.* — Where in compliance with the statute the defendant puts in a sworn plea or answer denying the execution of the instrument, the parties stand as they did at common law when the general issue was pleaded, which devolved upon the plaintiff the necessity of proving the execution of the instrument, and it is error to permit the plaintiff to read the execution in evidence without any proof of its execution.³

v. Harrison Wire Co., 91 Mo. 414; *Snowden v. McDaniel*, 7 Mo. 313; *Bates v. Hinton*, 4 Mo. 78; *McClintick v. Johnston*, 1 McLean (U. S.) 414. See also *Payne v. Snell*, 4 Mo. 238; *Shepherd v. Frys*, 3 Gratt. (Va.) 422. See, further, *Bennett v. Allison*, 2 La. 419; *Stockton v. Truxton*, 8 La. 224; *Miller v. Whitfield*, 16 La. Ann. 10; *Hughes v. Harrison*, 8 Martin N. S. (La.) 297, which cases were decided under a statute of Louisiana, requiring, not a sworn answer, but an answer expressly denying the defendant's signature.

1. *Wallace v. Reed*, 70 Ind. 263; *McIntosh v. Robison*, 68 Ind. 120; *Woollen v. Whitacre*, 73 Ind. 198; *Pattison v. Shaw*, 82 Ind. 32, in which case the court cited *Feeney v. Mazelin*, 87 Ind. 226; *Collins v. Maghee*, 32 Ind. 268, in which case the court cited *Fosdick v. Starbuck*, 4 Blackf. (Ind.) 417, and *King v. Conn*, 25 Ind. 425; *Evans v. Southern Turnpike Co.*, 18 Ind. 101; *Bates v. Hunt*, 1 Blackf. (Ind.) 67; *Kinnard v. Herlock*, 20 Tex. 48, in which case the court followed *Able v. Chandler*, 12 Tex. 88, and *Matossy v. Frosh*, 9 Tex. 10; *Sebree v. Dorr*, 9 Wheat. (U. S.) 558, in which case the court construed a statute of Kentucky. See also *Lewin v. Houston*, 8 Tex. 94.

Contra. — In *Payne v. Kansas City First Nat. Bank*, 16 Kan. 147, *Valentine, J.*, declared that where the execution of the instrument is not denied

under oath, there is no necessity of introducing it in evidence on the trial. See also *Diven v. Spicer*, 1 Kan. 103; *Williams v. Norton*, 3 Kan. 295; *Morton v. Coffin*, 29 Iowa 235, in which last case it was held that a denial of indebtedness was insufficient to put in issue the execution of the instrument, and that therefore it was not necessary to introduce the instrument in evidence, this having been done upon a previous trial. See, further, *McClusky v. Gerhauser*, 2 Nev. 47.

Unsworn Answer Frivolous. — A general denial unaccompanied by any affidavit may be regarded as frivolous where it is apparent that the defendant has failed to set up a substantial ground of defense of which he was all along apprised, until the day of trial, for the purpose of surprising the plaintiff and obtaining delay. *Lewin v. Houston*, 8 Tex. 94, in which case it was held that the court, under the circumstances, properly refused to allow the defendant to amend.

2. *Hutchison v. Myers*, 52 Kan. 290, in which case it was declared that this has been the general practice in the district courts of Kansas.

3. *Crow v. Decatur Bank*, 5 Ala. 249; *McCoy v. Harrell*, 40 Ala. 232; *Ferguson v. State Bank*, 8 Ark. 416; *Lothrop v. Roberts*, 16 Colo. 250; *Soaps v. Eichberg*, 42 Ill. App. 375, in which case the court cited *Zuel v. Bowen*, 78 Ill. 234, and *Templeton v. Hayward*,

Plea by One of Plurality of Makers. — In an action against two or more makers of an instrument, a verified plea or answer by one of them denying the execution of the instrument is available to the defendant only who puts it in, and other defendants who do not

65 Ill. 178; *Holmes v. Riley*, 14 Kan. 131; *Andrews v. Hayden*, 88 Ky. 455; *Monitor Plow Works v. Born*, 33 Neb. 747; *Wilson v. Skaggs*, 10 Tex. 298.

Not Affirmative Plea. — The ordinary rule that where an affirmative plea is put in by the defendant the onus of proving it lies upon him does not apply where a sworn plea of *non est factum* is interposed. *McCoy v. Harrell*, 40 Ala. 232, citing *Crow v. Decatur Bank*, 5 Ala. 249.

Plea under Oath Prevents Judgment by Default. — When a sworn plea denying the execution of the instrument is interposed, proof of the execution of the instrument is indispensable, and no judgment by default can be rendered, because the instrument is not *prima facie* evidence, and a judgment by default excludes the presumption that any evidence whatever was offered by the plaintiff. *Crow v. Decatur Bank*, 5 Ala. 249, distinguishing *Dougherty v. Colquitt*, 2 Ala. 337, in which case the plea did not question the plaintiff's cause of action, but merely denied his right to maintain the action because of the pendency of another suit for the same matter.

Burden of Proof Does Not Shift. — Where the execution of the instrument is put in issue by the defendant, it devolves upon the plaintiff to establish the genuineness of the defendant's signature by a preponderance of the evidence, and this burden remains with the plaintiff throughout the case. After evidence has been introduced by the plaintiff to establish the execution of the instrument, the burden of proof does not shift to the defendant to show that he did not sign the instrument. *Monitor Plow Works v. Born*, 33 Neb. 747, in which case the question was as to the propriety of an instruction to the jury; citing *Madison First Nat. Bank v. Carson*, 30 Neb. 104.

Proof of Subsequent Promise. — Where the defendant puts in a sworn plea of *non est factum*, the plaintiff cannot sustain his action upon proof of an oral promise made by the defendant after the execution of the instrument, where the plaintiff has not declared upon such subsequent promise. *Wilson v. Skaggs*,

10 Tex. 298. See also article LIMITATIONS, vol. 13, p. 176.

What Plaintiff Must Prove. — It is not incumbent upon the plaintiff to prove that the plea and affidavit are false, but only that the signature of the defendant is genuine. *Patrick v. Carr*, 50 Miss. 199, in which case the court erroneously instructed the jury.

No Replication Necessary. — In *Kentucky*, since the petition on a note, or other like instrument, must aver in substance its execution and delivery, a plea of *non est factum* completes the issue, and no reply is necessary. *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036.

In *Louisiana*, where the defendant specially denies the genuineness of the signature, it is incumbent upon the plaintiff to prove that it is genuine. *Fryer v. Darcy*, 17 La. 527.

Effect of Compliance with Massachusetts Statute. — Where the defendant files the special denial and demand of proof required by the Massachusetts statute, the production of the instrument by the plaintiff without evidence of its authenticity is not sufficient. *True v. Dillon*, 138 Mass. 347, citing *Warner v. Brooks*, 14 Gray (Mass.) 109.

One Notice Sufficient. — A notice given by the defendant, in compliance with a rule of court, of his intention to deny the genuineness of the instrument, is sufficient and applies to each subsequent trial of the action. *Dana v. Underwood*, 19 Pick. (Mass.) 99.

Effect of Amendment. — Where the defendant files a special denial and demand of proof required by the statute, subsequent changes in the answer, by either addition or substitution, so long as the denial and demand are not withdrawn, do not change the rule of evidence and relieve the plaintiff from the burden of proof. *True v. Dillon*, 138 Mass. 347.

Presumption on Appeal. — Where a sworn plea denying the execution of the instrument has been filed, it will be presumed on appeal that the trial court required evidence of its execution to be introduced before allowing the instrument to be read in evidence, where the record does not show that

put in a denial under oath receive no advantage from it.¹ Such plea or answer, however, is available to the defendant who puts it in, notwithstanding the failure of other defendants to put in a denial under oath.²

(5) *Waiver of Denial under Oath* — (a) *By Plaintiff*. — It has been held that the defendant's failure to put in a proper plea or answer under oath is not waived by the plaintiff by failure to make objection until the trial is in progress.³

(b) *By Defendant*. — The defendant may on the trial waive the effect of a plea or answer under oath denying the execution of the instrument by permitting the instrument to be introduced in evidence without proof of its execution or by expressly admitting the execution of the instrument.⁴

there was no proof of its execution. *Reed v. Phillips*, 5 Ill. 39.

1. *Ferguson v. State Bank*, 8 Ark. 416; *Murchie v. Peck*, 57 Ill. App. 396, in which case the court cited *Davis v. Scarritt*, 17 Ill. 202, and *Zuel v. Bowen*, 78 Ill. 234; *Taylor v. Gay*, 6 Blackf. (Ind.) 150; *Pursley v. Morrison*, 7 Ind. 356; *Beagles v. Sefton*, 7 Ind. 496; *Feeney v. Mazelin*, 87 Ind. 226; *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597.

2. *Wren v. McLaren*, 48 Mich. 197, in which case the court said: "To require one defendant to lose his defense unless his codefendant will join him in an affidavit of non-execution would subject him to such danger of fraud and collusion as would render such a rule as contained such a requirement unjust and arbitrary in the extreme. No such meaning can be applied to the rule which requires a plea to be supported by affidavit, and such dangerous practice can receive no sanction."

3. *Douglass v. Matheny*, 35 Iowa 112, in which case it was held that the instrument was admissible in evidence without further proof, notwithstanding the plaintiff's failure to attack the sufficiency of the answer by a motion or demurrer; *Drew v. Harrison*, 12 Tex. 279, holding that the plaintiff cannot be required to assume the burden of proof, unless it is imposed upon him in the mode prescribed by the statute, and that he can insist upon the insufficiency of the answer at the trial; *Phaup v. Stratton*, 9 Gratt. (Va.) 615. But see *contra*, *Schwarz v. Oppold*, 74 N. Y. 307.

Instruction to Disregard Defendant's Evidence. — Where evidence has been improvidently heard to disprove the genuineness of the instrument without

an affidavit denying its execution, the court should instruct the jury to disregard such evidence or refuse any instruction which would give weight to such evidence. *Phaup v. Stratton*, 9 Gratt. (Va.) 615.

Objections After Trial—Motion for Judgment Non Obstante. — In *Myers v. Douglass*, 99 Ky. 267, it was held, under a statute providing that no objection shall be taken after the commencement of the trial to any plea for the want of or a defect in the verification, that after a trial and verdict for the defendant, the plaintiff cannot, because the answer is not verified, move for judgment notwithstanding the verdict.

On Appeal. — An objection to the sufficiency of the answer because it is not accompanied by an affidavit of its truth is waived by treating it as sufficient and going to trial under it, and cannot be taken for the first time on appeal. *Grogan v. Ruckle*, 1 Cal. 193.

Failure of Plaintiff to Return Copy. — In *Minnesota* the negligence of the plaintiff to return the copy of the answer served upon him constitutes a waiver of the want of a verification. *Hayward v. Grant*, 13 Minn. 165, following *Smith v. Mulliken*, 2 Minn. 319.

4. *Hansen v. Hale*, 44 Ill. App. 474, in which case the court held that a defendant who permits the instrument to be read without proof of its execution, although he has filed a verified plea, cannot make the objection for the first time on appeal; *Soaps v. Eichberg*, 42 Ill. App. 375, in which case the defendant, in testifying as a witness, admitted the execution of the instrument; *Thornton v. Alliston*, 12 Smed. & M. (Miss.) 124, per Clayton, J. See also *Wilson v. King*, 83 Ill. 232; *Loomis v.*

c. REQUISITES AND SUFFICIENCY OF ALLEGATIONS — (1) *In General*. — Where the declaration contains several counts a special plea which commences as an answer to the whole declaration, and answers only one count thereof, is bad.¹

Where a Denial under Oath Is Required by Statute, the denial need not be in the precise language of the statute, and a denial in terms of equivalent signification is sufficient.²

(2) *Definiteness and Certainty*. — The denial must be explicit and in clear and precise terms, and should not be ambiguous, argumentative, or evasive.³

Metcalf, 30 Iowa 382; Carter v. Taylor, 6 Smed. & M. (Miss.) 367.

Denial that Defendant Signed Verification. — Where the defendant, in testifying as a witness, denies that he signed the verification, it is proper, it would seem, to strike out the verification and leave the plea to stand as an unverified one. Kripner v. Lincoln, 54 Ill. App. 675.

Where Statute Requiring Oath Is Inapplicable. — In Cawood v. Lee, 32 Ind. 44, it was held that in a case in which the statute requiring a denial under oath is inapplicable, the general denial puts in issue the execution of the instrument, and that the fact that the defendant allows the instrument to be read without objection does not constitute a waiver of proof of its execution.

1. Hinton v. Husbands, 4 Ill. 187.

2. Edmonston v. Henry, 45 Mo. App. 346.

Oyer of Instrument. — In Iowa it has been declared that if the defendant desires to see the instrument, he should ask an inspection of it. Sheldon v. Middleton, 10 Iowa 17. See also Fowler v. Bender, 18 Ark. 262; Wesson v. Judd, 1 Abb. Pr. (N. Y. C. Pl.) 254.

Precedent of Denial and Demand of Proof. — In Massachusetts the special denial and demand of proof required by statute may be in the following form: "And now comes the defendant in the above entitled action and denies that the note declared on by the plaintiff was ever signed by her, and denies that the signature to said note was ever made by her, or at her request, or with her knowledge, and requests that the plaintiff may be compelled and obliged to prove the said signature to said note was made by her at the trial of said cause." True v. Dillon, 138 Mass. 347.

Denial of Waiver of Exemptions. — A plea by the defendant that he did not sign the instrument as a waive note or contract is to be regarded as simply

controverting the fact of waiver of exemptions, and the question as to the rights of the party as a *bona fide* holder for value without notice is eliminated and waived. Slaughter v. Montgomery First Nat. Bank, 109 Ala. 157.

A Special Plea of Non Est Factum admits the actual execution of the instrument, but limits the denial to some special matter, or rather it is an averment of some fact which defeats the legal operation of the paper. Stephenson v. Landis, 14 Lea (Tenn.) 433; Johl v. Fernberger, 10 Heisk. (Tenn.) 37, per McFarland, J.

Replication. — In Indiana it has been held that ordinarily a special answer of *non est factum* closes the issues, and neither requires nor, strictly speaking, admits of a replication. Lewis v. Hodapp, 14 Ind. App. 111, citing Webb v. Corbin, 78 Ind. 403.

That Defendant Did Make Instrument.

— A general replication that the writing is the act or deed of the defendant states only a deduction of law, and is not a denial of the facts averred in the plea, and therefore the facts so averred and unanswered should be considered as having been admitted. Hall v. Bank of Commonwealth, 5 Dana (Ky.) 258.

3. Mutzenburg v. McGowan, 10 Colo. App. 486; Sheldon v. Middleton, 10 Iowa 17; Framingham Bank v. Gay, 9 Gray (Mass.) 241; Law v. Crawford, 67 Mo. App. 150.

Argumentative Denial. — In Mutzenburg v. McGowan, 10 Colo. App. 486, the answer contained an argumentative denial of the execution of the instrument, and a denial of its indorsement and delivery to the plaintiff, and averred that the defendant executed an instrument to the same payee, bearing the same date, for the same amount, and at the same time as the instrument sued on. It was held that this amounted to an admission of the execution of

(3) *Allegation and Denial of Legal Conclusions.*—A plea or answer which does no more than deny the legal effect of the instrument described by the plaintiff, or which, without stating facts, alleges legal conclusions merely, is bad, and is not sufficient to put the execution of the instrument in issue, or, when such plea or answer is sworn to under the statute, to require the plaintiff to prove its execution.¹

the instrument upon which suit was brought.

Denial on Information and Belief—Allegation of Ignorance.—In *Arkansas* an answer under oath alleging that if the defendant executed the instrument described by the plaintiff he did not know that it was a note as alleged, and that he had no knowledge or remembrance of executing any paper, except one which he was informed was a mortgage, has been held insufficient to put the plaintiff upon proof of the execution of the note. *Frits v. Frits*, 32 Ark. 327.

In *Iowa* an answer alleging that the defendant has no knowledge or information sufficient to form a belief as to whether he executed the instrument, although duly verified, is insufficient to cast upon the plaintiff the burden of proof. *Hall v. Aetna Mfg. Co.*, 30 Iowa 215; *Loomis v. Metcalf*, 30 Iowa 382. But see *Fannon v. Robinson*, 10 Iowa 272, from which it would seem that a denial by the defendant of the execution of the instrument "according to his opinion and belief" is sufficient to prevent the execution of the instrument from being taken as admitted.

In *Kentucky* it has been held in an action against the executor of the alleged maker that a denial by the executor that he has knowledge sufficient to form a belief as to whether or not his decedent made, executed, and delivered the instrument is not sufficient, as it does not negative the possession of sufficient information to warrant a belief that the instrument is genuine. *Kentucky Female Orphan School v. Fleming*, 10 Bush (Ky.) 234.

In *New York* an answer in which the defendant admits that he did execute some instrument but denies that he has sufficient knowledge or information to form a belief whether the instrument described in the complaint is or is not correctly set forth, is bad. If the defendant is in doubt as to the correctness of what purports to be a copy of

the instrument as set forth in the complaint, he should demand an inspection of the original instrument. *Wesson v. Judd*, 1 Abb. Pr. (N. Y. C. Pl.) 254, *distinguishing* *Hance v. Remming*, 1 Code Rep. N. S. (N. Y. C. Pl.) 204.

Compliance with Rule of U. S. Court.—In *Owosso Sav. Bank v. Walsh*, 65 Fed. Rep. 783, an affidavit of defense in an action against an indorser conceding that the defendant's indorsement "may have been" obtained by fraud and without his knowledge, and averring that he had no recollection whatever of having indorsed the notes, "and therefore denies that the alleged signature on said notes is his signature and demands that proof thereof be required upon the trial of the cause," was with some hesitation considered sufficient and accepted as having been made in good faith. *Dallas, J.*, said: "The rule of court was not intended to fix upon a party the admission of a fact which he does not remember and therefore asks shall be proved, even though he acknowledges its existence to be possible."

1. *Clark v. Gramling*, 54 Ark. 525; *Taylor v. Purcell*, 60 Ark. 606, in which case the court cited *Lawrence v. Meyer*, 35 Ark. 106, and *Fain v. Goodwin*, 35 Ark. 110; *Posey v. Denver Nat. Bank*, 7 Colo. App. 108; *Matthews v. Bates*, 93 Ga. 319; *Hasselback v. Sinton*, 17 Ind. 545, holding that an allegation that the defendant "did not undertake and promise as averred" does not put in issue the execution of the instrument; *Morton v. Coffin*, 29 Iowa 235; *Reed v. Arnold*, 10 Kan. 102; *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 507; *Thornton v. Alliston*, 12 Smed. & M. (Miss.) 124, holding that a plea that the alleged maker "did not undertake or promise in manner and form as set up as complained," with an affidavit of its verity, is not a sufficient compliance with the statute; *Spencer v. Turney*, 5 Okla. 683, holding that a denial that the defendant is indebted to the plaintiff in

Denial of Indebtedness. — A denial that the defendant is indebted to the plaintiff in any amount upon the instrument sued upon is bad and presents no issue, as it is a denial of a legal conclusion only.¹

(4) **Denial of Place of Execution.** — An answer which does no more than deny the execution of the instrument at the place at which the plaintiff alleges it was executed is a negative pregnant and presents an immaterial issue.²

(5) **General Issue** — (a) **At Common Law.** — According to the rule of the common law, and in those states in which the rule has not been changed by statute, if by a proper plea the execution of the instrument is put in issue, the plaintiff is bound to prove that the defendant, or some one acting by his authority, executed the instrument, and for this purpose the general issue, *e. g.*, *non assumpsit*, or *nil debet*, according to the nature of the action, puts the whole case in issue and makes it incumbent upon the plaintiff to prove everything which he is bound to state in his declaration and enables the defendant to prove anything which shows that the plaintiff has no demand against him, and is all that is necessary to require proof of the execution of the instrument and admit proof that it was not executed.³

any sum whatever, presents no issue, as the defendant should deny the fact alleged that the defendant executed the instrument.

In **Alabama**, it has been held that pleas which amount to nothing more than a denial of the execution of the instrument in such a manner as to be binding on the defendant, are bad, unless they are verified by the affidavit required by statute. *Bryan v. Wilson*, 27 Ala. 208; *Sorelle v. Elmes*, 6 Ala. 706.

Defendant's Inability to Execute Instrument. — A plea that a defendant, owing to sickness, "was in no condition to execute a legal promissory note," does not state facts sufficient to constitute a good plea of *non est factum*, but alleges merely legal conclusions. *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 507.

Allegation of Forgery. — An averment that the defendant never made or joined in the making of the instrument, and that if his name appears thereon, the signature is a forgery, is not objectionable as charging a mere legal conclusion. *Ludlow v. Berry*, 62 Wis. 78.

Qualifying Allegations. — A plea which denies the execution of the instrument may be rendered bad by other allegations which qualify the plea, and show that it is based upon the legal conclusions of the pleader. *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 507.

Motion to Strike Out. — An answer which does no more than deny the legal effect of the instrument may be stricken out on motion. *Posey v. Denver Nat. Bank*, 7 Colo. App. 108.

1. *Taylor v. Purcell*, 60 Ark. 606, in which case the court cited *Lawrence v. Meyer*, 35 Ark. 106, and *Fain v. Goodwin*, 35 Ark. 110; *Spencer v. Turney*, 5 Okla. 683.

In an **Action by an Indorsee**, an allegation that the defendant does not owe the plaintiff in manner and form as is set forth in his declaration is not a denial that the defendant made the instrument and thereby became a debtor to those who should afterwards legally hold it. *Framingham Bank v. Gay*, 9 Gray (Mass.) 241.

2. *Spencer v. Turney*, 5 Okla. 683, *distinguishing* *Brenner v. Bigelow*, 8 Kan. 496, and *Moore v. Emmert*, 21 Kan. 1.

3. Although in many of the states indicated below the rule of the common law has been changed by statutes requiring a denial under oath, it has been declared in the following cases:

Alabama. — *Shippey v. Eastwood*, 9 Ala. 198; *Wimberly v. Dallas*, 52 Ala. 196, *per* Brickell, C. J.; *Dew v. Garner*, 7 Port. (Ala.) 503, *per* Goldthwaite, J.

Arkansas. — *Alexander v. Foster*, 16 Ark. 660, *per* Hanly, J.

District of Columbia. — *Keyser v.*

A General Denial under the Code is scarcely distinguishable from a plea of the general issue at common law, and the same proof is admissible under the one as under the other.¹

Pickrell, 4 App. Cas. (D. C.) 198, *per* Shepard, J.

Illinois. — Bailey v. Valley Nat. Bank, 127 Ill. 332, *per* Shope, J., *affirming* 21 Ill. App. 642.

Indiana. — Bates v. Hunt, 1 Blackf. (Ind.) 67, holding that in assumpsit the execution of the instrument is put in issue by a plea of the general issue; Cawood v. Lee, 32 Ind. 44.

Iowa. — Chambers v. Games, 2 Greene (Iowa) 320.

Maryland. — Banks v. McCosker, 82 Md. 518, *per* Roberts, J.

Missouri. — National Bank v. Nickell, 34 Mo. App. 295; Law v. Crawford, 67 Mo. App. 150; George T. Smith Middlings Purifier Co. v. Rembaugh, 21 Mo. App. 390.

Nebraska. — Donovan v. Fowler, 17 Neb. 247; Monitor Plow Works v. Born, 33 Neb. 747.

New York. — Boomer v. Koon, 6 Hun (N. Y.) 645; Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, *per* Andrews, C. J.; Rittenhouse v. Creveling, (Supreme Ct.) 14 N. Y. Supp. 85; Sawyer v. Warner, 15 Barb. (N. Y.) 282.

Massachusetts. — Estabrook v. Boyle, 1 Allen (Mass.) 412; Boston Relief, etc., Co. v. Burnett, 1 Allen (Mass.) 410.

Ohio. — Palmer v. Yarrington, 1 Ohio St. 253.

South Carolina. — American Button-Hole, etc., Sewing Mach. Co. v. Hill, 27 S. Car. 164. See also Hunter v. Graham, 1 Hill L. (S. Car.) 370.

Tennessee. — Johl v. Fernberger, 10 Heisk. (Tenn.) 37, *per* McFarland, J.

Virginia. — Clason v. Parrish, 93 Va. 24, *per* Harrison, J.

Washington. — Fairhaven v. Cowgill, 8 Wash. 686.

United States. — McClintick v. Johnston, 1 McLean (U. S.) 414; Mills v. U. S. Bank, 11 Wheat. (U. S.) 431.

In *Indiana* the general issue is *non est factum*, and that term has been applied to all pleas, answers, and replies that deny the execution of the instrument constituting the foundation of the previous plea answered by such denial. *Per* Perkins, J., in Evans v. Southern Turnpike Co., 18 Ind. 101. See also Hine v. Shiveley, 84 Ind. 136; Bates v. Hunt, 1 Blackf. (Ind.) 67; Gully v. Remy, 1 Blackf. (Ind.) 68.

In *North Carolina*, an allegation that

the averments of the complaint are untrue in manner and form as therein alleged is neither frank nor sufficient. Rumbough v. Southern Imp. Co., 106 N. Car. 461.

In *South Carolina* a plea of *non est factum* puts in issue the legal execution of the instrument, and anything may be given in evidence under it which goes to show that the instrument was not, in law, valid or binding at the time of its execution; but this plea does no more. Anything which admits the legal execution of the instrument but undertakes to avoid it entirely from failure of consideration or from a mistake in a part of the consideration, must be at common law specially pleaded. Hunter v. Graham, 1 Hill L. (S. Car.) 370.

Instrument Executed on Sunday. — The fact that the instrument is illegal and void because it was executed on Sunday may be shown under the plea of *non assumpsit*. Shippey v. Eastwood, 9 Ala. 198. See also article SUNDAY AND HOLIDAYS.

1. Fairhaven v. Cowgill, 8 Wash. 686. And see the cases cited in the note to the next preceding text.

Denial of Allegations Not Expressly Admitted. — In *South Carolina* an answer stating that the defendant denies each and every allegation of said complaint not hereinbefore admitted or denied, and which contains no unequivocal admission of the execution of the instrument, is in effect a denial that the defendant executed the instrument, and puts its execution in issue. American Button-Hole, etc., Sewing Mach. Co. v. Hill, 27 S. Car. 164.

Frame of General Denial. — An answer reciting that the defendant comes by his attorneys "and for answer to the petition of the said plaintiff filed in the above cause, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he denies each and every allegation in plaintiff's petition alleged against him," is a good general denial and is not bad because the defendant uses the language "he says that he denies," instead of "he denies." Such an answer sworn to in compliance with the *Kansas* statute is sufficient to subject the defendant to

Special Denial Surplusage. — In actions on negotiable instruments the general rule is applied that the defendant cannot plead specially any matter of which he can avail himself under the general issue, and where a plea of the general issue duly verified is sufficient to put the execution of the instrument in issue and is interposed, or the defendant files any other sufficient plea denying the making of the instrument, such plea or answer is sufficient.¹

Issues Not Raised. — By a general denial, the general issue, or a plea or answer denying the execution of the instrument, the legal execution of the instrument is put in issue, and anything may be given in evidence under it which goes to show that the instrument was not in law valid or binding at the time of its execution, but such a plea or answer does no more, and where the defendant admits the legal execution of the instrument, but wishes to avoid it because of failure of consideration, mistake, etc., the facts must be specially pleaded.²

Plea Must Be Appropriate to Action. — Where the defendant pleads the general issue, he must do so in conformity with the laws of pleading, and must select a plea which is appropriate to the action. Thus, in assumpsit he must plead *non assumpsit*; in debt he must plead *nil debet*.³

the penalties of perjury if the statements of the answer are known by him to be false. *Munn v. Taulman*, 1 Kan. 254.

Misdescription of Instrument by Plaintiff. — In *Colorado* the plea of *non est factum* is sufficient to give the defendant advantage of any variance between the instrument counted upon and the allegations descriptive thereof. *Peddle v. Donnelly*, 1 Colo. 421.

1. *McCallum v. Driggs*, 35 Fla. 277, holding that under a plea denying the making of the instrument all evidence is admissible that can be shown under a plea that the defendant indorsed the instrument as surety only and not as maker; *Williams v. Miami Powder Co.*, 36 Ill. App. 107, holding that where the defendant puts in a sworn plea of the general issue another sworn plea alleging that the instrument was signed by the defendant as an officer of a corporation and not individually is unnecessary and is demurrable; *Karch v. Emerick*, 59 Ill. 184, holding that a special plea denying any liability on the part of the defendant amounts to no more than the general issue, and that, therefore, where a plea of the general issue is interposed such special plea is demurrable; *Kimble v. Christie*, 55 Ind. 140; *Moorman v. Barton*, 16 Ind. 206; *Hine v. Shiveley*, 84

Ind. 136, holding that where an answer contains sufficient averments to constitute a good general *non est factum* answer it is immaterial whether or not previous facts alleged therein constitute a good special *non est factum*; *Bates v. Hunt*, 1 Blackf. (Ind.) 67. See also *Johl v. Fernberger*, 10 Heisk. (Tenn.) 37, in which case the court cited *Carter v. Turner*, 5 Sneed (Tenn.) 178, and *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

2. *Johns v. Harrison*, 20 Ind. 317, holding that a general denial, sworn to in compliance with the statute, excludes the questions of usury, want and failure of consideration, and fraud, except fraud in the execution of the instrument; *Chambers v. Games*, 2 Greene (Iowa) 320, wherein *Williams, C. J.*, declared that at common law such defenses as related to the consideration or inducements which influenced the defendant to make the instrument, could not be made under a plea of *non est factum*; *Hunter v. Graham*, 1 Hill L. (S. Car.) 370. See also *Rittenhouse v. Creveling*, (Supreme Ct.) 14 N. Y. Supp. 85 [in which case the court cited *Eldridge v. Mather*, 2 N. Y. 157; *Dubois v. Hermance*, 56 N. Y. 673; and *Springer v. Dwyer*, 50 N. Y. 19].

3. *Per Collier, C. J.*, in *Mauldin v. Branch Bank*, 2 Ala. 502.

(b) **Under Statutes Requiring Denial under Oath.** — According to some authorities statutes requiring a plea or answer under oath denying the execution of the instrument, in order to impose upon the plaintiff the burden of proving the execution of the instrument or to enable the defendant to question its execution, do not prescribe the plea or answer under which the defendant shall be allowed to make the denial, and intend no interference with the law of pleading further than is expressly provided, but leave the defendant to select such plea as would at common law throw upon the plaintiff the burden of proving the execution of the instrument. Consequently an appropriate plea of the general issue or a general denial properly sworn to meets the requirements of the statute.¹

Not Guilty. — The defendant should not plead not guilty in an action of assumpsit, and if he does so it may be stricken out. *Cunys v. Guenther*, 96 Ala. 564.

Non Est Factum. — The defendant in an action of assumpsit should not plead *non est factum*. *Heaton v. Myers*, 4 Colo. 59; *Hinton v. Husbands*, 4 Ill. 187, *per* Breese, J. See also *Longley v. Norvall*, 2 Ill. 389. Nor is such a plea proper in an action of debt. *Richmond, etc., Land, etc., Imp. Co. v. West Point*, 94 Va. 668.

Nil Debet. — The defendant should not plead *nil debet* in an action on a sealed instrument. *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1.

Under the Code. — Since all technical forms of action and of pleading are abolished by the code, where the plaintiff's petition is substantially in the form given by the code, and assumes as nearly the form of declaration in debt on a simple contract as it does a declaration in assumpsit, an answer denying indebtedness shows a substantial cause of defense and is not demurrable on the ground that it is a plea of *nil debet* to an action of assumpsit. *Lyon v. Bunn*, 6 Iowa 48.

1. *Mauldin v. Branch Bank*, 2 Ala. 502, *per* Collier, C. J.; *Bailey v. Valley Nat. Bank*, 127 Ill. 332, 21 Ill. App. 642; *Karch v. Emerick*, 59 Ill. 184; *Kripner v. Lincoln*, 66 Ill. App. 532, holding that a plea of *non assumpsit* sworn to is sufficient; *Williams v. Miami Powder Co.*, 36 Ill. App. 107; *Chicago Electric Light Renting Co. v. Hutchinson*, 25 Ill. App. 476; *Kimble v. Christie*, 55 Ind. 140, holding that a general denial under oath is broad enough to cover all matters of special denial; *Evans v. Southern Turnpike Co.*, 18 Ind. 101, holding that the gen-

eral denial under oath is equivalent in code pleading to a verified plea of *non est factum*; *Scribner v. Bullitt*, 1 Blackf. (Ind.) 112, holding that the defendant may plead *non assumpsit*, either with or without an oath, according to whether he intends to controvert the execution of the instrument or not; *Bates v. Hunt*, 1 Blackf. (Ind.) 67; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344; *Soper v. Peck*, 51 Mich. 563; *Stephenson v. Landis*, 14 Lea (Tenn.) 433, holding that the defendant may put in either a general or special plea of *non est factum*. See also *Munn v. Taulman*, 1 Kan. 254.

In Arkansas the statute provides that the plea of *nil debet* and *non assumpsit* may be filed, but that they shall not put in issue the execution of the instrument unless the same shall be verified by affidavit. *Trowbridge v. Pitcher*, 4 Ark. 157; *Ferguson v. State Bank*, 8 Ark. 416; *State Bank v. Ward*, 8 Ark. 506; *State Bank v. Kerby*, 9 Ark. 345; *Alexander v. Foster*, 16 Ark. 660; *Richardson v. Comstock*, 21 Ark. 69.

Authorities of Persuasive Influence. — The following cases hold that pleas of *non assumpsit*, *nil debet*, and *non est factum*, and the like, unless sworn to, require the production of the instrument only, and impliedly hold that such pleas when supported by a proper affidavit are sufficient for the purpose of preventing the execution of the instrument from being admitted: *McDougald v. Rutherford*, 30 Ala. 253; *Longley v. Norvall*, 2 Ill. 389; *Chambers v. Games*, 2 Greene (Iowa) 320; *Law v. Crawford*, 67 Mo. App. 150; *George T. Smith Middlings Purifier Co. v. Rembaugh*, 21 Mo. App. 390; *Knott v. Planters' Bank*, 2 Humph. (Tenn.) 493; *Lewin v. Houston*, 8 Tex. 94.

Other authorities, however, take the contrary view and hold that it is incumbent upon the defendant to file a special plea or denial sustained by an affidavit of its truth.¹

d. IN ACTIONS AGAINST PARTNERS — (1) *Necessity of Plea or Answer.* — The defense that the defendant was not a member of a partnership in whose name the instrument was executed, or that the defendant's partner in executing the instrument exceeded his authority, cannot be made except under an appropriate plea or answer.²

(2) *General Issue.* — This defense, however, may be made under a plea of the general issue or an answer denying that the defendant executed the instrument.³

(3) *Special Pleas and Denials* — (a) *Denial of Partnership.* — It has been held that where the plaintiff alleges that the defendants were partners and that in that character they made the paper declared on, a plea or answer which merely denies the existence of the partnership at the time the instrument was executed, but does not deny the execution of the instrument by the partners

1. *Sinclair v. Gray*, 9 Fla. 71, holding a plea of *non assumpsit* insufficient; *Matthews v. Bates*, 93 Ga. 317; *Barwick v. Kea*, 85 Ga. 564; *Thornton v. Alliston*, 12 Smed. & M. (Miss.) 124, *per* Thacher, J.; *McCormick Harvesting Mach. Co. v. Doucette*, 61 Minn. 40, in which case the court *cited* *Bausman v. Credit Guarantee Co.*, 47 Minn. 377. See also *Hauser v. Metzger*, 1 Cinc. Super. Ct. Rep. 164.

Either the Plea or the Affidavit must in *Mississippi* expressly deny the signature, execution of the instrument, etc., to put the plaintiff on such proof as he would have stood upon prior to the passage of the statutes. *Thornton v. Alliston*, 12 Smed. & M. (Miss.) 125. *Citing Fairchild v. Grand Gulf Bank*, 5 5 How. (Miss.) 597; *Vicksburg Waterworks, etc., Co. v. Washington*, 1 Smed. & M. (Miss.) 536; *Lake v. Munford*, 4 Smed. & M. (Miss.) 312; *Hemphill v. Alabama Bank*, 6 Smed. & M. (Miss.) 44; *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507; *Prewitt v. Bennett*, 7 Smed. & M. (Miss.) 101; *Moore v. Anderson*, 3 Smed. & M. (Miss.) 321.

Issue Without Imposing Burden on Plaintiff. — In *Minnesota* a general denial under oath is sufficient to make an issue as to the execution of the instrument, although it is not sufficient to impose the burden of proof upon the plaintiff. *McCormick Harvesting Mach. Co. v. Doucette*, 61 Minn. 40, in which case the court disapproved what

was inadvertently said to the contrary in *Bausman v. Credit Guarantee Co.*, 47 Minn. 377.

2. *Montgomery v. Elliott*, 6 Ala. 701; *Fowlkes v. Baldwin*, 2 Ala. 705; *Dorn v. Tyler*, 64 Ill. App. 110; *Smith v. Lusher*, 5 Cow. (N. Y.) 709, *per* Cowen, J.; *Lewis v. Lowery*, 31 Tex. 663.

3. *Buck v. Smith*, 2 Colo. 500, holding that a plea of *non est factum* puts in issue the existence of the partnership; *Follmer v. Frommel*, 63 Hun (N. Y.) 370, in which case the court held that it might be shown under a general denial that the partner who executed the instrument exceeded his authority, and *cited* *Benton v. Hatch*, 43 Hun (N. Y.) 146; *Griffin v. Long Island R. Co.*, 101 N. Y. 354, 20 Abb. N. Cas. (N. Y.) 342, note, and *Williams v. Walbridge*, 3 Wend. (N. Y.) 415, in which last case it was declared that the *dictum* of Senator Colden in *Smith v. Lusher*, 5 Cow. (N. Y.) 709, was not to be regarded as an adjudication of authoritative influence; *Fairchild v. Rushmore*, 8 Bosw. (N. Y.) 608; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; *Johl v. Fernberger*, 10 Heisk. (Tenn.) 37.

In *Georgia*, in an action upon an instrument executed by a partnership through one of the partners as agent, his authority to execute the instrument need not be proven by the plaintiff where the general issue is pleaded. *Barwick v. Kea*, 85 Ga. 564.

or by the answering defendant in their name is insufficient,¹ and that where the plaintiff does not allege that the defendants executed the instrument as partners, although he describes them as partners, a plea or answer denying that the defendants executed the instrument as partners is immaterial.²

(b) **Denial of Execution of Instrument.** — In an action against defendants sued as partners, a plea by one of them that he neither signed, authorized nor consented to the execution of the said instrument declared on is, it would seem, sufficient, and is not open to the objection that it does not deny that his partner had authority to sign the firm name.³

1. *Whitwell v. Thomas*, 9 Cal. 499; *Ferguson v. Wood*, 23 Tex. 177. See also *Hawkins v. Fellowes*, 6 Dana (Ky.) 128, in which case it was held that a plea that "at the time of the execution of the note sued on he was not a co-partner of the firm" was not tantamount to a plea of *non est factum*, because the defendant might not have been a partner and yet might have signed it himself or authorized another to do so. But see *contra*, a *dictum* by Collier, C. J., in *Fowlkes v. Baldwin*, 2 Ala. 705. See further, generally, article PARTNERSHIP.

Answers Considered Sufficient. — In *Curlew Coal Co. v. Grief*, 2 Duv. (Ky.) 528, it was held that where the only facts alleged in the petition to make the defendants individually liable as indorsers of a bill are that they were members of a company and that the instrument was indorsed by such company, and it is not alleged that the defendants by themselves, or by another, made the indorsement by the name and style of such company, an answer denying that the defendants were members of the company is sufficient to present a bar to the action. *Distinguishing* *Isaack v. Porter*, 2 A. K. Marsh. (Ky.) 453, and *Hawkins v. Fellowes*, 6 Dana (Ky.) 128.

Issue as to Existence of Partnership. — In *Strauss v. Waldo*, 25 Ga. 641, which was an action on an instrument executed in the name of a partnership by one partner, the plaintiff alleged that this partner and another were partners doing business under the name and style in which the instrument was executed, and it was held that a plea by the other partner that at the time the instrument was executed he was not a partner was sufficient to require the plaintiff to prove the existence of the partnership.

Partnership Not Denied. — Where the plaintiff alleges that the defendants signed the instrument as partners and one of them answers alleging that the defendants did not in any wise become liable on the instrument and that they were utter strangers to the transaction, the plaintiff need only prove that a duly authorized agent of the partnership signed the instrument, and it is not necessary for him to prove that the defendants composed the partnership or that they were in fact members of it at the time of the execution of the instrument. *Geddes v. Adams*, 11 Gray (Mass.) 384.

2. *Johnson v. Buell*, 26 Ill. 66. See also *Whitwell v. Thomas*, 9 Cal. 499. And see *Fowlkes v. Baldwin*, 2 Ala. 705, holding insufficient under the statute a plea that "he never made and delivered with Phineas Fowlkes [described in the writ as the answering defendant's partner] the promissory note declared on to the plaintiffs."

3. *Zuel v. Bowen*, 78 Ill. 234; *Haight v. Arnold*, 48 Mich. 512, in which case it was considered sufficient to deny that the defendant executed the instrument by himself, or by any one authorized by him; *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597, holding that a denial that the defendant executed the instrument is equivalent to a denial that he was a member of the firm; *Johl v. Fernberger*, 10 Heisk. (Tenn.) 37, in which case it was considered sufficient to plead that the instrument "was not executed by him or by any one authorized to bind him in the premises" without denying the existence of the partnership. In the last case, the court cited *Carter v. Turner*, 5 Sneed (Tenn.) 178, and *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

Contra. — In *Collier v. Cross*, 20 Ga. 1, it was held that where the plaintiff

(4) *Plea or Answer under Oath* — *Applicability of Statutes.* — Statutes providing that the execution of the instrument, or the genuineness of the defendant's signature, shall stand admitted unless it is denied under oath, while not in terms, are in their spirit applicable to partnership instruments, as well as to those executed by persons in their individual character; consequently, in states where such statutes have been enacted, pleas or answers under which the defendant intends to show that he was not a member of the partnership, or that his partner in executing the instrument exceeded his authority, must be sworn to.¹

alleges that the defendants in their firm name executed the instrument, a plea by one of them that "he did not make the said note in the said suit described, and that he did not authorize any other person to make said note" should have been stricken out, as it did not deny that the note was the note of the firm. And see *Fowlkes v. Baldwin*, 2 Ala. 705.

Facts Negating Partner's Authority. — In *Wingate v. Atlanta Nat. Bank*, 95 Ga. 1, it was held that a plea alleging that the partnership did not execute the instrument, but admitting that one of the firm made it in the firm name, without setting forth facts sufficient to negative his authority so to do, is not a sufficient plea of *non est factum*.

Affidavit of Defense. — In *Pennsylvania* an affidavit by a defendant sued as a member of a partnership denying that he made the instrument or authorized or ratified the making of it, and that he was or had been a member of the firm, is sufficient. *Reiter v. Fruh*, 150 Pa. St. 623, following *Hogg v. Orgill*, 34 Pa. St. 344. See also *Adams v. Kehoe*, 1 W. N. C. (Pa.) 232.

1. *Montgomery v. Elliott*, 6 Ala. 701; *Fowlkes v. Baldwin*, 2 Ala. 705; *Hoefgan v. Harrison*, 7 Ind. 594; *Pegg v. Bidleman*, 5 Mich. 26; *Memphis German Sav. Inst. v. Hargan*, 9 Heisk. (Tenn.) 496; *Barrett v. Hambright*, 4 Sneed (Tenn.) 586; *Lewis v. Lowery*, 31 Tex. 663; *Persons v. Frost*, 25 Tex. Supp. 129, in which case the court followed *Drew v. Harrison*, 12 Tex. 279; *Shepherd v. Frys*, 3 Gratt. (Va.) 423, per *Baldwin, J.*; *Phaup v. Stratton*, 9 Gratt. (Va.) 616.

In *Illinois* it has been provided by statute that a person sued as a partner may deny his liability as a member of the partnership by a plea in abatement, or by a plea in bar denying the joint liability or the execution of the instrument sued on verified by affidavit. If

a partnership does not exist between the defendants, the plea should be in abatement, but if they are partners and the firm name has been improperly used for the private purpose of one of the partners, the other partner should file a plea denying the execution of the instrument, properly sworn to. *Zuel v. Bowen*, 78 Ill. 234. See also *Dorn v. Tyler*, 64 Ill. App. 110, holding that a plea of non-joint liability accompanied by an affidavit of its truth, will not take the place of a plea denying the execution of the instrument; *Dwight v. Newell*, 15 Ill. 333; *Warren v. Chambers*, 12 Ill. 124; *Stevenson v. Farnsworth*, 7 Ill. 715.

Massachusetts Statute Applicable. — Stat. 1877, c. 163, providing that the defendant's signature shall be taken as admitted, unless he shall file a special denial of its genuineness and a demand that the plaintiff prove it, is applicable to an action against partners on an instrument signed in the firm name, and where one of the defendants appears and files a general denial the signature is to be taken as admitted against him and the plaintiff need not prove that he is a member of the firm. *Haskins v. D'Este*, 133 Mass. 356.

Special Traverse. — Where the plaintiff avers that the defendants signed the instrument as partners, an allegation in the answer that the firm was dissolved when the note was given is not matter in avoidance or discharge of the cause of action, but is in the nature of a special traverse and under it the defendant may prove the dissolution of the partnership by the death of one of its members. *Marlett v. Jackman*, 3 Allen (Mass.) 287.

New Hampshire Rule of Court Applicable. — In *Williams v. Gilchrist*, 11 N. H. 535, it was held that where a partner is sued upon an instrument signed in the firm name, without any authority of the firm, for a debt for which it

Admission of Execution as Alleged.—The defendants by failing to file the affidavit required admit not only the execution of the instrument in the abstract, but also that it was executed by the parties declared against.¹

c. IN ACTIONS ON INSTRUMENTS EXECUTED BY AGENTS—

(1) *General Issue.*—A plea of the general issue or a general denial puts in issue the authority of an agent to execute the instrument.²

(2) *Special Denial of Agent's Authority.*—A plea or answer under which it is sought to show that an agent who executed the instrument was without authority to do so should not allege merely that the instrument was executed by the agent without the defendant's knowledge or consent, but it should clearly and distinctly deny the execution of the instrument and the authority of the agent to execute it.³

was not responsible, although the instrument is wholly void as against the defendant, he is within the rule requiring notice that the signature will be disputed to be entered upon the docket at the first term of the court.

Form of Affidavit.—The denial "should either be jointly on the part of all the defendants, or, if a part of them only file an affidavit on their own behalf, the denial should be broad enough to negative such a proper execution of the instrument in the partnership name by another partner as would bind the defendants who file it as makers." *Mills v. Bunce*, 29 Mich. 364, in which case an affidavit that the defendants "do now, each for himself, deny that he ever signed, executed or delivered either of said notes, copies of which are set forth in the plaintiff's declaration," was held insufficient because such an affidavit might have been truthfully made by any one of the partners except the one who actually signed in the partnership name and delivered the instrument.

1. *Pegg v. Bidleman*, 5 Mich. 26, in which case the court said: "If the statute be so construed as only to admit the execution of the note or instrument in the abstract, without reference to the party by whom executed, further proof would in all cases be required; as well where the signature purports to be that of a single individual, as where it purports to be a collective or partnership name; especially (as is usually the case) where the Christian name of the individual should be signed by initials only, as was the case of *Fish v. Hale*, 4 Mich. 506. Such a construction, it seems to

us, would defeat the intention of the legislature, and render the statute almost, if not altogether, nugatory." See also *Ringgold v. Edwards*, 7 Ark. 86; *Towle v. Dunham*, 76 Mich. 251; *Frye v. Menkins*, 15 Ill. 339; *Pickering v. Pulsifer*, 9 Ill. 82; *Hoefgan v. Harrison*, 7 Ind. 594; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Lobdell v. Merchants', etc., Bank*, 33 Mich. 408.

2. *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344; *Goss v. Whitehead*, 33 Miss. 213; *Pope v. Risley*, 23 Mo. 185. In the last case the court followed *Wahrendorff v. Whitaker*, 1 Mo. 205.

No Replication Necessary.—Where the defendant puts in a sworn answer of *non est factum*, a reply setting up that the instrument was signed by the defendant, or by another duly authorized to do so, is unnecessary. *Lewis v. Hodapp*, 14 Ind. App. 111. See also *Collins v. Partin*, (Ky. 1897) 42 S. W. Rep. 1111, holding that where the defendant denies that he executed the instrument or authorized any one else to do so for him and the plaintiff files a reply alleging that, while the defendant did not write his name, he made his mark to the instrument and that the same was duly attested, no rejoinder is necessary, as the issue is complete upon the filing of the answer.

3. *Donnell v. McDonald*, 37 Ill. App. 144; *Isaack v. Porter*, 2 A. K. Marsh. (Ky.) 452; *Slack v. Greenville First Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 354.

Denial of Written Authority.—It is not sufficient to allege that the person

(3) *Denial of Execution of Instrument.* — It is sufficient for the defendant to deny the ultimate fact alleged by the plaintiff that he made the instrument.¹

(4) *Plea or Answer under Oath.* — In some states it has been held that statutes requiring a denial of the execution of the instrument under oath in order to permit proof that it was not executed or to impose the burden of proving its execution upon the plaintiff, apply as well to instruments which the defendant has executed through an agent as to one which he has executed himself, and that the plaintiff cannot be put to proof of either the

who signed the instrument as the defendant's agent had no written authority to do so, but the defendant should deny that he had any authority in writing, or at all. *Garrett v. Ashcraft*, (Ky. 1897) 39 S. W. Rep. 51.

Denial on Information and Belief. — An answer alleging that the "defendant has no knowledge or information sufficient to form a belief that it did, at the time, for that purpose stated in the complaint by its authorized agent, make its promissory note by the name and for the amount and as is in this respect set forth in said complaint, or that it is indebted to the said plaintiffs upon such a note as is in the said complaint mentioned," is bad, as the authority of the agent to execute the instrument is a fact which must be deemed to be within the knowledge of the principal; it is not sufficient to deny personal knowledge merely, but the defendant must deny all knowledge or information sufficient to form a belief. *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y. Supreme Ct.) 187, in which case Pratt, J., said: "As a general rule the principal should be deemed possessed of all the knowledge of the agent in the transaction of his business. It seems to me, therefore, that the right to answer in the form under consideration was not designed for such a case, and the rule applied to the allegations of facts on the personal knowledge of the party should be applied to cases of this kind. And if a natural person would have no right to plead in this form, still less should the right be extended to a corporation which must not only act by agents, but plead also by agents."

Excess of Authority by Plaintiff. — A plea alleging that when the instrument was delivered to the plaintiff the sum and date were placed on the margin

with the expectation and intention that the plaintiff would insert the same sum and date in the body, but that the defendant tore off the margin and inserted a different sum and date without authority and that so the instrument is not the defendant's act, is a good plea of *non est factum*. *Hall v. Bank of Commonwealth*, 5 Dana (Ky.) 258.

Denial by Corporation. — In *New York* in an action against a corporation as the acceptor of a draft an answer alleging that the defendant is not a moneyed corporation, that the acceptance was not made in the due and regular course of its business, that it was not made at the company's office or place of business, and that neither its directors nor stockholders ever sanctioned or approved, or in any manner authorized the same, puts in issue the question whether the act of acceptance was a corporate act of the corporation performed within the scope of the agent's authority, and is not frivolous. *Mather v. Union L. & T. Co.*, (City Ct.) 26 N. Y. St. Rep. 58.

1. *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, in which case the defendant denied the execution of the instrument, and it was held that a denial that a certain person had authority to execute the instrument in behalf of the defendant was redundant and did not limit the issue to the question of such person's authority, and that the defendant was not entitled to a judgment because of the plaintiff's failure to reply and deny the defendant's allegation that the person named was without authority. See also *Oak Grove, etc., Cattle Co. v. Foster*, 7 N. Mex. 650, holding that an answer denying that the defendant either executed the instrument or authorized any person to execute it in its behalf is good.

execution of the instrument or the agency by which it was effected, unless the plea or answer be sworn to, but in other states no affidavit is required.¹

Effect of Denial Under Oath. — Where the defendant pleads the general issue and verifies his plea by affidavit in a case in which a denial under oath is required by statute, the burden is thrown on the plaintiff to show that an agent who executed the instrument in behalf of the defendant had competent authority to do so.²

(5) *Denial of Individual Liability of Agent.* — It has been held under statutes requiring an answer under oath denying the execution of the instrument that where the defendant is *prima facie* the maker of the instrument, and not the agent of the maker, a plea averring that he signed as agent and not as principal must be sworn to.³

f. DENIAL OF GENUINENESS OF SIGNATURE OR OF EXECUTION. — Where the statute requires that the party whose signature is affixed to the instrument shall deny the genuineness of the same

1. *Thompson v. Abbott*, 11 Iowa 193, which was a case decided under a statute requiring an answer denying not the genuineness of the signature but the execution of the instrument to be sworn to; *Clark v. Des Moines*, 19 Iowa 199; *Drew v. Harrison*, 12 Tex. 279, which case was decided under a statute which applied to instruments "executed by the other party, or by his authority;" *Reid v. Reid*, 11 Tex. 585. See also *Cook v. Martin*, 5 Smed. & M. (Miss.) 379; *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351.

Affidavit of Defense. — In *Pennsylvania* when an action is brought upon an instrument signed by one as an agent of another, the plaintiff is entitled to a judgment against the principal, unless an affidavit be filed denying the authority of the agent or setting forth some other sufficient defense. *Montour Iron Co. v. Coleman*, 31 Pa. St. 80.

In *Mississippi* it has been held that under a general denial the defendant may show that an agent who filled up the instrument after it had been signed in blank exceeded his authority and inserted a sum larger than that intended, and that the plaintiff knew of these facts, as the defendant admits the execution of the instrument to the extent of the agent's authority, and therefore cannot deny its execution under oath. *Goss v. Whitehead*, 33 Miss. 213.

In *Missouri* it has been held that under a plea of *non assumpsit* in an ac-

tion on an instrument executed by an agent, the agency must be proved before the instrument can be read in evidence, although the truth of the plea is not supported by an affidavit. *Pope v. Risley*, 23 Mo. 185; *Wahrendorff v. Whitaker*, 1 Mo. 205. But in *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462, it is held that the execution of an instrument which purports to have been signed by an agent, although not denied under oath, is not admitted where the power of the agent to bind his principal depends on special facts limiting his agency, as this rule has no application to actions where the agency is conclusively presumed by law. *Distinguishing Carpenter v. Lathrop*, 51 Mo. 498.

2. *Chicago Electric Light Renting Co. v. Hutchinson*, 25 Ill. App. 476; *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344.

3. *Drake v. Flewellen*, 33 Ala. 106; *Lazarus v. Shearer*, 2 Ala. 718; *McKensy v. Edwards*, 88 Ky. 272. See also *Thackaray v. Hanson*, 1 Colo. 365.

Where the Instrument Shows that the Principal Is Bound and that it was not the intention of the agent to bind himself personally, the failure of the agent to answer does not constitute an admission of his liability, although the complaint alleges that the instrument was executed by the principal and by the agents. *Shaver v. Ocean Min. Co.*, 21 Cal. 45. See also *Frankland v. Johnson*, 147 Ill. 520, 46 Ill. App. 430.

under oath, it is necessary to deny the genuineness of the signature in order to cast the burden of proof upon the plaintiff, and a denial of the execution of the instrument is not sufficient.¹ Where all that is required by the statute is a denial of the execution of the instrument, the defendant need not deny that the signature is genuine, as the instrument may be a forgery, although the signature is genuine;² but under such a statute a denial that the defendant signed the instrument is sufficient, as it is equivalent to a denial that he executed it.³

g. DENIAL OF DELIVERY — (1) General Issue. — A plea of the

1. *Jones v. Baker*, 76 Iowa 303; *Sully v. Goldsmith*, 49 Iowa 690; *Douglass v. Matheny*, 35 Iowa 112; *Lake v. Cruikshank*, 31 Iowa 395; *Robinson v. Lair*, 31 Iowa 9; *Clinton Nat. Bank v. Torry*, 30 Iowa 85; *Hall v. Aetna Mfg. Co.*, 30 Iowa 215; *Loomis v. Metcalf*, 30 Iowa 382; *Carle v. Cornell*, 11 Iowa 374.

In Louisiana, it being provided by statute that if the defendant falsely denies the genuineness of his signature he shall be precluded from making other defenses, it has been held that a denial by the defendant that he made or executed the instrument is not an express denial of the genuineness of the signature within the meaning of the statute. *Stockton v. Truxton*, 8 La. 224.

Proof Which Defendant May Make. — In Iowa, although a denial under oath of the execution of the instrument without denying the genuineness of the signature is not sufficient to cast on the plaintiff the burden of proving the genuineness of the signature, it is sufficient to enable proof that the signature is not genuine to be made by the defendant. *Sully v. Goldsmith*, 49 Iowa 690.

In Wisconsin it has been held that the words of the statute "signed or executed" and "signature or execution" are used by way of repetition merely, and that the words "executed" and "execution" are meaningless, unnecessary and nugatory, and that the clear object of the statute is to dispense with proof of the signature unless there is a denial under oath, and that an answer upon information and belief that the instrument is a forgery is not a specific denial of the defendant's signature, within the meaning of the statute, and is not sufficient. *Nielson v. Shuckman*, 53 Wis. 638; *Smith v. Ehnert*, 47 Wis. 479. In the latter case the court said: "Notwithstanding

ing the defendant's signature may have been his genuine signature, still, in one sense of the word 'forgery,' as used in the defendant's answer, it might have been a forgery by reason of its having been altered in a material part after his signature, or by having been written in the first instance over his signature, without the knowledge or consent of the defendant. This court holds that in order to put the plaintiff to the proof of the defendant's signature, or to put the fact of his signature in issue, there must be a specific denial thereof upon oath or affidavit, or verified answer; and an answer which only denies the same by inference is not sufficient." *Citing Ela v. Sprague*, 3 Pin. (Wis.) 323; *Schwalm v. McIntyre*, 17 Wis. 232, and *State v. Money*, 33 Wis. 615.

Insufficient Denial. — In Iowa a denial under oath that the defendant "ever signed or executed a promissory note of the tenor or effect as set forth in the petition" is not a denial of the genuineness of the signature in compliance with the statute and is not sufficient to prevent the introduction of the instrument in evidence without proof by the plaintiff. *Douglass v. Matheny*, 35 Iowa 112, *citing Lake v. Cruikshank*, 31 Iowa 395.

2. *Anderson v. Walter*, 34 Mich. 113.

3. *Edmonston v. Henry*, 45 Mo. App. 346.

Instrument Not in Maker's Handwriting. — Where the defendant puts in a denial under oath, the authorship of the instrument is not at issue, but the question is whether or not the defendant or some one else signed it, and the plaintiff need only prove that the instrument was signed by the defendant, or by somebody acting as his agent, and that it was duly delivered. *Sumpster v. Geron*, 4 How. (Miss.) 263; *Wagoner v. Ruply*, 69 Tex. 700.

general issue or a general denial puts in issue the delivery of the instrument.¹

(2) *Sufficiency of Denial of Execution.* — Delivery is a part of the execution of the instrument, and consequently, under a plea or answer denying the execution of the instrument, it is competent to prove that it was not delivered.²

(3) *Express Denial of Delivery.* — An answer averring that the instrument was executed but not delivered is sufficient, and fairly construed means that the instrument was signed but not delivered.³

(4) *Admission of Delivery.* — The signing and delivery of an instrument constitute an execution thereof, but the mere signing

1. *Owings v. Grubbs*, 6 J. J. Marsh. (Ky.) 31, in which case the plea was *non est factum*; *Rittenhouse v. Creveling*, (Supreme Ct.) 14 N. Y. Supp. 85; *Dusenbury v. Hoadley*, (Supreme Ct.) 20 N. Y. Supp. 911. In the last case the court cited *Sawyer v. Warner*, 15 Barb. (N. Y.) 282, which case is not in point, as the defendant therein did not put in a general denial, but expressly denied that he "gave" the instrument, and that he was indebted to the plaintiff thereon.

2. *Palmer v. Poor*, 121 Ind. 135. See also *Sawyer v. Warner*, 15 Barb. (N. Y.) 282, holding that an answer alleging that the defendant never "gave" the instrument to the plaintiff is a denial that the defendant delivered the instrument.

Contra. — In *Miller v. Voss*, 40 Ind. 307, which was an action by an indorsee against the maker, the defendant did not file a general denial, but an answer under oath denying the execution of the instrument, and it was held sufficient for the plaintiff to prove the genuineness of the defendant's signature without affirmative proof of its delivery by the defendant to the payee.

3. *Ricketts v. Harvey*, 78 Ind. 152, in which case the court said: "The word 'executed' implies a delivery, but as it is expressly averred that the notes were not delivered, we think the word 'executed,' as used, was synonymous with the word 'signed,' and that the paragraph, fairly construed, means that the notes were signed, but not delivered. The paragraph attempted to deny the execution of the notes, but, as it was not verified, it was insufficient for such purpose. It, however, denied the delivery of the notes, and was equivalent to a general denial. The demurrer was properly overruled." But see *Cogswell v. Hayden*, 5 Oregon

22, in which case it was held that an answer denying that the defendant delivered the instrument did not put in issue an allegation of the complaint that the alleged maker "made, executed and delivered" the instrument and that it operated as an admission of the making and execution of the instrument.

In *Michigan* it has been held, under a statute requiring a denial of the "execution" of the instrument on oath, that a plea of the general issue accompanied by an affidavit denying the delivery of the instrument to the plaintiff, or to any person for the plaintiff, is not sufficient to prevent the introduction of the instrument in evidence without proof of its execution. *McCormick Harvesting Mach. Co. v. McKee*, 51 Mich. 426; *Burson v. Huntington*, 21 Mich. 415.

Delivery in Contravention of Contract. — An answer denying that the instrument was ever delivered by the defendant to the plaintiff and alleging that it was delivered before the completion of a road "in contravention of the terms of said contract," without any averment of mistake or fraud, is wholly immaterial and irrelevant. *Witmer Bros. Co. v. Weid*, 108 Cal. 569.

Admission of Genuineness of Signature. — Where the defendant's denial under oath is special and does not deny the execution of the instrument, but merely the delivery thereof, and the affixing and cancellation of the stamp, the genuineness of the signature is admitted. *Burson v. Huntington*, 21 Mich. 415.

Delivery to Stranger. — An answer denying the delivery of the instrument to the plaintiff and alleging that the same was delivered to one who, so far as the answer shows, is an entire stranger to both the instrument and the consideration, is insufficient, as the legal effect

does not, and, consequently, an admission that the instrument was signed is not an admission of the execution of the instrument, as it is not an admission of the delivery thereof.¹

(5) *Denial under Oath.*— Since the delivery of an instrument is essential to its execution, the defense that the instrument was not delivered cannot be made except under a sworn plea, where by statute it is required that a plea denying the execution of the instrument shall be sworn to.²

h. INDORSER'S DENIAL OF INDORSEMENT— (1) *Necessity of Plea or Answer.*— In an action against an indorser it is not incumbent upon the plaintiff to prove the genuineness of the indorser's signature when it is not put in issue by a plea or answer.³

(2) *General Issue.*— At common law, in an action against an indorser, the execution of the indorsement is put in issue by a plea of the general issue.⁴

of such delivery is a delivery to the payee. *Hayward v. Grant*, 13 Minn. 165.

1. *Hepp v. Huefner*, 61 Wis. 148.

Failure to Deny Execution.— In *Hart v. Harrison Wire Co.*, 91 Mo. 414, it was held that by failure to deny the execution of the instrument under oath, as required by statute, the defendant admits the genuineness of the signature, and also the delivery of the instrument, signing and delivery being both included in the execution.

2. *Hunt v. Weir*, 29 Ill. 83. See also *Ricketts v. Harvey*, 78 Ind. 152; *Kusler v. Crofoot*, 78 Ind. 597; *Ashworth v. Grubbs*, 47 Iowa 353.

Demurrer to Answer Not Sworn to.— An answer not under oath denying the delivery of the instrument is equivalent to a general denial, and a demurrer thereto should be overruled. *Ricketts v. Harvey*, 78 Ind. 152.

3. *Rosenfield v. Rosenthal*, (Tex. Civ. App. 1897) 39 S. W. Rep. 193, holding that it is not sufficient to admit the genuineness of the indorser's signature and to allege an alteration of the instrument.

4. *Keyser v. Pickrell*, 4 App. Cas. (D. C.) 198; *Bates v. Hunt*, 1 Blackf. (Ind.) 67.

Denial of Indebtedness.— In *Oregon* it has been held that in an action against an indorser a denial of indebtedness will be treated as a conclusion of law and as insufficient, where none of the facts out of which the indebtedness is alleged to have arisen are denied. *Cogswell v. Hayden*, 5 Oregon 22.

Denial of Signature.— In *Iowa* an an-

swer under oath in which the defendant "denies that any promissory note of the description and for the amount claimed in plaintiff's petition was for a valuable consideration assigned and indorsed to the said plaintiff by him, the said Cornell, or by any other person with his knowledge or consent, at the time and in the manner set forth in plaintiff's petition," is not such a denial of a defendant's signature to the assignment of the instrument as is required by the statute to make it incumbent on the plaintiff to prove the same. *Carle v. Cornell*, 11 Iowa 374.

Denial of Knowledge.— In *Georgia* a plea that the defendants indorsed notes for like amounts, but "whether or not the notes sued on are the notes which the defendants indorsed, the defendants do not know, and for that reason cannot answer," is insufficient, and may be stricken out. *Lester v. McIntosh*, 101 Ga. 675.

Denial of Guaranty.— In *Illinois*, in an action against a guarantor, a plea that the guaranty was not made when the instrument was executed, but later, is bad on special demurrer, as it amounts to the general issue. *McCord v. Mechanics' Nat. Bank*, 84 Ill. 49.

Denial of Plaintiff's Ignorance of Fraud.— A plea by an indorser that "at the time of indorsing, as security, the said promissory notes declared on they were both blank as to the amount, and that some time subsequent to the execution thereof by this defendant, and in his absence, and without his assent or authority, said blanks were filled up," without his knowledge or the redeliv-

(3) *Denial under Oath.*—In many states it is required by statutes that the genuineness and due execution of the instrument shall be deemed admitted unless the plea or answer denying the same be accompanied by an affidavit of its truth, and it has been generally held that these statutes are applicable to a denial of the genuineness and due execution of an indorsement in an action against an indorser; and in some states the statutes in terms apply to indorsements.¹

ery of said notes, in a greater amount than had been agreed upon is bad in an action by a *bona fide* holder, because it does not negative the plaintiff's ignorance of the fraud that had been perpetrated upon the defendant. *Grissom v. Fite*, 1 Head (Tenn.) 332.

1. *Alabama.*—*McDougald v. Rutherford*, 30 Ala. 253; *Miller v. McIntyre*, 9 Ala. 638; *Mauldin v. Branch Bank*, 2 Ala. 502.

California.—*Mahe v. Reynolds*, 38 Cal. 560; *Grogan v. Ruckle*, 1 Cal. 158, *per Hastings, J.*

Delaware.—*Wilmington v. Hedges*, 5 Harr. (Del.) 421; *Pusey v. Pyle*, 4 Houst. (Del.) 98, in which case it was held that the words of the statute are general and broad enough to cover an indorsement.

Illinois.—*Dietrich v. Mitchell*, 43 Ill. 40, which was an action against a guarantor.

Indiana.—*Scribner v. Bullitt*, 1 Blackf. (Ind.) 112, holding that a plea of *non assumpsit* not sworn to is not sufficient. See also *Berger v. Henderson*, 5 Blackf. (Ind.) 545.

Iowa.—*Partridge v. Patterson*, 6 Iowa 514, which was an action against a guarantor.

Michigan.—*Howry v. Eppinger*, 34 Mich. 29; *Lobdell v. Merchants', etc., Bank*, 33 Mich. 408; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Spicer v. Smith*, 23 Mich. 96. See also *Flint First Nat. Bank v. Union Cent. L. Ins. Co.*, 107 Mich. 543; *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351.

Mississippi.—*Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373, holding that a plea of *non assumpsit* not sworn to admits the execution of the indorsement.

Tennessee.—*Smith v. McManus*, 7 Yerg. (Tenn.) 477, decided under a statute which in terms applies to indorsements; *Smith v. Wallace*, 4 Yerg. (Tenn.) 572; *Knott v. Planters' Bank*, 2 Humph. (Tenn.) 493; *Harding v. Waters*, 6 Lea (Tenn.) 324; *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Action Against Guarantor.—In an action against a guarantor the plaintiff is not bound to prove the guarantor's signature or the execution of the guaranty, unless it is denied under oath. *Dietrich v. Mitchell*, 43 Ill. 40, holding that where a sworn denial is put in, the plaintiff must prove not only the genuineness of the guarantor's signature but also that he executed the contract written over his signature. See also *Partridge v. Patterson*, 6 Iowa 514; *Hinsey v. Studebaker Bros. Mfg. Co.*, 73 Ill. App. 278.

Admission of Indorsement.—An indorser, who is alleged to have written a guaranty over his name, who does not wish to deny the genuineness of his signature, but merely that he executed the guaranty, should file a special plea of *non est factum* admitting having signed his name, but denying having executed the guaranty. *Harding v. Waters*, 6 Lea (Tenn.) 324.

Defendant Both Indorser and Maker.—Where the defendant is declared against as an indorser, and he puts in a sworn plea denying that he indorsed the instrument, the fact that he is also one of the makers and does not put in any plea denying that he signed the instrument as a maker does not make it proper to admit the instrument as evidence of his indorsement without further proof. *Adams v. Moore*, 9 Port. (Ala.) 406.

Affidavit of Defense.—In *Pennsylvania* it has been held that the term "execution" in the rule of court providing that the plaintiff shall be relieved of the necessity of proving the execution of the instrument, unless the defendant "by affidavit filed at or before the time of filing his or her plea shall have denied" that the instrument was duly executed, includes its indorsement also. *Miller v. Weeks*, 22 Pa. St. 89, which was an action by an indorsee against the maker.

Denial by Indorser of Execution of Instrument.—In an action against an in-

i. INCONSISTENT DEFENSES. — In actions on negotiable instruments the defendant may, under the code, set forth in his answer; in addition to a denial of the execution of the instrument, as many other grounds of defense as he may have without any limitation, except what is implied in the provisions requiring pleadings to be verified by oath.¹ But although inconsistent defenses may be set up it must be done by clear and distinct allegations which will enable the adversary to know what defenses are being relied on;² and it is not proper in the same paragraph of the answer to deny the execution of the instrument and to plead matters in confession and avoidance.³

j. VERIFICATION — HOW AND BY WHOM MADE — In General. — The affidavit by which the plea or answer is verified must conform to the requisites of the statute.⁴

dorser, an answer "that the defendant denies all the allegations set forth in the petition and asks judgment" is equivalent to the general issue, and does not allege sufficient facts to authorize the defendant to show under it that the indorsement was a forgery. *Hauser v. Metzger*, 1 Cinc. Super. Ct. Rep. 164. See also *Woodward v. Harbin*, 1 Ala. 104, holding that the indorser, by his indorsement, affirms the genuineness of the instrument, and that though his indorsee, in declaring against him, may allege in the usual form the execution of the instrument and its indorsement, yet the plaintiff cannot be required to prove its execution.

1. Denial of Execution and Consideration. — Pleas of *non est factum* and want of consideration are not inconsistent and repugnant. *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462; *Barnes v. Scott*, 29 Fla. 285; *Citizens' Bank v. Closson*, 29 Ohio St. 78; *Pavey v. Pavey*, 30 Ohio St. 600. See also *Mullikin v. Mulliken*, (Ky. 1893) 23 S. W. Rep. 352, (Ky. 1894) 25 S. W. Rep. 598, holding that an allegation that there was no consideration in direct connection with a plea of *non est factum*, is to be taken as merely an argumentative statement of the pleader's conclusion that there was no consideration because the instrument was not executed, and that therefore the only defense presented is *non est factum*.

Denial of Execution and Allegation of Payment. — A plea of *non est factum* is not inconsistent with a plea of payment or release, because men sometimes adjust demands for which they are not liable. *Per Bliss, J.*, in *Nelson v.*

Brodhack, 44 Mo. 596. See also *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462; *Cavitt v. Tharp*, 30 Mo. App. 131.

Limitations and Denial of Execution. — The defendant may allege that the action is barred by the statute of limitations, and also deny the execution of the instrument. *Schuchman v. Heath*, 38 Mo. App. 280.

Denial of Execution and Allegation of Fraud. — An answer alleging that the defendant is ignorant whether he signed the instrument or not, and that he does not believe that he did, and therefore denies it, and that if he did sign it his signature was obtained by fraud and without consideration, is not open to the objection that it sets up inconsistent defenses. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

2. *Mulliken v. Mulliken*, (Ky. 1894) 25 S. W. Rep. 598.

A Verified Plea of *Non Est Factum* in *Indiana* stands as a complete defense not affected by other paragraphs of the answer, and the plaintiff cannot avail himself of the allegations in other paragraphs of the answer as conclusive admissions. *Palmer v. Poor*, 121 Ind. 135.

3. *Kimble v. Christie*, 55 Ind. 140; *Cronk v. Cole*, 10 Ind. 485; *Woollen v. Whitacre*, 73 Ind. 198. See also *Mulliken v. Mulliken*, (Ky. 1894) 25 S. W. Rep. 598.

4. *Bancroft v. Paine*, 15 Ala. 834. See also, generally, article VERIFICATION.

Denial as to Handwriting. — In *Virginia* the affidavit which the defendant is required to make is that the said instrument was not made by him as

Technical Accuracy. — The affidavit should not be subjected to technical rules of construction, and should be considered sufficient if it seems to be intended in good faith to meet the objects of the case.¹

Must Not Be Evasive. — The affidavit should not be evasive, and if it studiously avoids stating what it evidently intends the court shall believe is its real meaning, it will not be sufficient.²

By Whom Affidavit Must Be Made. — As a general rule, the affidavit must be made by the defendant himself, not by an agent or third person.³

charged in the declaration, and it is not sufficient to make oath that the name subscribed is not in his hand writing, for, if so, a party who had caused the instrument to be signed by his name and in his presence by a third person, might raise an entirely immaterial question. *Archer v. Ward*, 9 Gratt. (Va.) 622. *Disapproving Shepherd v. Frys*, 3 Gratt. (Va.) 422.

An Affidavit of Merits, filed with a plea of *non assumpsit*, which contains nothing as to the truth of the plea, and which is made for the purpose of staying the right of the plaintiff to take judgment by default, does not dispense with the necessity of verifying the plea, where the defendant intends to deny the execution of the instrument. *Hansen v. Hale*, 44 Ill. App. 474.

For Forms of Affidavits, see *Wren v. McLaren*, 48 Mich. 197, in which case will be found the substance of an affidavit which was considered sufficient; *McRobert v. Crane*, 49 Mich. 483, where will be found an affidavit in full which was considered sufficient.

In *Stephens v. Anderson*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1000, the defendant pleaded *non est factum*, and the *jurat* was as follows: "Sworn to and subscribed before me by J. P. Anderson, this 7th day of December, 1894," with the official seal and signature of a notary attached thereto. It was held that this was a sufficient compliance with the statute. *Following Kohn v. Washer*, 69 Tex. 67.

In *Dorn v. Tyler*, 64 Ill. App. 110, it was held that an affidavit is insufficient which omits to state that the plea is true, the affidavit which was considered insufficient in that case being as follows: "Gay Dorn and Charlotte E. Dorn, being duly sworn, on oath say that they are not jointly liable for the payment of the note sued on herein, and Charlotte E. Dorn for herself says she did not execute the same."

In *Pennsylvania* an affidavit of defense "that the note on which this suit is brought was not made or given by him and that he knows nothing of it" is a sufficient denial. *Hogg v. Orgill*, 34 Pa. St. 344.

1. *Haight v. Arnold*, 48 Mich. 512; *Anderson v. Walter*, 34 Mich. 113; *McCormack v. Bay City*, 23 Mich. 457.

Clerical Errors. — A manifest mistake in the affidavit, in respect to the date at which the defendant signed the paper, which is a clerical error of the writer of the affidavit, may be amended. *Franklin v. Cox*, 4 Rand. (Va.) 448.

2. *Haight v. Arnold*, 48 Mich. 512. See also *Woods v. Watkins*, 40 Pa. St. 458.

Plea, Not Notice of Defense, Must Be Sworn to. — In *Illinois* an unverified plea of *non assumpsit* and a notice stating that on the trial the defendant will deny the execution of the instrument sued on, and averring that such instrument was not made or executed by the defendant, accompanied by an affidavit setting forth such facts, are insufficient, as it is not the notice that should be verified, but the plea. *Bailey v. Valley Nat. Bank*, 127 Ill. 332, 21 Ill. App. 642.

Information and Belief. — An affidavit that the plea is true to the best of the affiant's remembrance has been held sufficient. *Moore v. Morris*, 26 Ga. 649. But see *Warman v. Akron First Nat. Bank*, 70 Ill. App. 181. See also article VERIFICATION.

Allegation of Facts. — The defendant need not state in his affidavit every fact going to make up his defense, but may merely indicate his defense, or make a plain denial. *McCormick v. Bay City*, 23 Mich. 457; *Anderson v. Walter*, 34 Mich. 113.

3. *Fowler v. Gate City Nat. Bank*, 88 Ga. 29. See also *Warman v. Akron First Nat. Bank*, 70 Ill. App. 181. But see *McCoy v. Harrell*, 40 Ala. 232, in

k. DEMURRER TO PLEA OR ANSWER. — A plea by which the defendant attempts to deny the execution of the instrument, which is insufficient in substance, may be stricken out on demurrer;¹ but it would seem that, according to the weight of authority, a demurrer does not reach the want of an affidavit to a plea of the general issue, or to a general denial, as such plea or answer is not wholly insufficient because it is not sworn to.²

l. MOTION TO STRIKE OUT. — Where an unsworn plea or answer has been filed, upon the defendant's refusal to verify it the court is, according to some authorities, authorized on motion to strike it from the record.³

m. AMENDMENTS — (1) *In Matters of Substance*. — The court has power to allow the defendant to amend his plea or answer by

which case Judge, J., said, *obiter*, that the affidavit may be made by a third person acquainted with the facts.

Information and Belief. — An affidavit made by an agent that he verily believes the plea to be true, is not sufficient, even if the affidavit can be made by an agent. *Warman v. Akron First Nat. Bank*, 70 Ill. App. 181, in which case it was strongly intimated that an agent is not a competent person to make the affidavit.

Affidavit by Heir. — In *Eborn v. Zimpelman*, 47 Tex. 503, the right of an heir of the deceased maker of an instrument to verify a plea of *non est factum*, with the consent of the administrator, was recognized. *Cited and followed in Solomon v. Huey*, 1 Tex. Unrep. Cas. 265.

1. *Wingate v. Atlanta Nat. Bank*, 95 Ga. 1; *Alexander v. Foster*, 16 Ark. 660, in which case it was held that a plea which is insufficient in substance as a special plea of *non est factum*, may be stricken out on demurrer.

2. *Brooks v. Chilton*, 6 Cal. 641; *Longley v. Norvall*, 2 Ill. 389; *Wade v. Mussleman*, 14 Ind. 362; *Bates v. Hunt*, 1 Blackf. (Ind.) 67; *Wolf v. Hagensick*, 10 Iowa 590; *Seachrist v. Griffith*, 6 Iowa 390; *Lyon v. Bunn*, 6 Iowa 48; *Snowden v. McDaniel*, 7 Mo. 313; *Parker v. Simpson*, 1 Mo. 539, in which case it was declared that the plaintiff should either treat an unsworn plea as a nullity, and take judgment accordingly, or move the court to set aside the plea; *Shepherd v. Frys*, 3 Gratt. (Va.) 422; *McClintick v. Johnston*, 1 McLean (U. S.) 414.

In Alabama, unless the plea is verified, it is demurrable. *McCoy v. Harrell*, 40 Ala. 232; *Bancroft v. Paine*, 15 Ala. 834; *McWhorter v. Lewis*, 4 Ala. 198;

McAlpin v. May, 1 Stew. (Ala.) 520; *Tarver v. Nance*, 5 Ala. 712.

Failure to Comply with Louisiana Statute. — Code Prac., art. 324, provides that the defendant shall be bound in his answer to acknowledge expressly, or to deny, his signature; but it has been held that although a general denial amounts to a confession of the execution of the instrument, every other legal defense is open under it. *Hughes v. Harrison*, 8 Martin N. S. (La.) 297; *Miller v. Whitfield*, 16 La. Ann. 10; *Stockton v. Truxton*, 8 La. 224.

3. *Sorelle v. Elmes*, 6 Ala. 706; *McCoy v. Harrell*, 40 Ala. 232; *Myers v. Douglass*, 99 Ky. 267; *Parker v. Simpson*, 1 Mo. 539; *Fowler v. Bender*, 18 Ark. 262. In the last case the court cited *Alexander v. Foster*, 16 Ark. 660; *Allis v. Bender*, 14 Ark. 625; *Williams v. Williams*, 13 Ark. 421; *State Bank v. Ward*, 8 Ark. 506; *Little Rock v. State Bank*, 8 Ark. 227; *Hardwick v. Campbell*, 7 Ark. 118, and *Wilson v. Shannon*, 6 Ark. 198.

The General Issue, however, according to some authorities, although accompanied by no affidavit, is sufficient to enable the defendant to make some defenses, other than that he did not execute the instrument or that his signature is not genuine, and consequently it should not be stricken out for the want of an affidavit, or as sham and frivolous. *Brooks v. Chilton*, 6 Cal. 641; *Bates v. Hinton*, 4 Mo. 78. See also *Payne v. Snell*, 4 Mo. 238.

The Order. — An order directing the affidavit to be stricken out is, in effect, an order striking out the plea. *Hamilton v. Conyers*, 28 Ga. 276.

Refusal to Permit Answer to Be Filed. — The court, upon having its attention called to the fact that the answer is not

alleging facts which will make it more definite and certain or by expunging admissions improvidently made.¹

(2) *By Filing Affidavit.* — Where the defendant has failed to file the affidavit required by statute denying the execution of the instrument, at any time before judgment, it is permissible to allow him to amend by filing such affidavit.²

Discretion of Court. — It is within the discretion of the court to grant leave to amend by putting in an affidavit denying the execution of the instrument according to its view of the real merits of the application.³ The court has ample power to protect the opposite party in case of surprise by imposing terms so as to prevent injury being done by allowing the affidavit to be filed,⁴ and the court may refuse to allow the affidavit to be filed where the defendant has been guilty of delay or negligence for which no sufficient excuse is given.⁵

n. ORDER OF PROOF — In General. — Where the execution of the instrument is put in issue after there has been sufficient evidence addressed to the court to entitle the instrument to be read in evidence, the court should not allow the defendant to adduce counter proof before the instrument is read to the jury, and thus assume to take the question of the execution of the instrument

accompanied by the required affidavit, may refuse to allow it to be filed. *Myers v. Douglass*, 99 Ky. 267.

1. *McVey v. Ely*, 5 Lea (Tenn.) 438, in which case the defendant in a suit in equity to set aside a fraudulent conveyance and collect negotiable instruments was allowed to amend his answer by setting up the fact that the instrument had been altered. See also *Reynolds v. Roth*, 61 Ark. 317; *Hepp v. Huefner*, 61 Wis. 148.

2. *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Anderson v. Hance*, 49 Mo. 159, in which case the defendant failed to verify the answer through mere inadvertence; *Wallis v. White*, 58 Wis. 26. See also *Ennor v. Hodson*, 28 Ill. App. 445.

In Wisconsin the statute does not provide that the affidavit shall be filed within the usual time for pleading, and the court may allow it to be filed during the trial. *Wallis v. White*, 58 Wis. 26.

3. In *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44, the court said: "The rule as framed was intended to leave a discretionary authority to be exercised as the justice of particular cases should require, so that parties could be let in after pleading, upon good cause. The motion, then, was really an appeal to the discretionary

power of the court below, and might have been granted or denied upon the merits in the exercise of that power." See also *Truesdell v. Hunter*, 28 Ill. App. 292; *Foote v. Sprague*, 13 Kan. 155; *Towle v. Dunham*, 76 Mich. 251; *Green v. Robinson*, 3 How. (Miss.) 105; *Lewin v. Houston*, 8 Tex. 94; *Wallis v. White*, 58 Wis. 26.

4. *Anderson v. Hance*, 49 Mo. 159; *Wallis v. White*, 58 Wis. 26.

5. *Foote v. Sprague*, 13 Kan. 155; *Towle v. Dunham*, 76 Mich. 251; *Green v. Robinson*, 3 How. (Miss.) 105, in which case leave to amend after the case has been given to the jury was denied because of the defendant's delay in making the application, and also because his failure to file an affidavit previously was due wholly to the ignorance or inattention of his attorney; *Lewin v. Houston*, 8 Tex. 95.

Failure to Withdraw Affidavit Previously Filed. — Where the defendant files an affidavit denying the execution of the instrument, and on the trial, by permission of the court and with the consent of the plaintiff, makes and files another affidavit, and there is no withdrawal or exclusion of the first affidavit, the defendant may rely upon the first affidavit if it is sufficient in form. *McRobert v. Crane*, 49 Mich. 483.

from the jury.¹

Introducing Instrument Before Proof of Execution. — Where the execution of the instrument is denied under oath, proof of its execution is necessary before putting the instrument in evidence, but the order in which the evidence is introduced is not material, and the court may allow the instrument to be introduced in evidence before its execution has been proven, in order to enable the jury to apply the evidence as to its execution.² But where the instrument is prematurely read in evidence, its admission does not in any way affect the evidence as to the execution of the instrument.³

3. Want or Failure of Consideration — *a. AVAILABILITY AS A DEFENSE.* — Want of Consideration is a good defense in an action on a negotiable instrument except as against an innocent holder protected by the law merchant.⁴

1. *Pate v. Aurora First Nat. Bank*, 63 Ind. 254, citing *Fisher v. Kean*, 1 Watts (Pa.) 278. See also *Morris v. Varner*, 32 Ala. 499, holding that where a plea of *non est factum* is filed, accompanied by an affidavit of its truth, the plaintiff need only show to the court evidence conducing to prove the issue, and that it is not requisite to the admission of the instrument in evidence that a *prima facie* case as to the genuineness of the defendant's signature should be made out.

In *Indiana* it has been declared that as the plaintiff has the burden of proof he is entitled to go to the jury with his evidence in chief when the instrument is read to them, and close the case with evidence in rebuttal, or he may rest when the instrument is read to the jury, and reserve his right to be further heard in rebuttal. *Pate v. Aurora First Nat. Bank*, 63 Ind. 254, per Niblack, J., who remarked that the rule had not been well defined by any of the authorities which had fallen under his observation.

2. *Lothrop v. Roberts*, 16 Colo. 250; *Kusler v. Crofoot*, 78 Ind. 597; *Hunter v. Parsons*, 22 Mich. 96. See also *Catlin v. Gilders*, 3 Ala. 536; *Pate v. Aurora First Nat. Bank*, 63 Ind. 254.

Contra. — In *Soaps v. Eichberg*, 42 Ill. App. 375, will be found a dictum by Boggs, J., to the effect that proof of the execution of the instrument must be made before reading the instrument in evidence.

Proof of Delivery. — Where the defendant puts in a special plea of *non est factum*, admitting the signing of the instrument, but denying its delivery, the plaintiff, having possession of the instrument and the signature being ad-

mitted, has a right to introduce it as evidence and then make proof as to the delivery. *Kusler v. Crofoot*, 78 Ind. 597.

3. *Hunter v. Parsons*, 22 Mich. 96.

4. *Illinois.* — *Hardy v. Ross*, 4 Ill. App. 501; *Knotts v. Preble*, 50 Ill. 226; *Kirkpatrick v. Taylor*, 43 Ill. 207.

Indiana. — *Moyer v. Brand*, 102 Ind. 301; *Mooklar v. Lewis*, 40 Ind. 1; *Beaver v. Hartsville University*, 34 Ind. 245.

Massachusetts. — *Nash v. Lull*, 102 Mass. 60; *Kellogg v. Barton*, 12 Allen (Mass.) 527; *Lester v. Palmer*, 4 Allen (Mass.) 145; *Dickinson v. Hall*, 14 Pick. (Mass.) 217.

Michigan. — *Freeman v. Ellison*, 37 Mich. 459.

Minnesota. — *Lebanon Sav. Bank v. Penney*, 44 Minn. 214.

Mississippi. — *Ohleyer v. Bernheim*, 67 Miss. 75.

Missouri. — *Harwood v. Brown*, 23 Mo. App. 69; *Hartman v. Redman*, 21 Mo. App. 124; *Beall v. January*, 62 Mo. 434; *Jolliffe v. Collins*, 21 Mo. 338.

New Hampshire. — *Dunbar v. Marden*, 13 N. H. 311.

New York. — *Bookstaver v. Jayne*, 60 N. Y. 146.

Oklahoma. — *Hagan v. Bigler*, 5 Okla. 575.

Pennsylvania. — *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. St. 241.

United States. — *Ryberg v. Snell*, 2 Wash. (U. S.) 294.

"Elementary writers, correctly as we believe, represent the law to be that in actions between the immediate parties to a bill of exchange or note, as the drawer and acceptor of the bill, the payee and maker of the note, or the

Total Failure of Consideration is a complete defense in like manner as an original and total absence of consideration.¹

Partial Failure. — At common law a partial failure of consideration, where the amount of such failure was liquidated or capable of definite ascertainment by calculation, could be pleaded as a defense *pro tanto*.² But according to the English authorities followed in some of the United States, if the amount was unliquidated or uncertain the defendant could have redress only by a cross-action against the plaintiff.³ In the absence of statutory changes this is still the rule in some of the states.⁴ In other jurisdictions a doctrine of recoupment was developed whereby, in order to prevent circuity of action, the defendant was permitted to reduce the plaintiff's recovery in part or defeat it entirely by showing fraud or breach of contract by the plaintiff in respect of the consideration of the instrument sued on,⁵ but no

indorsee and his indorser of either instrument, the consideration of the cause of action may be inquired into, and if none exist the action must fail." Niles v. Porter, 6 Blackf. (Ind.) 44.

1. *California*. — Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521.

Georgia. — Montgomery v. Hunt, 93 Ga. 438; Reviere v. Evans, (Ga. 1897) 29 S. E. Rep. 756.

Illinois. — Wineman v. Oberne, 40 Ill. App. 269.

Indiana. — Reagan v. Burton, 67 Ind. 347.

Kentucky. — Griswold v. Taylor, 1 Metc. (Ky.) 229.

Massachusetts. — Knapp v. Lee, 3 Pick. (Mass.) 452.

Mississippi. — Simmons v. Cutreer, 12 Smed. & M. (Miss.) 584.

Missouri. — Harwood v. Brown, 23 Mo. App. 69; Copeland v. Loan, 10 Mo. 266.

New Hampshire. — Tillotson v. Grapes, 4 N. H. 444.

New York. — Sawyer v. Chambers, 44 Barb. (N. Y.) 42; Chase v. Senn, (C. Pl.) 13 N. Y. Supp. 266; American Boiler Co. v. Foutham, (Supreme Ct.) 50 N. Y. Supp. 351.

United States. — Elming v. Drew, 4 McLean (U. S.) 388; Withers v. Greene, 9 How. (U. S.) 213; Scudder v. Andrews, 2 McLean (U. S.) 464.

See Am. and Eng. Encyc. of Law (2d ed.), title *Consideration*, vol. 6, p. 789.

2. Drew v. Towle, 27 N. H. 412; Riddle v. Gage, 37 N. H. 519; Elming v. Drew, 4 McLean (U. S.) 388; Am. and Eng. Encyc. of Law (2d ed.), title *Consideration*, vol. 6, p. 667.

3. Moggridge v. Jones, 14 East 486.

3 Campb. 38; Drew v. Towle, 27 N. H. 412; Riddle v. Gage, 37 N. H. 519; Montgomery v. Tipton, 1 Mo. 446; Cheongwo v. Jones, 3 Wash. (U. S.) 359; Elming v. Drew, 4 McLean (U. S.) 388; Scudder v. Andrews, 2 McLean (U. S.) 464, citing many English cases. See also Coleman v. Harper, 1 A. K. Marsh. (Ky.) 602.

4. See Riddle v. Gage, 37 N. H. 519.

5. *Arkansas*. — Smith v. Capers, 13 Ark. 9; Wheat v. Dotson, 12 Ark. 699; Desha v. Robinson, 17 Ark. 244; Keller v. Vowell, 17 Ark. 445; Rotan v. Nichols, 22 Ark. 244.

California. — Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521.

Indiana. — Marsh v. Low, 55 Ind. 271; Brower v. Nellis, 6 Ind. App. 323; Comparet v. Johnson, 6 Blackf. (Ind.) 59; Doremus v. Bond, 8 Blackf. (Ind.) 368.

Kansas. — French v. Gordon, 10 Kan. 370.

Massachusetts. — Stacy v. Kemp, 97 Mass. 166; Burnett v. Smith, 4 Gray (Mass.) 50; Davis v. Elliott, 15 Gray (Mass.) 90; Harrington v. Stratton, 22 Pick. (Mass.) 510, a leading case.

Minnesota. — Torinus v. Buckham, 29 Minn. 128.

Nebraska. — Lanning v. Burns, 36 Neb. 236.

New Jersey. — Wyckoff v. Runyon, 33 N. J. L. 107.

New York. — Gillespie v. Torrance, 25 N. Y. 306; Batterman v. Pierce, 3 Hill (N. Y.) 171.

Oklahoma. — Hagan v. Bigler, 5 Okla. 575.

Pennsylvania. — Hays v. Kingston, Volume XIV.

judgment could be rendered in favor of the defendant for any excess of damages.¹ Now, in most of the states, either by specific statutory provision² or by virtue of general statutes of set-off or counterclaim, merging the doctrine of recoupment, partial failure of consideration is a good defense *pro tanto*,³ and under proper pleadings a defendant may have judgment in his own favor for damages in excess of the plaintiff's claim.⁴

b. PLEADING WANT OF CONSIDERATION — (1) *Necessity of Specially Pleading*. — At Common Law in an action by the payee of a note against the maker⁵ or guarantor,⁶ or by an indorsee against his indorser,⁷ or by the drawer of a bill of exchange against the acceptor,⁸ the defendant is at liberty to show an original want of consideration under the general issue of *non assumpsit*.⁹ The common-law rule prevails in some of the United States which have not adopted the code system,¹⁰ and it has been held that a

23 W. N. C. (Pa.) 277; *Louchheim v. Maguire*, 186 Pa. St. 311.

Texas. — *Cooper v. Singleton*, 19 Tex. 260; *Brantley v. Thomas*, 22 Tex. 270.

Wisconsin. — *Smith v. Carter*, 25 Wis. 283.

United States. — *Withers v. Greene*, 9 How. (U. S.) 213, *overruling* in effect *Elminger v. Drew*, 4 McLean (U. S.) 395.

1. *Brower v. Nellis*, 6 Ind. App. 323.

2. *Florida*. — Rev. Stat. 1892, § 1072.

Illinois. — *Starr & Curt. Annot.* Ill. Stat. 1896, c. 98, § 13; *Broadwell v. Sanderson*, 29 Ill. App. 384; *Mason v. Wait*, 5 Ill. 127; *Gregory v. Scott*, 5 Ill. 392; *Ray v. Virgin*, 12 Ill. 216; *Davis v. M'Vickers*, 11 Ill. 327; *Marsh v. Bennett*, 22 Ill. 313; *Morgan v. Fallenstein*, 27 Ill. 31; *Schuchmann v. Knoebel*, 27 Ill. 175; *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *Oertel v. Schroeder*, 48 Ill. 133; *Jones v. Buffum*, 50 Ill. 277; *Richards v. Betzer*, 53 Ill. 466; *Walker v. Crawford*, 56 Ill. 444; *Leggat v. Sands Ale Brewing Co.*, 60 Ill. 158; *Gage v. Lewis*, 68 Ill. 604; *Mann v. Smyser*, 76 Ill. 365; *Weaver v. Fries*, 85 Ill. 356; *Wadhams v. Swan*, 109 Ill. 46.

Indiana. — *Harner's Annot.* Ind. Stat. 1896, § 366; *Davis v. Jackson*, 22 Ind. 233; *Bowles v. Newby*, 2 Blackf. (Ind.) 364; *Davis v. Clements*, 2 Blackf. (Ind.) 3.

Iowa. — Code 1897, § 3070.

Texas. — Rev. Stat. 1895, § 314.

Vermont. — Vt. Stat. 1894, § 1152.

3. See *Martin v. Wharton*, 38 Ala. 637; *Wood v. Fowler*, 37 Ala. 55; *Gibson v. Marquis*, 29 Ala. 668; *Kannady*

v. Lambert, 37 Ala. 57; *Simpson v. Moore*, 6 Baxt. (Tenn.) 371, and article SET-OFF AND COUNTERCLAIM.

4. *Herman v. Gray*, 79 Wis. 182; *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502. See also *Wheelock v. Berkeley*, 138 Ill. 153.

5. *Jamison v. Buckner*, 2 Blackf. (Ind.) 77; *Hankins v. Shoup*, 2 Ind. 342; *Catlett v. M'Dowell*, 4 Blackf. (Ind.) 556; *Tucker v. Tipton*, 4 Blackf. (Ind.) 529; *Ballou v. Wells*, 12 Allen (Mass.) 486; *Meakim v. Anderson*, 11 Barb. (N. Y.) 215; *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Limerick Nat. Bank v. Adams*, (Vt. 1898) 40 Atl. Rep. 166; *Clough v. Patrick*, 37 Vt. 421; *State University v. Baxter*, 42 Vt. 99; *Hatch v. Hyde*, 14 Vt. 25; *Williams v. Hicks*, 2 Vt. 36.

6. *Klein v. Currier*, 14 Ill. 237; *Hip-pach v. Makeever*, 64 Ill. App. 126, both cases holding that inasmuch as the plaintiff in such an action must aver and prove a consideration a plea of no consideration amounts to the general issue and is obnoxious to a special demurrer.

7. *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41. See also *Davis v. Travis*, 98 Mass. 222.

8. *Colbath v. Jones*, 28 Mich. 280; *Hardy v. Ross*, 4 Ill. App. 501.

9. See generally article CONTRACTS, vol. 4, p. 944.

10. In *Vermont*. — The statute (Vt. Stat. 1894, § 1150), provides that in actions of *assumpsit* if the defendant pleads the general issue and relies on "special matter of defense" or "matter operating to extinguish the right of action which once existed" he shall

plea in bar alleging a want of consideration is bad on demurrer as amounting to the general issue.¹

In the Code States want of consideration must be specially pleaded in the answer.²

(2) *Sufficiency of Plea or Answer — General Averment.* — In a plea or answer setting up the defense of want of consideration, a general averment that the defendant made the contract without any consideration therefor³ or the use of equivalent language⁴ is

file a notice in writing specifying such matter of defense, but the statute does not apply where the defense is want of consideration, as this goes to show that no cause of action ever existed. *Limerick Nat. Bank v. Adams*, (Vt. 1898) 40 Atl. Rep. 166. See also *State University v. Baxter*, 42 Vt. 99; *Clough v. Patrick*, 37 Vt. 421.

In *Indiana* it was held before the adoption of the code that the statute authorizing a special plea of want of consideration was cumulative and did not take away the common-law right to prove the defense under the general issue. *Jamison v. Buckner*, 2 Blackf. (Ind.) 77. It is now necessary to plead it specially. See the next note.

In *Illinois* it seems that the statute expressly authorizing the defendant to plead want of consideration has the effect of forbidding proof of that defense under the general issue. *Sheldon v. Lewis*, 97 Ill. 640. But see *Hardy v. Ross*, 4 Ill. App. 501, where it was held that whatever may be the effect of the statute in that behalf, it refers only to actions on instruments in writing other than bills of exchange, and that actions on the latter are governed by the common law. See also *Wineman v. Oberne*, 40 Ill. App. 269.

1. *Potter v. Stanley*, 1 D. Chip. (Vt.) 243; *State University v. Baxter*, 42 Vt. 99; *Hatch v. Hyde*, 14 Vt. 25. *Contra*, *Matlock v. Livingston*, 9 Smed. & M. (Miss.) 489.

2. *Sprague v. Sprague*, 80 Hun (N. Y.) 285; *Sharpless v. Giffen*, 47 Neb. 148; *Frybarger v. Cockefair*, 17 Ind. 404, which was an action by an indorsee against his indorser, and the court held that inasmuch as evidence of want of consideration would not have been admissible as a defense under the general denial on file, it was prejudicial error to sustain a demurrer to an additional special answer alleging want of consideration. See also *Johns v. Harrison*, 20 Ind. 317; *Rittenhouse v. Creveling*, (Supreme Ct.) 14 N. Y. Supp. 85.

3. *Massey v. Robertson*, 5 Ill. App. 476; *Sims v. Klein*, 1 Ill. 303.

Variance. — In *Davis v. Young*, 3 T. B. Mon. (Ky.) 381, it was held without discussion that a plea of no consideration was not sustained by evidence that there was a consideration fraudulently represented by the plaintiff to be good, which proved to be of no value.

4. *Alabama.* — *Giles v. Williams*, 3 Ala. 316; *Milligan v. Pollard*, 112 Ala. 465; *Kolsky v. Enslen*, 103 Ala. 97 [*distinguishing* *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Carmelich v. Mims*, 88 Ala. 335; *Darby v. Berney Nat. Bank*, 97 Ala. 643; *McAfee v. Glen Mary Coal, etc., Co.*, 97 Ala. 709].

Arkansas. — *Taylor v. Purcell*, 60 Ark. 606; *Catlin v. Horne*, 34 Ark. 169.

Illinois. — *Cassell v. Morrison*, 8 Ill. App. 175; *Massey v. Robertson*, 5 Ill. App. 476, the plea alleging that there was not "at any time any good and valuable consideration for said note;" *Sheldon v. Lewis*, 97 Ill. 640; *Honeyman v. Jarvis*, 64 Ill. 366.

Indiana. — *Fisher v. Fisher*, 113 Ind. 474; *Moore v. Boyd*, 95 Ind. 134; *Parker v. Morton*, 29 Ind. 89; *Wheelock v. Barney*, 27 Ind. 462; *Starr v. Hunt*, 25 Ind. 313; *Billan v. Hercklebrath*, 23 Ind. 72; *Barner v. Morehead*, 22 Ind. 354; *Honeywell v. Helm*, 19 Ind. 321; *Webb v. Bowless*, 15 Ind. 242; *Webster v. Parker*, 7 Ind. 185; *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Niles v. Porter*, 6 Blackf. (Ind.) 44; *Kernodle v. Hunt*, 4 Blackf. (Ind.) 57; *Bush v. Brown*, 49 Ind. 573.

Kansas. — See *Miller v. Brumbaugh*, 7 Kan. 343.

Kentucky. — *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Clay v. Johnson*, 5 Litt. (Ky.) 177; *Coleman v. Harper*, 1 A. K. Marsh. (Ky.) 602.

Minnesota. — *Webb v. Michener*, 32 Minn. 48.

Missouri. — *Beall v. January*, 62 Mo. 434.

Construction and Sufficiency of Various General Averments. — In a suit against the joint makers of a note, an answer

usually deemed sufficient,¹ at least in the absence of a motion for

by one defendant that "as to him it was executed without any consideration whatever" shows a good defense to the action so far as he is concerned. *Moyer v. Brand*, 102 Ind. 301.

In an action upon a joint promissory note, an answer by one of the defendants that "he executed the note sued on without any consideration whatever to him moving," etc., was held bad on demurrer, as there might have been a sufficient consideration moving to some third party with the defendant's consent. *Wheeler v. Barr*, 7 Ind. App. 381, following *Anderson v. Meeker*, 31 Ind. 245, where an answer alleged "that defendant received no consideration for said note," and *Bingham v. Kimball*, 33 Ind. 184, where the answer alleged that the note in suit "was given by this defendant to the plaintiff's assignors without any consideration of any kind to this defendant," the court in both cases holding the answer insufficient. The two cases last cited were distinguished in *Moyer v. Brand*, 102 Ind. 301, for the answer in which case see *supra* in this note. A plea that no consideration passed from the plaintiff to the defendant was also held bad on demurrer in *Hook v. Hook*, 3 J. J. Marsh. (Ky.) 111. Likewise a plea that "the note sued on was executed without any good or valuable consideration rendered by the plaintiff and received by defendants or either of them" in *Clay v. Johnson*, 5 Litt. (Ky.) 176, holding also that a traverse of the allegation raised an immaterial issue.

A plea by a surety that he received no consideration for his suretyship but failing to negative a consideration moving to his principal is bad. *Brokaw v. Kelsey*, 20 Ill. 304; *Darby v. Berney Nat. Bank*, 97 Ala. 643. But an allegation that he signed as surety after delivery without consideration moving to himself or his principal sets up a good defense. *Hartman v. Redman*, 21 Mo. App. 124.

A plea negating any "good" consideration, or alleging that there was no consideration "valid in law," does not sufficiently show a want of consideration. *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473.

Special Demurrer for Formal Defect. — In *Illinois* the statute, (Starr & Curt. Annot. Stat. 1896, c. 98, § 13), provides

that if the instrument sued on "was made or entered into without a good and valuable consideration" the defendant may plead such want of consideration. In *Sheldon v. Lewis*, 97 Ill. 640, the plea alleged that there was no good or valuable consideration. It was held that if the use of the disjunctive made the plea defective the objection could be taken only by special demurrer and was not reached by a general demurrer.

1. See the cases cited in the preceding note.

General Averment Insufficient in Some States. — *Iowa.* — In *Sac County v. Hobbs*, 72 Iowa 69, the court held the averment that the note was executed "without any consideration" to be a mere legal conclusion and the answer was struck out on motion. In *Simpson Centenary College v. Bryan*, 50 Iowa 293, it was held that such a defect in the answer was ground for a motion to make more specific and that objection could not be taken by demurrer. That a general averment of no consideration is insufficient see *Chambers v. Games*, 2 Greene (Iowa) 320.

Mississippi. — In *Tittle v. Bonner*, 53 Miss. 578, it was held that a plea of want of consideration for accepting a bill of exchange is bad on demurrer if it does not state affirmatively how there was no consideration, and does not negative benefit or advantage to the drawer of the bill at whose instance it was accepted. The court said. "In *Matlock v. Livingston*, 9 Smed. & M. (Miss.) 489, a plea 'that the said note was executed without any consideration good or valuable in law' was held good on general demurrer, and this was followed without comment in *Taylor v. McNairy*, 42 Miss. 276. Since the adoption of the code of 1857, which in this respect was followed by the code of 1871, such general pleading * * * is not admissible." See also *Hanks v. Neal*, 44 Miss. 212. In *Ohlender v. Bernheim*, 67 Miss. 75, the defendant's plea stated facts which were held sufficient to show a want of consideration for his acceptance of the bill of exchange in suit.

Pennsylvania. — A general averment of no consideration in an affidavit of defense is not a compliance with the rule of court requiring that the facts

a more specific statement.¹

Stating the Circumstances.— But it is not unusual or improper to state the circumstances for the purpose of referring the alleged insufficiency of the consideration directly to the judgment of the court.² If, however, the pleader thus sets forth the circumstances, the sufficiency of the pleading must rest upon the facts alleged therein and cannot be aided by the addition of the general averment,³ unless the facts stated are consistent with the

constituting a defense shall be stated. *Root v. Fox*, 2 Pa. Dist. Rep. 339, holding that the averment is a conclusion of law. *Woods v. Watkins*, 40 Pa. St. 458. See also *Hale v. Fenn*, 3 W. & S. (Pa.) 361.

In England under the new pleading rules of Hilary Term, 4 Wm. IV., a plea of no consideration was insufficient on special demurrer; it was necessary that the plea should state affirmatively the cause of the making of the note or drawing of the bill, as for instance, that it was made for accommodation. *Easton v. Pratchett*, 6 C. & P. 736, 25 E. C. L. 624; *Stoughton v. Kilmorey*, 2 C. M. & R. 72; *Atkinson v. Davies*, 11 M. & W. 241.

1. *Miller v. Brumbaugh*, 7 Kan. 343; *Chamberlain v. Painesville, etc.*, R. Co., 15 Ohio St. 225.

2. *Georgia*.— *O'Neal v. Phillips*, 83 Ga. 556, where the plea showed that the note was given for the purchase money of land which in fact belonged to the defendant and not to the plaintiff. *Hall v. Morrison*, 92 Ga. 311.

Illinois.— *Massey v. Robertson*, 5 Ill. App. 477; *Honeyman v. Jarvis*, 64 Ill. 366; *Marsh v. Bennett*, 22 Ill. 313.

Indiana.— *Maddy v. Sulphur Springs, etc., Co.*, 57 Ind. 148; *Hunter v. McLaughlin*, 43 Ind. 38; *Mooklar v. Lewis*, 40 Ind. 1; *Johnson v. McCabe*, 37 Ind. 535; *Beaver v. Hartsville University*, 34 Ind. 245.

Kansas.— *Lovejoy v. Citizens' Bank*, 23 Kan. 331.

Massachusetts.— *Kellogg v. Barton*, 12 Allen (Mass.) 527.

Texas.— *McDonald v. Young*, (Tex. Civ. App. 1897) 41 S. W. Rep. 885.

United States.— *Herklotz v. Chase*, 32 Fed. Rep. 433.

Good but Not Valuable Consideration.— A plea alleging facts which show that natural alleging was the sole consideration of the note is good when the facts are pleaded as a want of consideration. *Kirkpatrick v. Taylor*, 43 Ill. 207.

3. *Collins v. Townsend*, 58 Cal. 608; *Honeywell v. Helm*, 19 Ind. 321; *Ryle v. Harrington*, 4 Abb. Pr. (N. Y. Supreme Ct.) 421. See also *Long v. Johnson*, 15 Ind. App. 493; *Dunning v. Pond*, 5 Minn. 296; *Maxwell v. Campbell*, 8 Ohio St. 265.

Insufficient Averments.— In *McCor-mick v. Barry*, 10 Neb. 207, the general averment was accompanied by a statement of circumstances which showed it to be untrue. The court said: "Taking the whole answer together, we think a good and sufficient consideration for the notes is shown, and that the particular averment of a want thereof must be taken only as equivalent to saying, 'in view of the foregoing facts and circumstances it follows that the defendant has received no consideration for said notes.' It is no more than the expression of an opinion upon the legal effect of the facts and circumstances which are particularly set forth." For another case where upon construction of the entire plea it was held that the general averment was nullified by the facts stated, see *Stevens v. Gibson*, 69 Vt. 142.

In *Swope v. Fair*, 18 Ind. 300, the defendant's answer alleged that the note "was obtained from him by the fraud, covin, misrepresentation and deceit of said plaintiff, and without any good or valuable consideration whatever." Speaking of this plea, to which a demurrer was sustained, the court said: "It seems to admit that there was some consideration, but the pleader assumes to determine that it was not a valid one, for what reason we are not informed. It is too uncertain a mode of pleading, does not give the facts upon which the conclusion is drawn, that the consideration is invalid. Of course this could not be done in an instance where it is expressly stated that there was no consideration." See also *McMurray v. Gifford*, 5 How. Pr. (N. Y. Supreme Ct.) 14.

conclusion or so inconsequential as to constitute surplusage.¹

To Be Separately Pleading. — Want of consideration is a defense distinct from that of total or partial failure of consideration and must be separately pleaded.²

c. PLEADING FAILURE OF CONSIDERATION — (1) Necessity of Specially Pleading. — At Common Law the defense of total failure of consideration is admissible under the general issue,³ even where the failure arises out of the fraud of the plaintiff⁴ or consists of a breach of express or implied warranty, which defeats the entire consideration.⁵ Recoupment, strictly confining the term to matter in mitigation and reduction of damages, could be proved under the general issue,⁶ and likewise, it seems, failure of consid-

1. In *Sheldon v. Lewis*, 97 Ill. 640, the plea alleged that the note was "got and obtained of the said defendant without any good or valuable consideration whatever by practicing unlawfully and feloniously what is known as the 'confidence game' by the criminal laws of the state of Illinois, used and practiced upon him by said plaintiff." It was held to be a good plea of want of consideration, the added averments being rejected as surplusage. See also *Parker v. Morton*, 29 Ind. 89; *Starr v. Hunt*, 25 Ind. 313; *Sherman v. Elder*, 12 Iowa 433.

2. *Belden v. Church*, 23 Ill. App. 473; *Sims v. Klein*, 1 Ill. 303. See also *McClintic v. Cory*, 22 Ind. 170, holding that if want of consideration and failure of consideration are pleaded in separate paragraphs the defendant should not be compelled to elect between them.

Waiver of Defect. — But if facts set forth in the plea show a want of consideration the objection that they are pleaded as a failure of consideration should be specially assigned as a ground of demurrer, otherwise the defect will be disregarded. *Kirkpatrick v. Taylor*, 43 Ill. 207.

3. *Illinois*. — *Wineman v. Oberne*, 40 Ill. App. 269.

Indiana. — *Jamison v. Buckner*, 2 Blackf. (Ind.) 77; *Tucker v. Tipton*, 4 Blackf. (Ind.) 556, note 2; *Catlett v. M'Dowell*, 4 Blackf. (Ind.) 556; *Hankins v. Shoup*, 2 Ind. 342; *Streeter v. Henley*, 1 Ind. 401. See also *Cohee v. Cooper*, 8 Blackf. (Ind.) 115.

New Hampshire. — *Tillotson v. Grapes*, 4 N. H. 444.

New York. — *Meakim v. Anderson*, 11 Barb. (N. Y.) 215; *Payne v. Cutler*, 13 Wend. (N. Y.) 605.

South Carolina. — *Hunter v. Gra-*

ham, 1 Hill L. (S. Car.) 370; *Farrow v. Mays*, 1 Nott & M. (S. Car.) 312.

Vermont. — *Williams v. Hicks*, 2 Vt. 36.

Thus in *Perkins v. Brown*, (Mich. 1897) 72 N. W. Rep. 1095, the defendant pleaded the general issue and was allowed to defeat the action by showing that the notes sued on were executed in consideration of fruit trees sold by the plaintiff to the defendant, the former at the same time agreeing to set out the trees in the spring and care for them, and that the plaintiff had failed to set out the trees, which, for that reason, became worthless.

4. *Simmons v. Cutreer*, 12 Smed. & M. (Miss.) 584, holding, however, that it is more regular to plead the fraud specially, or give notice of it with the plea. *People v. Niagara C. P.*, 12 Wend. N. Y.) 246; *Sill v. Rood*, 15 Johns. (N. Y.) 230, where it was held that the defendant might show as a complete defense under the general issue that the note was given for the price of a chattel, that the plaintiff made false and fraudulent representations with respect to the usefulness of the chattel, and that the same was in fact worth nothing and totally useless. See also *Shelton v. Garry*, 1 McCord L. (S. Car.) 470, holding that the defendant may prove under the general issue that the note was given for a tract of land, the lines and boundaries of which were fraudulently misrepresented by the vendor.

5. *Talbert v. Cason*, 1 Brev. (S. Car.) 298.

6. *Crabtree v. Kille*, 21 Ill. 184; *Wadhams v. Swan*, 109 Ill. 46; *Underwood v. Wolf*, 131 Ill. 437; *Hoerner v. Giles*, 53 Ill. App. 540; *Compere v. Johnson*, 6 Blackf. (Ind.) 59; *Catlett v. M'Dowell*, 4 Blackf. (Ind.) 556. See also *Har-*

eration at common law so far as it was allowable as a defense.¹

Under Statutes or Codes. — Under statutes authorizing the defense of failure of consideration to be pleaded² and in code pleading³ the defendant in an action on a negotiable instrument must make proper special averment in his answer to enable him to prove total or partial failure of consideration.

Precision in Framing Plea or Answer. — Some authorities declare that proof of partial failure of consideration is not available under a plea or answer of total failure,⁴ or of no consideration.⁵ Other cases uphold the contrary rule.⁶

rington v. Stratton, 22 Pick. (Mass.) 510; Wyckoff v. Runyon, 33 N. J. L. 107.

But it was held in *Eldridge v. Mather*, 2 N. Y. 157, that, according to the common-law practice in *New York*, the defense was not admissible under the general issue unless the plea was accompanied by notice of the defense. Citing *Runyan v. Nichols*, 11 Johns. (N. Y.) 547; *Beecker v. Vrooman*, 13 Johns. (N. Y.) 302; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431; *Burton v. Stewart*, 3 Wend. (N. Y.) 236; *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Barber v. Rose*, 5 Hill (N. Y.) 76. See also *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *People v. Niagara C. P.*, 12 Wend. (N. Y.) 246.

1. See *Riddle v. Gage*, 37 N. H. 519; *Eldridge v. Mather*, 2 N. Y. 159.

2. Under the *Illinois Statute* allowing total or partial failure of consideration to be pleaded, neither total nor partial failure is admissible under the general issue, to a declaration containing a special count on a note or bill. *Dickinson v. Citizens' Nat. Bank*, 70 Ill. App. 405; *Lake Superior Mineral Land Development Co. v. Clapp*, 50 Ill. App. 301; *Teuber v. Schumacher*, 44 Ill. App. 578; *Wilson v. King*, 83 Ill. 232; *Rose v. Mortimer*, 17 Ill. 475; *Keith v. Mafit*, 38 Ill. 303; *Leggat v. Sands Ale Brewing Co.*, 60 Ill. 158; *Sheldon v. Lewis*, 97 Ill. 644; *Schroer v. Wessell*, 89 Ill. 114; *Anderson v. Jacobson*, 66 Ill. 522; *Johnson v. Wilson*, 54 Ill. 419; *Swain v. Cawood*, 3 Ill. 505; *Stacker v. Hewitt*, 2 Ill. 207. Nor is either of those defenses admissible under the general issue where the declaration contains only the common counts, and the plaintiff files a copy of the instrument therewith and a written statement that no other evidence than the instrument of which a copy is filed will be offered on the trial. *Wilson v. King*, 83 Ill. 232. Otherwise where

the note is read in evidence under the common counts without a special count or copy of instrument with their written statement. *Morehouse v. Fowler*, 69 Ill. App. 50.

Recoupment is not treated strictly as a failure of consideration within the meaning of the rule above stated, but as a mere reduction of damages. It is usually based upon a breach of warranty, and the proof is admissible under the general issue. See *Illinois* cases cited in the last note but one. But it is frequently pleaded specially in bar of the plaintiffs' entire cause of action. *Wadhams v. Swan*, 109 Ill. 46.

In *Massachusetts*, recoupment or partial failure of consideration must be pleaded. *Hunting v. Downer*, 151 Mass. 278; *Jackman v. Doland*, 116 Mass. 551; *Hodgkins v. Moulton*, 100 Mass. 309.

3. *Sac County v. Hobbs*, 72 Iowa 69; *Dubois v. Hermance*, 56 N. Y. 673; *Copeland v. Loan*, 10 Mo. 266; *Moore v. Alston*, (Tex. App. 1891) 17 S. W. Rep. 1117; *Gregory v. Hart*, 7 Wis. 532.

4. *Chicago Trust, etc., Bank v. Landfield*, 73 Ill. App. 173; *Day v. Milligan*, 72 Ill. App. 324; *Belden v. Church*, 23 Ill. App. 474; *Bailey v. Valley Nat. Bank*, 21 Ill. App. 642; *Wadhams v. Swan*, 109 Ill. 46; *Burnap v. Cook*, 32 Ill. 168; *Swain v. Cawood*, 3 Ill. 505.

5. *Wadhams v. Swan*, 109 Ill. 46; *Whitacre v. Culver*, 9 Minn. 295. See also *Kilgore v. Powers*, 5 Blackf. (Ind.) 22, holding that where the plea set up the defense of no consideration and the replication alleged a consideration a rejoinder showing a partial failure of consideration was a departure.

6. *Sinex v. Toledo, etc., R. Co.*, 27 Ind. 365; *Billan v. Hercklebrath*, 23 Ind. 71; *Landry v. Durham*, 21 Ind. 232; *Wynn v. Hiday*, 2 Blackf. (Ind.) 123. In *Morgan v. Printup*, 72 Ga. 68, the court said: "Under a plea of total failure of consideration, a defendant

(2) *Sufficiency of Plea or Answer* — (a) *In General* — *Facts to Be Particularly Stated*. — A general averment of total or partial failure of consideration is insufficient; the facts constituting the failure should be stated.¹ But a general averment may avail to prevent the plaintiff from taking judgment on the pleadings,² or be sufficient to withstand a general demurrer,³ or a motion to strike out as frivolous;⁴ and the better opinion seems to be that an objection for generality is waived by joining issue on the plea.⁵ In order to avoid a possible ambiguity it is advisable to make a distinct averment that the consideration which is alleged to

would be entitled to an abatement of the sum agreed to be paid, if the proof should show that there had been a partial failure of consideration and its extent. This plea of total failure of consideration includes partial failure. *Omne majus continet in se minus.*" To the same effect see *Rotan v. Nichols*, 22 Ark. 244.

1. *Alabama*. — *Carmelich v. Mims*, 88 Ala. 335.

Delaware. — *Flagg v. Taylor*, 8 Houst. (Del.) 165, by force of Rev. Code Del., c. 106, § 4.

District of Columbia. — *Durant v. Murdock*, 3 App. Cas. (D. C.) 114, by force of Rule 73 of the Supreme Court.

Florida. — *McCallum v. Driggs*, 35 Fla. 277.

Illinois. — *Sheldon v. Lewis*, 97 Ill. 640, where the court said: "In a plea of failure of consideration it is necessary to set up what the consideration was, and then aver wherein the consideration has failed;" *Hough v. Gage*, 74 Ill. 258, where the court said that in a plea of total failure of consideration "all the elements entering into the consideration must be set forth, and a failure of each and every part of it distinctly averred;" *Honeyman v. Jarvis*, 64 Ill. 366; *Smith v. Doty*, 24 Ill. 164; *Parks v. Holmes*, 22 Ill. 522; *Baldwin v. Banks*, 20 Ill. 48; *Christopher v. Cheney*, 64 Ill. 26; *Vanlandingham v. Ryan*, 17 Ill. 25; *Kinney v. Turner*, 15 Ill. 182; *Furness v. Williams*, 11 Ill. 229; *Evans v. Greene County*, 6 Ill. 654; *Wann v. M'Goon*, 3 Ill. 74; *Sims v. Klein*, 1 Ill. 302; *Bradshaw v. Newman*, 1 Ill. 133; *Poole v. Vanlandingham*, 1 Ill. 47; *Cornelius v. Vanorsdall*, 1 Ill. 23; *Taylor v. Sprinkle*, 1 Ill. 17; *Massey v. Robertson*, 5 Ill. App. 476.

Indiana. — *Billan v. Hercklebrath*, 23 Ind. 71; *Moore v. Boyd*, 95 Ind. 134; *Swope v. Fair*, 18 Ind. 300; *Smith*

v. Baxter, 13 Ind. 151; *Applegate v. Crawford*, 2 Ind. 579; *Garrett v. Heaston*, 5 Blackf. (Ind.) 349.

Iowa. — *Chambers v. Games*, 2 Greene (Iowa) 320. See also *Donahue v. Prosser*, 10 Iowa 276.

Kentucky. — *Gains v. Park*, 3 B. Mon. (Ky.) 224; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Coleman v. Harper*, 1 A. K. Marsh. (Ky.) 602.

Louisiana. — *Langstaff v. Lees*, 11 La. Ann. 271.

Mississippi. — *Sturdivant v. Memphis Nat. Bank*, 60 Fed. Rep. 730, on error to the United States Circuit Court for the Northern District of Mississippi.

Texas. — *Fortson v. Caldwell*, 17 Tex. 627.

Wisconsin. — *Gregory v. Hart*, 7 Wis. 532.

In Form of Counterclaim. — Proof of a failure of consideration should not be rejected though the facts constituting the defense are alleged as a counterclaim. *Gleason v. Moen*, 2 Duer (N. Y.) 639. See also *Springer v. Dwyer*, 50 N. Y. 19.

Variance. — A plea setting up a consideration and alleging its failure cannot be sustained by proof of failure of another and different consideration. *Lemmon v. Hanley*, 28 Tex. 219.

2. *Reddick v. Mickler*, 23 Fla. 335.

3. See *Ray v. Woolfolk*, 1 Smed. & M. (Miss.) 523.

4. In *Churchill v. Witbeck*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 122, the court said that "failure of consideration is a fact and not altogether a conclusion to be drawn from facts," and a motion to strike out as frivolous an answer alleging generally that there was an entire failure of consideration was denied. The court further said that it was "not at all clear that the answer would be bad on demurrer."

5. *McCallum v. Driggs*, 35 Fla. 284.

have failed was the sole consideration for the defendant's contract.¹ If the facts alleged do not show an entire or partial failure, a general averment of failure in the conclusion will not help the pleading.²

Nonperformance of Express or Implied Contract.—Where the alleged failure consists in the nonperformance of plaintiff's reciprocal promise or duty the allegation and breach thereof must be distinctly alleged,³

See also the opinion of the court in *Morehouse v. Fowler*, 69 Ill. App. 50.

1. See *Garriott v. Abbott*, 28 Ind. 9; *Taylor v. Purcell*, 60 Ark. 606; *Gains v. Park*, 3 B. Mon. (Ky.) 223, and the precedent in *Withers v. Greene*, 9 How. (U. S.) 213.

Thus, in *Garriott v. Abbott*, 28 Ind. 9, where the defendant was sued upon a promissory note, the answer alleged that the note was executed by the maker, pending bastardy proceedings against him, that it was made under an express agreement by the plaintiff that she would enter of record that suitable provision had been made to her satisfaction for the support and maintenance of the bastard child, and that she had wholly neglected and refused to make such entry, whereby the consideration of the note had wholly failed. The statute provided that such entry should bar further proceeding in the cause. The court held the averments bad on demurrer for the reason that, taken with other paragraphs in the answer, it did not clearly appear that the promise of the plaintiff was the sole consideration for the note.

2. *Billan v. Hercklebrath*, 23 Ind. 71.

3. *Alabama*.—*Carmelich v. Mims*, 88 Ala. 335.

Arkansas.—*Scott v. Cantrell*, 26 Ark. 226; *Farish v. Jones*, 23 Ark. 323; *Pike v. Fraser*, 17 Ark. 597. See also *Desha v. Robinson*, 17 Ark. 228; *Rotan v. Nichols*, 22 Ark. 244.

Delaware.—*Flagg v. Taylor*, 8 Houst. (Del.) 165.

District of Columbia.—*Durant v. Murdock*, 3 App. Cas. (D. C.) 114.

Illinois.—*Morehouse v. Fowler*, 69 Ill. App. 50; *McNeal v. Calkins*, 50 Ill. App. 17; *Parks v. Holmes*, 22 Ill. 522; *Hancock v. Hodgson*, 4 Ill. 329; *Wagy v. Lane*, 4 Ill. 237; *Merriweather v. Gregory*, 3 Ill. 50.

Indiana.—*Thompson v. Voss*, 16 Ind. 297; *Smith v. Baxter*, 13 Ind. 151; *Wilkins v. Jessup*, 8 Ind. 262; *Cox v. Hazard*, 7 Blackf. (Ind.) 408; *Cox v. Wells*, 7 Blackf. (Ind.) 410. See

also *Thomas v. Page*, 6 Blackf. (Ind.) 78.

Kentucky.—*Castles v. Woodhouse*, 1 Code Rep. (N. Y. Super. Ct.) 71; *Childers v. Smith*, 10 B. Mon. (Ky.) 236.

Massachusetts.—See *Jackman v. Doland*, 116 Mass. 550.

Pennsylvania.—See *Woods v. Vankirk*, 17 Pa. Co. Ct. Rep. 158.

Texas.—*Luckie v. McGlasson*, 22 Tex. 282.

Illustrations.—Thus, in *Welborn v. Norwood*, 1 Tex. Civ. App. 614, the plea charged a failure of consideration in that the note sued on was executed in consideration of the plaintiff's promise to deliver to the defendant certain other notes, and the plaintiff had failed and refused to comply with his promise. A special demurrer was sustained because the plea nowhere specified that the plaintiff undertook to surrender the notes at any particular time, nor that the time of performance was of the essence of the agreement.

In *Maness v. Henry*, 96 Ala. 454, the defendant pleaded as a partial failure of consideration that "the cotton press for which this note was partly given was never delivered to the defendant by plaintiff, or any one else, though defendant has always held himself in readiness to accept the same if delivered." The plea was held insufficient in failing to show that the plaintiff had undertaken to deliver the press, or that it had been sold by him to the defendant.

In *Parks v. Holmes*, 22 Ill. 522, the answer held insufficient alleged that certain work which the plaintiff contracted to perform was executed in such an unskilful and unworkmanlike manner as to be useless and of no value to the defendant, without showing particularly wherein the work was imperfect.

In *McDonald v. Pincus*, 13 Mont. 83, the answer contained a vague allusion to some agreement for labor, alleged to have constituted the consideration for the note in question, and without

showing with certainty that the defendant has suffered damage ¹

stating the terms of the agreement alluded to, or even the conditions or effect thereof, it was alleged that the plaintiff failed to perform "said agreement." It was held that on motion of the plaintiff he was entitled to judgment on the pleadings. To the same effect, see *Cairo, etc., R. Co. v. Dodge*, 72 Ill. 253; *Winstandley v. Rariden*, 110 Ind. 140.

In *Farish v. Jones*, 23 Ark. 323, the plea alleged in substance that the note sued on was given for a tract of land sold by the plaintiff to the defendant with a bond for a fee simple title deed; that the deed was to be made and delivered upon the payment of the purchase money; but that no deed had been tendered before suit, etc. The plea was held insufficient on demurrer because, as the court said, "the plea fails to show that the bond contained mutual and dependent covenants, or, in other words, that the plaintiff was bound by the terms of the contract of sale to make or tender to defendant a deed for the land before suit for the purchase money."

For Sufficient Averments of breach of a contract to lay a pavement and keep the same in repair, whereby the defendants "have been compelled to pay out * * * a large sum of money to repair the same, and place it in proper order and condition, a much larger sum" than that sued for, see *Louchheim v. Maguire*, 186 Pa. St. 311. For other averments of failure of consideration based on breach of contract other than warranty and held sufficient, see *Smith v. Capers*, 13 Ark. 9; *Atlanta City St. R. Co. v. American Car Co.*, (Ga. 1898) 29 S. E. Rep. 925; *Hill v. Enders*, 19 Ill. 163; *Gregory v. Scott*, 5 Ill. 392; *Gorham v. Reeves*, 1 Ind. 421; *Reagan v. Burton*, 67 Ind. 347; *Morehead v. Murray*, 31 Ind. 418; *Miller v. Gibbs*, 29 Ind. 228; *Burton v. Johnson*, 2 Ind. 339; *Bowles v. Newby*, 2 Blackf. (Ind.) 364; *Davis v. Clements*, 2 Blackf. (Ind.) 3; *Newcom v. Dubois*, 95 Iowa 194; *Burns v. Jordan*, 43 Minn. 25; *Chase v. Senn*, (C. Pl.) 13 N. Y. Supp. 266; *Lindon v. Beach*, 6 Hun (N. Y.) 200; *Reznor v. Supplee*, 81 Pa. St. 180. As to averments of breach of warranty, see *infra*, p.

More Indefiniteness in the answer is a defect which in code pleading must usually be taken by motion to make

more specific and cannot be reached by demurrer. See article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246; *Bushey v. Reynolds*, 31 Ark. 657, where the defendant, who was sued as surety on a note, answered that the sole consideration was an agreement by the plaintiffs to advance the sum of two thousand dollars to the principal, and that the plaintiffs had not advanced "said sum of two thousand dollars as they had agreed to do," etc. It was objected on general demurrer that there was no direct allegation of a contract to advance the money, nor any averment excluding the conclusion that part of the sum was advanced. The court held that the objection was not available on demurrer.

Broad Averment Sustained Against General Demurrer.—In *Ray v. Woolfolk*, 1 Smed. & M. (Miss.) 523, the plea alleged "that the note was given for a certain lot, and that the consideration had wholly failed for want of title in the vendor." On general demurrer the court said: "There is no doubt that the special plea is very informal, and would be necessarily decided to be bad, if the defects had been pointed out by the demurrer. It does not disclose enough to enable the court to determine whether the consideration has failed or not. It states no warranty of title, and, for aught that appears, the purchaser might have agreed to run the risk of the title. It is therefore defective. Yet, as the demurrer is equally general and indefinite, and does not point to any imperfection in the plea, we think it ought to have been overruled."

1. *Taylor v. Purcell*, 60 Ark. 606; *Witmer Bros. Co. v. Weid*, 108 Cal. 569; *Brevoort v. Hughes*, 10 Colo. App. 379; *Jones v. Streeter*, 8 Fla. 83; *Moore v. Prussing*, 165 Ill. 319; *Patterson v. Lord*, 47 Ind. 203; *Harrison v. Bryant*, 5 Ind. 160; *McCormick v. Barry*, 10 Neb. 207; *Castles v. Woodhouse*, 1 Code Rep. (N. Y. Super. Ct.) 71; *Davis v. Gray*, 17 Ohio St. 330; *Barnard v. Robertson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 697. See also *Herman v. Gray*, 79 Wis. 182; *Cairo, etc., R. Co. v. Delap*, 7 Ill. App. 60.

Thus, in *Davis v. Gray*, 17 Ohio St. 330, the answer alleged that the defendant gave the note in suit for certain patent fees upon the agreement of

directly resulting from the alleged breach.¹

Frame of Plea or Answer. — A plea or answer of failure of part of the consideration should not be framed as a bar to the whole cause of action, but only to such part.²

(b) **Breach of Warranty.** — A plea or answer of total or partial failure of consideration by reason of a breach of warranty of property purchased by the defendant should state the terms of the contract in proper form,³ specifically alleging a breach thereof⁴ to the damage of the defendant.⁵

If the defendant has an election to rescind the contract on account of a breach of warranty, he cannot have the benefit of a rescission so as to defeat the action *in toto* without alleging a return of the consideration received or an offer to return it,⁶

the plaintiff, the payee, to procure releases from parties whose patents were infringed or alleged to be infringed, that the defendant was threatened with suit by parties alleging infringement, and that the plaintiff refused to procure releases from those parties. A demurrer was sustained because there was "no allegation of suit, cost, loss, or damage against or to" the defendant.

In *Numbers v. Bowser*, 29 Ind. 491, the answer was held insufficient because it did not show that the defendant had suffered any damage by reason of alleged delay in the delivery of goods for the price of which the note in suit was given.

See generally, as to averment of breach of contract, article CONTRACTS, vol. 4, p. 913.

1. *McCormack v. Klingensmith*, 29 Ind. 296. See also *Lyman v. Campbell*, 34 Mo. App. 213.

2. *Billan v. Hercklebrath*, 23 Ind. 71; *McClintic v. Cory*, 22 Ind. 170; *Smith v. Baxter*, 13 Ind. 151; *Manly v. Hubbard*, 9 Ind. 230. See also *Christopher v. Cheney*, 64 Ill. 26; *Belden v. Church*, 23 Ill. App. 473; *Baldwin v. Banks*, 20 Ill. 48; *Henderson v. Farrelly*, 16 Ill. 137; *Wadhams v. Swan*, 109 Ill. 46; *Waller v. Bowles*, 10 Ky. L. Rep. 875. But compare *Rotan v. Nichols*, 22 Ark. 244.

A plea of partial failure to a certain extent is bad on demurrer if the facts stated show only a failure to a less extent. *Hall v. Marks*, 56 Ill. 125.

3. *Wilkins v. Jessup*, 8 Ind. 262; *Laforge v. Mathews*, 68 Ill. 328.

Variance. — An answer setting up the breach of a contract of general warranty is not supported by proof of a

limited warranty and a breach thereof. *Logan v. Holland*, 25 Tex. 398.

4. *Copeland v. Loan*, 10 Mo. 266; *Walter A. Wood Mowing, etc., Mach. Co. v. Irons*, 10 Ind. App. 454; *Brower v. Nellis*, 6 Ind. App. 323; *Lafayette Agricultural Works v. Phillips*, 47 Ind. 259. See also *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502; *Wilkins v. Jessup*, 8 Ind. 262; *Hall v. Marks*, 56 Ill. 125; *Furness v. Williams*, 11 Ill. 229.

As to the sufficiency of averments of breach of warranty, see generally article WARRANTY.

An Approved Precedent of an answer alleging breach of warranty of machinery which constituted the consideration of the note whereby the entire consideration failed, will be found in *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328, and also in *Dill v. O'Ferrell*, 45 Ind. 268. See also *Beers v. Williams*, 16 Ill. 69; *Morehead v. Murray*, 31 Ind. 418.

5. *Kern v. Saul*, 14 Ind. App. 72.

Thus, according to most authorities, where a defendant pleads breach of warranty of title to property, he shows no failure of consideration unless he alleges an eviction by a paramount title. *Randon v. Toby*, 11 How. (U. S.) 493; *Dawson v. Graham*, 43 Iowa 124; *McDermott v. Cable*, 23 Ark. 200; *Streeter v. Henley*, 1 Ind. 401; *Laforge v. Mathews*, 68 Ill. 328; *Vining v. Lee-man*, 45 Ill. 246. But see *Richardson v. McFadden*, 13 Tex. 278; *Cooper v. Singleton*, 19 Tex. 260; *Tarpley v. Poage*, 2 Tex. 139.

6. *Wynn v. Hiday*, 2 Blackf. (Ind.) 123. See also *Ware v. Houghton*, 41 Miss. 370.

Sufficiency of Averment of Offer. — An

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unless it is alleged to be of no value.¹ But under the doctrine of recoupment,² or by virtue of statutes of set-off or counterclaim³ the defendant may wholly defeat recovery if the damages are alleged to exceed the amount sued for.⁴

(e) **Fraud — In General.** — In pleading fraud the general rule is that the facts constituting the same must be alleged.⁵ Thus where false and fraudulent representations are charged in a plea or

answer alleging that the machine for which the note was given was utterly worthless for the purpose for which it was warranted, and that the defendant notified the plaintiff's agent of that fact and gave the latter an opportunity to repair it or take it back, shows a sufficient offer of return in the absence of a motion to make the answer more specific. *Aultman, etc., Co. v. Trainer*, 80 Iowa 451.

1. *Dill v. O'Ferrell*, 45 Ind. 268; *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328; *Palmer v. Wilks*, 17 Tex. 105, *distinguishing* *Jackson v. Marshall*, 6 Tex. 324. See also *Blood v. Northup*, 1 Kan. 28.

2. *Williams v. Miller*, 21 Ark. 469; *Wheelock v. Berkeley*, 138 Ill. 153; *Brown v. Reinholdt*, 41 Ill. App. 599; *Brantley v. Thomas*, 22 Tex. 270. See also *Underwood v. Wolf*, 131 Ill. 425; *Desha v. Robinson*, 17 Ark. 228.

3. **Election to Recoup or Counterclaim.** — In *Brower v. Nellis*, 6 Ind. App. 323, it was held that the defendant might at his election plead in recoupment and thus reduce or altogether defeat the plaintiff's recovery, or plead to damages as a counterclaim and recover judgment in his own favor, for the excess alleged and proved. See also *Springfield Engine, etc., Co. v. Kennedy*, 7 Ind. App. 502.

4. See cases cited in the last two notes.

5. *Alabama*. — *Bunzel v. Maas*, (Ala. 1897) 22 So. Rep. 568; *Carmelich v. Mims*, 88 Ala. 335; *Giles v. Williams*, 3 Ala. 316.

Arkansas. — *Keller v. Vowell*, 17 Ark. 445.

California. — *Gushee v. Leavitt*, 5 Cal. 160.

Illinois. — *Goodrich v. Reynolds*, 31 Ill. 490; *Sims v. Klein*, 1 Ill. 302; *Slack v. McLagan*, 15 Ill. 242.

Indiana. — *Howe Mach. Co. v. Brown*, 78 Ind. 209; *Norris v. Scott*, 6 Ind. App. 18; *Kain v. Rinker*, 1 Ind. App. 86; *Parker v. Morton*, 29 Ind. 89; *Swope v. Fair*, 18 Ind. 300; *Honeywell*

v. Helm, 19 Ind. 321; *Webster v. Parker*, 7 Ind. 185; *Richardson v. Hittle*, 31 Ind. 119.

Minnesota. — *Cummings v. Thompson*, 18 Minn. 246.

Mississippi. — *Tittle v. Bonner*, 53 Miss. 578.

New York. — *McMurray v. Gifford*, 5 How. Pr. (N. Y. Supreme Ct.) 14.

Texas. — *Williams v. Warnell*, 28 Tex. 610.

Utah. — *Voorhees v. Fisher*, 9 Utah 303.

Washington. — *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100.

Wisconsin. — *Gregory v. Hart*, 7 Wis. 532.

Contra. — According to the meagre reports of some early cases it seems to have been held that the consideration might be impeached by a general averment of fraud, covin, and misrepresentation. *Hildreth v. Tomlinson*, 2 Greene (Iowa) 360; *Strawser v. Johnson*, 2 Greene (Iowa) 373; *Hampton v. Pearce*, 1 Morr. (Iowa) 489; *Pemberton v. Staples*, 6 Mo. 59; *Montgomery v. Tipton*, 1 Mo. 446. And this is still the rule in *Missouri*, *Clough v. Holden*, 115 Mo. 336; *Edgell v. Sigerson*, 20 Mo. 494; and apparently in *Georgia*, *Steed v. Groves*, (Ga. 1898) 30 S. E. Rep. 626. For explanation and adverse criticism of the early cases above cited, see article FRAUD, vol. 9, pp. 692, 693, notes; *Giles v. Williams*, 3 Ala. 318.

In *Kentucky* a general averment that the instrument was obtained by fraud, covin, and misrepresentation, is sufficient. *Evans v. Stone*, 80 Ky. 78; *Sharp v. White*, 1 J. J. Marsh. (Ky.) 106; *Ross v. Braydon*, 2 Dana (Ky.) 161; *Whitehead v. Root*, 2 Metc. (Ky.) 584. But if the consideration is impeached for fraud, it seems that the facts must be stated. *Speak v. Warner*, 5 J. J. Marsh. (Ky.) 68. See also article FRAUD, vol. 9, p. 692, notes.

Approved Precedent of Plea. — For a sufficient averment of fraud whereby a partial failure of consideration resulted,

answer the representations should be clearly set forth ¹ with an allegation that they were false ² to the knowledge of the party making them, ³ that the defendant relied upon them as true, and was deceived thereby, ⁴ and suffered damages by reason thereof. ⁵

See the precedent in *Withers v. Greene*, 9 How. (U. S.) 213.

Name of Alleged Agent.—In *American Nat. Bank v. Cruger*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1057, the defendant alleged that the note was procured by certain fraudulent representations by an agent of the plaintiff. It was held on special demurrer that the answer was defective in failing to disclose the name of the alleged agent.

Failure of Plaintiff to Demur.—An answer alleging fraud, though in very broad and general terms, may be sufficient to admit proof in the absence of a special demurrer, or motion to make more specific. *Donaldson v. Cleburne First Nat. Bank*, (Tex. Civ. App. 1893) 22 S. W. Rep. 543.

1. *Catlin v. Horne*, 34 Ark. 169.

In *Wann v. M'Goon*, 3 Ill. 74, the court said: "The second plea is radically defective in not describing the real estate specially and certainly which, the plea charges, the plaintiff M'Goon represented himself the owner of. Its precise locality should have been given, so that the plaintiff might know certainly what lands he was charged with having misrepresented, and for the sale of which the note sued on is alleged to have been the consideration."

2. *Gage v. Lewis*, 68 Ill. 604; *Hays v. Ottawa, etc., R. Co.*, 61 Ill. 422; *Hall v. Marks*, 56 Ill. 125; *Howe Mach. Co. v. Brown*, 78 Ind. 209.

Representations Consisting of Legal Conclusions.—If the alleged representation was not a statement of fact, but of a legal conclusion from facts, it is not sufficient merely to aver that it was false; the facts upon which the falsity is predicated should be stated. *Cooper v. Hunter*, 8 Colo. App. 101, where an answer which set forth a representation by the plaintiff that he had a valid claim on public lands and then averred that the plaintiff had no valid claim was held insufficient, even if the misrepresentation was of such a character as to afford ground for relief. And for the same reason, in *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100, an answer alleging that representations that certain property was of great value

and desirably situated were false and fraudulent, without directly alleging wherein they were false, was held insufficient.

3. *Rice v. Van Ackere*, 22 Ill. App. 588; *Gage v. Lewis*, 68 Ill. 604; *Hays v. Ottawa, etc., R. Co.*, 61 Ill. 422; *Richards v. Betzer*, 53 Ill. 466; *Goodrich v. Reynolds*, 31 Ill. 490; *Shook v. Singer Mfg. Co.*, 61 Ind. 520. Compare *Thompson v. Varnin*, 4 J. J. Marsh. (Ky.) 254.

"It is customary to charge that the representations were falsely and fraudulently made." *Langsdale v. Girton*, 51 Ind. 99. See also *Kinney v. Osborne*, 14 Cal. 112; *Budd v. Power*, 8 Mont. 380, the latter case holding that an answer which averred that certain representations by the plaintiff were false, and that he falsely represented certain facts, was insufficient as a charge of fraud or deceit.

4. *Kannady v. Lambert*, 37 Ala. 57; *Farmers', etc., Bank v. Richards*, (Cal. 1898) 53 Pac. Rep. 439, holding that the answer must show by proper allegations the relation of cause and effect between the alleged false representations and the execution of the contract by the defendant; *Dennis v. Piper*, 21 Ill. App. 169; *Wisdom v. Becker*, 52 Ill. 342; *Howe Mach. Co. v. Brown*, 78 Ind. 209; *Shook v. Singer Mfg. Co.*, 61 Ind. 520; *Kain v. Rinker*, 1 Ind. App. 86; *Saxton v. Dodge*, 57 Barb. (N. Y.) 84; *Luckie v. McGlasson*, 22 Tex. 282; *Clifton v. Brundage*, 25 Tex. 331; *Voorhees v. Fisher*, 9 Utah 303. See also *Kernodle v. Hunt*, 4 Blackf. (Ind.) 57.

5. *Kinney v. Osborne*, 14 Cal. 112; *Wisdom v. Becker*, 52 Ill. 342; *McCormack v. Klingensmith*, 29 Ind. 296; *McClerkin v. Sutton*, 29 Ind. 407; *Kain v. Rinker*, 1 Ind. App. 86; *Parker v. Jewett*, 52 Minn. 514; *Kilbourn v. Pacific Bank*, 11 Wis. 230.

Sufficiency of Averment.—In *Jones v. Streeter*, 8 Fla. 83, the plea alleged that "the said promissory note was signed and delivered by defendant to plaintiff for and in consideration of a buggy, which the plaintiff fraudulently represented to the defendant [to be] whole and sound, and the defendant in fact says that said buggy

Rescission or Offer to Rescind. — Where the defendant seeks to defeat the plaintiff's claim *in toto*, by way of rescission of the contract, the plea or answer must aver that the defendant returned or tendered back the consideration received.¹ This averment is unnecessary, however, where it is alleged that the consideration is worthless,² or where fraud is pleaded only in mitigation of damages under the doctrine of recoupment.³

d. IN ACTIONS ON SEALED INSTRUMENTS. — At common law, neither want of consideration or failure of consideration,⁴ nor fraud in the consideration,⁵ was admissible as a defense under

at the time of said sale was badly broken and wholly unfit for use, and this he is ready to verify," etc. The court said: "The plea in this case was evidently intended to raise the defense of a 'failure of consideration,' but the facts stated therein (even if they would amount to a defense) are so defectively set out that we think the court was right in sustaining the demurrer. It is true that the plea alleges that the note was given for the buggy, and that the buggy was badly broken and unfit for use at the time of the sale and purchase, but *non constat* that the defendant had not received a benefit from the purchase and indeed full value for the note given by him. By his own showing the plaintiff had been enabled to sell the buggy to him, notwithstanding its dilapidated condition and unfitness for use, and there is nothing in the plea to negative the idea that he had not been equally fortunate in disposing of it for a sound price. The plea should have alleged expressly the failure or (under our statute) the partial failure of the consideration for which the note was given, in order to constitute it a good plea. It is defective for the want of certainty."

Specific Amount of Damages. — In *Herman v. Gray*, 79 Wis. 182, it was held that a partial failure of consideration on account of false and fraudulent representations is not sufficiently pleaded, unless the amount of damages resulting therefrom is alleged.

1. *Willis v. Halliburton*, 25 Ark. 173; *Desha v. Robinson*, 17 Ark. 228; *Rose v. Hurley*, 39 Ind. 77; *Wynn v. Hiday*, 2 Blackf. (Ind.) 123; *Burns v. Barnes*, 58 Ind. 436; *Long v. Johnson*, 15 Ind. App. 498; *Donahue v. Prosser*, 10 Iowa 276; *Rogers v. McKnight*, 4 J. J. Marsh. (Ky.) 154; *Speak v. Warner*, 5 J. J. Marsh. (Ky.) 68; *Montgomery v. Tipton*, 1 Mo. 446; *McCormick v.*

Barry, 10 Neb. 207; *Herman v. Gray*, 79 Wis. 182; *Elminger v. Drew*, 4 McLean (U. S.) 394. See also *Knight v. Turner*, 11 Ala. 636; *Collins v. Townsend*, 58 Cal. 608; *Tissot v. Throckmorton*, 6 Cal. 471; *Fitz v. Bynum*, 55 Cal. 459; *Gillespie v. Torrance*, 25 N. Y. 306; *Lemmon v. Hanley*, 28 Tex. 219; *Williams v. Warnell*, 28 Tex. 610.

2. *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521; *Citizens' Bank v. Leonhart*, 126 Ind. 206; *Wynn v. Hiday*, 2 Blackf. (Ind.) 123; *Rogers v. McKnight*, 4 J. J. Marsh. (Ky.) 154. See also *O'Neal v. Phillips*, 83 Ga. 556.

Insufficient Averment of Worthlessness. — An averment that the note sued on was given in consideration of a clock which was sold by the plaintiff to the defendant and fraudulently represented to be a good timepiece, but was of no value "as a timepiece," was held insufficient to excuse the absence of an averment that the defendant offered within a reasonable time to return the clock. *Speak v. Warner*, 5 J. J. Marsh. (Ky.) 68.

3. *Withers v. Greene*, 9 How. (U. S.) 213; *Harrington v. Stratton*, 22 Pick. (Mass.) 510.

4. *Davis v. Clements*, 2 Blackf. (Ind.) 5; *Leonard v. Bates*, 1 Blackf. (Ind.) 171; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Vrooman v. Phelps*, 2 Johns. (N. Y.) 177; *Fay v. Richards*, 21 Wend. (N. Y.) 626; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430. See also *Schuchmann v. Knoebel*, 27 Ill. 175.

5. *Wyche v. Macklin*, 2 Rand. (Va.) 426; *Greathouse v. Dunlap*, 3 McLean (U. S.) 303; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430; *Vrooman v. Phelps*, 2 Johns. (N. Y.) 177. Covenant on a sealed obligation, the alleged defense being a false and fraudulent warranty. *Gage v. Lewis*, 68 Ill. 604; *Woolson v.*

any form of pleading in an action on a specialty.¹

By Statute in Many States the consideration of a sealed instrument may be impeached as if it were unsealed,² and the requisites of the plea or answer are the same in both cases.³

4. Averments of Notice of Defense, Bad Faith, or Taking After Maturity. — The general rule is that absence of consideration or a failure of consideration is available as a defense in a suit by an assignee of the instrument only by specially pleading the same⁴ and showing by additional allegations why the instrument is subject in his hands to the defense,⁵ as for instance, that the

Shirley, 6 Dana (Ky.) 309; Holley v. Younge, 27 Ala. 203.

1. See article BONDS, vol. 3, pp. 665, 666.

2. For cases on sealed obligations for the payment of money decided under such statutes, see *Giles v. Williams*, 3 Ala. 316; *Withers v. Greene*, 9 How. (U. S.) 213, a case governed by the Alabama statute; *Dickson v. Burk*, 6 Ark. 412; *Schuchmann v. Knoebel*, 27 Ill. 175; *Gage v. Lewis*, 68 Ill. 604; *Wynn v. Hiday*, 2 Blackf. (Ind.) 123; *Tucker v. Tipton*, 4 Blackf. (Ind.) 529; *Davis v. Clements*, 2 Blackf. (Ind.) 3; *Leonard v. Bates*, 1 Blackf. (Ind.) 171; *Ralston v. Bullitts*, 3 Bibb (Ky.) 261; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Fay v. Richards*, 21 Wend. (N. Y.) 626; *Case v. Boughton*, 11 Wend. (N. Y.) 106.

3. See cases cited, *supra*.

4. **The Want or Failure of Consideration**, arising out of fraud or otherwise, must be shown by averments of the same character as would be necessary in an action between the original parties. See *Morehouse v. Fowler*, 69 Ill. App. 50; *Ebersole v. Morrison First Nat. Bank*, 36 Ill. App. 267; *Belden v. Church*, 23 Ill. App. 473; *Rice v. Van Ackere*, 22 Ill. App. 588; *Scott v. Cantrell*, 26 Ark. 226; *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100; *Gregory v. Hart*, 7 Wis. 532. For the requisites and sufficiency of averments of want or failure of consideration, see *supra*, p. 606.

Under the General Issue. — In the few jurisdictions where the defendant in an action between the original parties to the instrument is at liberty to prove want or failure of consideration under the general issue, or where, in other words, the general issue is substantially as broad as at common law (see *supra*, p. 632), he may likewise adduce proof of those defenses or of other defenses

which he could have made in a suit by the payee, under the general issue in an action by an indorsee, together with proof that the plaintiff took the instrument with notice of the defense or subject thereto. *Banks v. McCosker*, 82 Md. 518; *Herrick v. Swomley*, 56 Md. 456; *Limerick Nat. Bank v. Adams*, (Vt. 1898) 40 Atl. Rep. 166. See also *Clough v. Patrick*, 37 Vt. 421; *Riddle v. Gage*, 37 N. H. 519; *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Knapp v. Lee*, 3 Pick. (Mass.) 452. There is a similar intimation in *Early v. McCart*, 2 Dana (Ky.) 414, but in that case, as well as in *Banks v. McCosker*, 82 Md. 518, above cited, it was held that if the defendant specially pleads the facts constituting the defense he must also allege the facts showing that the defense is available against the plaintiff.

5. The following cases are cited to the proposition that the plea or answer must state facts which show that by the law merchant the plaintiff is not entitled to protection from the defense alleged. The cases are classified according to the nature of the defense set up in the plea or answer. But this is simply for the convenience of the practitioner, as the cases cited in this list do not recognize the distinction adopted in the *Indiana* case quoted *infra*, p. 644, note 4.

Want or Failure of Consideration in General — Arkansas — *Reynolds v. Roth*, 61 Ark. 317.

Colorado. — *Rand v. Pantagraph Stationery Co.*, 1 Colo. App. 270, holding that for want of such averment the defense of failure of consideration should be stricken out of the answer; *Parkison v. Boddiker*, 10 Colo. 503.

Florida. — *Hancock v. Hale*, 17 Fla. 808.

Georgia. — See *Montgomery v. Hunt*, 93 Ga. 438.

Illinois. — *Warman v. Akron First*

Nat. Bank, 70 Ill. App. 181; Mitchell v. Deeds, 49 Ill. 416; Harlow v. Boswell, 15 Ill. 56; Cassell v. Morrison, 8 Ill. App. 175.

Indiana. — Glover v. Jennings, 6 Blackf. (Ind.) 10; Coffing v. Hardy, 86 Ind. 369; Woollen v. Vankirk, 61 Ind. 497; Hubler v. Pullen, 12 Ind. 567; Hunter v. McLaughlin, 43 Ind. 38. See also Scotten v. Randolph, 96 Ind. 581; Hankins v. Shoup, 2 Ind. 342; Voris v. Harshbarger, 11 Ind. App. 555; Mitchell v. Tomlinson, 91 Ind. 167. And as to the important distinction drawn in a late Indiana case, see *infra*, p. 644, note 4.

Kansas. — Bradbury v. Van Pelt, 4 Kan. App. 571.

Kentucky. — Early v. McCart, 2 Dana (Ky.) 414.

Louisiana. — Parker v. Raynal, 1 La. Ann. 209.

Mississippi. — See Sturdivant v. Memphis Nat. Bank, 60 Fed. Rep. 730, on error to the United States Circuit Court for the Northern District of Mississippi.

Nebraska. — See Haggerty v. Walker, 21 Neb. 596.

New York. — See Davis v. McCready, 17 N. Y. 230; Oppen v. Caillon, 9 Daly (N. Y.) 157; Lindon v. Beach, 6 Hun (N. Y.) 200; National Bank of North America v. White, 19 N. Y. App. Div. 390; Albany County Bank v. Rider, 74 Hun (N. Y.) 349; Sawyer v. Chambers, 44 Barb. (N. Y.) 45; Saxton v. Dodge, 57 Barb. (N. Y.) 84.

Pennsylvania. — Kraft v. Gingrich, 12 Pa. Co. Ct. Rep. 604. See also Hays v. Kingston, (Pa. 1889) 16 Atl. Rep. 745, 23 W. N. C. (Pa.) 277; Woods v. Vankirk, 17 Pa. Co. Ct. Rep. 158, 5 Pa. Dist. Rep. 135; Newbold v. Bernard, 15 Pa. Co. Ct. Rep. 118; Chestnut St. Nat. Bank v. Ellis, 161 Pa. St. 241; Superior Nat. Bank v. Stadelman, 153 Pa. St. 634; Devlin v. Burns, 147 Pa. St. 168; Reznor v. Supplee, 81 Pa. St. 180; Woods v. Watkins, 40 Pa. St. 458.

Texas. — Smith v. Traders' Nat. Bank, 74 Tex. 541; Gee v. Saunders, 66 Tex. 333. See also Malsch v. Heller, (Tex. Civ. App. 1896) 37 S. W. Rep. 384.

Wisconsin. — Gregory v. Hart, 7 Wis. 532; Peterson v. Johnson, 22 Wis. 21.

United States. — Elming v. Drew, 4 McLean (U. S.) 396.

Fraud in the Consideration — *Florida*. — Hancock v. Hale, 17 Fla. 808. See also Livingston v. Roberts, 18 Fla. 70; Prescott v. Johnson, 8 Fla. 391.

Georgia. — See Steed v. Groves, (Ga.

1898) 30 S. E. Rep. 626; Ball v. Powers, 62 Ga. 757.

Illinois. — Bemis v. Horner, 44 Ill. App. 317 (reversed on another ground in 145 Ill. 567, but apparently affirmed on this point); Ebersole v. Morrison First Nat. Bank, 36 Ill. App. 267; Gridley v. Bane, 57 Ill. 529; Young v. Ward, 21 Ill. 283; Goodrich v. Reynolds, 31 Ill. 490.

Iowa. — Lane v. Krekle, 22 Iowa 399; Stein v. Keeler, 4 Greene (Iowa) 86. See also Bennett State Bank v. Schloesser, 101 Iowa 571.

Kentucky. — Early v. McCart, 2 Dana (Ky.) 414.

Minnesota. — See Cummings v. Thompson, 18 Minn. 246.

Missouri. — See Clough v. Holden, 115 Mo. 336; Mechanics' Bank v. Fowler, 36 Mo. 33.

Nebraska. — See Crosby v. Ritchey, 47 Neb. 924.

Ohio. — Wisenogle v. Powers, 1 Cleve. L. Rep. (Ohio) 141.

Pennsylvania. — Clarion Second Nat. Bank v. Morgan, 165 Pa. St. 199; Albiert v. Mellon, 37 Pa. St. 367. See also Keller v. Downey, 14 Lanc. L. Rev. (Pa.) 117; Lingg v. Blummer, 88 Pa. St. 518; Hoffman v. Foster, 43 Pa. St. 137; Boomer v. Henry, 13 Pa. Co. Ct. Rep. 104; Erie Boat, etc., Co. v. Eichenlaub, 127 Pa. St. 164. *Contra*, Smith v. Popular Loan, etc., Assoc., 93 Pa. St. 19; Tradesmen's Nat. Bank v. Bacheneheimer, 5 Pa. Dist. Rep. 218; Gittings v. Loper, 84 Fed. Rep. 102, decided in the United States Circuit Court for the Eastern District of Pennsylvania. See also Gere v. Unger, 125 Pa. St. 644.

Utah. — Voorhees v. Fisher, 9 Utah 303.

Wisconsin. — Gregory v. Hart, 7 Wis. 532.

United States. — McClintick v. Johnston, 1 McLean (U. S.) 414.

England. — Harvey v. Towers, 6 Exch. 656; Bramah v. Roberts, 1 Bing. N. Cas. 469, 27 E. C. L. 460; Lewis v. Reilly, 1 Q. B. 349, 41 E. C. L. 572.

Question First Mooted by the Plaintiff. — In Ball v. Powers, 62 Ga. 757, the court held that while correct pleading requires the defendant to allege in his plea the facts necessary to make the defense good against the plaintiff, yet if the plea omits such averments and the plaintiff introduces evidence to prove that he is a *bona fide* holder for value, etc., the defendant may properly offer evidence to the contrary and

assignee is a holder with notice,¹ or in bad faith,² or without

the court may charge the jury on the subject. To substantially the same point, see *Huff v. Wagner*, 63 Barb. (N. Y.) 215.

Joint Payee Suing as Assignee.—Where the several payees of a note indorse the same to one of their number who sues the maker, the answer setting up a want of consideration need not aver notice or knowledge in the plaintiff, as his suit is to be regarded precisely as if he had brought it in the capacity of payee of the note. *Saxton v. Dodge*, 57 Barb. (N. Y.) 84.

In Alabama, if the declaration does not allege that the plaintiff is a purchaser for value before maturity and without notice of equities or defenses—and regularly by the practice in that state, such averment should not be made in the declaration—a plea impeaching the consideration for fraud or otherwise or alleging a failure of the consideration need not also allege that the plaintiff had notice of the defense or that his right to recover is for other reasons subject thereto. In order to invoke protection of the law merchant the plaintiff must present the necessary facts in a special replication to the plea; a general replication will not do. *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157; *Alabama Nat. Bank v. Halsey*, 109 Ala. 196; *Trammell v. Hudmon*, 56 Ala. 235. See also *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611.

In North Carolina if the complaint avers that the plaintiff took the instrument for value before maturity, and that allegation is admitted or not properly denied, it becomes necessary for the defendant to allege and prove that the plaintiff had notice of the alleged defense against the payee or immediate party from whom the plaintiff acquired title; but if the complaint does not allege that the plaintiff was a holder for value before maturity the defendant is relieved of the necessity of alleging notice of the defense set up in his answer, and the question is to be determined by evidence on the trial. *Campbell v. Patton*, 113 N. Car. 481. In that case the answer alleged fraudulent representations by the payee, but the practice seems to be the same where the defense is not based upon fraud. See *Wiggins v. Kirkpatrick*, 114 N. Car. 298.

1. Date of Alleged Notice.—A plea setting up the facts showing a defense between the original parties and averring generally that the plaintiff had notice of the premises, but failing to state that he had such notice at or before the time when the note was assigned to him, is demurrable. *Bemis v. Horner*, 44 Ill. App. 317, *reversed* in 145 Ill. 567, but only because the trial court erroneously struck out the plea on account of certain irregularities in filing it.

Notice of Failure of Consideration.—In a suit by an assignee against the acceptor of a bill of exchange the latter answered that the bill was given in consideration of goods warranted to be of a certain quality, that they were not of the quality warranted, and that the plaintiffs were agents of the payees and knew the consideration of the bill. The answer was held bad on demurrer for failing to allege that the plaintiff had notice of the breach as well as of the warranty. *Hubler v. Pullen*, 12 Ind. 567. To the same point see *Davis v. McCready*, 17 N. Y. 230; *American Boiler Co. v. Foutham*, (Supreme Ct.) 50 N. Y. Supp. 351.

2. General Averment of Mala Fides.—In *Uther v. Rich*, 10 Ad. & El. 784, 37 E. C. L. 232, which was an action by an indorsee against the drawer of a bill of exchange, payable to the order of the drawer and indorsed by him, the plea alleged that the note was drawn and indorsed by the defendant to a third party for a special purpose, who, in fraud of that purpose, had handed it to another, who in turn indorsed it to the plaintiff, and that "the plaintiff was not at any time, nor now is, a *bona fide* holder of the said bill of exchange for value or consideration in that behalf given." The replication was *de injuria*, and it was held that nothing was put in issue by these pleadings but the fact of a consideration having been given, and that the defendant was not at liberty to show that the plaintiff knew of the fraud. *Denman, C. J.*, said: "The only proper mode of implicating the plaintiff in the alleged fraud by pleading is to aver that he had notice of it, leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence; and we cannot treat the allegation that the

value,¹ or after maturity,² or derived title from one who was affected by the alleged infirmity.³ In *Indiana* a distinction is drawn between cases in which an instrument is obtained by fraud and those in which there is a want or failure of consideration; in the former it is unnecessary to allege that the plaintiff had notice of the defense.⁴ In *Vermont* no allegation connecting the plaintiff

plaintiff was not a *bona fide* holder as equivalent to such an averment." The case was followed in *Voorhees v. Fisher*, 9 Utah 303, holding that an answer alleging that the "plaintiff is not an innocent holder for value of said note," is insufficient as a charge of *mala fides* in the absence of a distinct allegation of the facts constituting bad faith. See also *Clarion Second Nat. Bank v. Morgan*, 165 Pa. St. 199. But compare *Sturges v. Metropolitan Nat. Bank*, 49 Ill. 228.

1. **Variance.**—A plea alleging a failure of consideration and that the plaintiff took the instrument with notice thereof or after maturity will not admit proof that he was not a holder for value. *Warman v. Akron First Nat. Bank*, 70 Ill. App. 181.

2. **Sufficiency of Averment.**—In an action by an indorsee against the maker of a note the answer averred that the note "was received coupled with and subject to all equities between this defendant and [the payee]," and then proceeded to set up a counterclaim for partial failure of the consideration of the note. The court held that the answer was sufficient and that fairly interpreted it was a denial of the assignment of the note for value and before maturity. *Wiggins v. Kirkpatrick*, 114 N. Car. 298.

3. Thus in *Rice v. Van Ackere*, 22 Ill. App. 588, the maker of a note was sued by a holder who acquired title from one to whom the payee had transferred it. The defendant set up fraudulent representations by the payee and alleged that the plaintiff had notice thereof and acquired title after maturity and without consideration. These averments were held insufficient because it did not appear but that the plaintiff's transferrer was an innocent holder for value before maturity, in which case, according to well-settled principles, the plaintiff's title would be unaffected by either of the circumstances alleged as a defense. See also *Superior Nat. Bank v. Stadelman*, 153 Pa. St. 634.

Compare *Erie Boat, etc., Co. v. Eichenlaub*, 127 Pa. St. 164.

On the other hand, where a plea avers that the holder of the note prior to the plaintiff was cognizant of the alleged failure of consideration it is not sufficient without also charging that the plaintiff received the note with notice, or under suspicious circumstances; nor can the defendant under such a pleading be allowed to prove that the plaintiff had notice. *Parker v. Raynal*, 1 La. Ann. 209.

4. *Huntington First Nat. Bank v. Ruhl*, 122 Ind. 279, where the court said: "In the case of *Giberson v. Jolley*, 120 Ind. 301, we collected and examined our own decisions and declared that it is, and long has been, the rule in this state that where a note is shown to have been obtained by fraud, it devolves upon the holder to show that he is a good faith purchaser in all that the term implies. It has certainly been the rule since the decision in the case of *Harbison v. State Bank*, 28 Ind. 133. It is not necessary to again discuss the question, but we may, without impropriety, say that we are convinced that our rule is a just and salutary one. * * * It seems to follow, necessarily and directly, that if the answer shows that the note was obtained by fraud it states a *prima facie* defense, sufficient to require a reply from the plaintiff. It is quite difficult to conceive how it can be otherwise when, as the cases generally declare, the fact that the note was obtained by fraud casts the burden upon the holder. The rule we have stated should prevail in all cases where the answer shows that the note originated in fraud, and there is nothing in the decisions in *Hunter v. McLaughlin*, 43 Ind. 38, and *Glenn v. Porter*, 49 Ind. 500, which opposes this conclusion. What was said in the opinions in those cases, so far as it is relevant to the point here directly involved, was said generally and in respect to answers pleading simply a want of considera-

with the alleged defense against the original party is necessary in any case.¹

5. Illegality in Consideration—*a. NECESSITY OF SPECIALLY PLEADING.*—At Common Law illegality in the consideration could be proved under the general issue of *non assumpsit*,² but not

tion. The decision in *Woollen v. Vankirk*, 61 Ind. 497, does to some extent oppose the conclusion we have stated, but it is evident that in that case the court fell into error by confusing the cases which hold that a plea of want of consideration is not good unless it avers notice, with those which plead fraud in securing the note. None of the cases cited by the court in its opinion sustain the ruling made in that case, for in none of them was the question presented. It is somewhat difficult to determine just what point controlled the decision in *Maxwell v. Morehart*, 66 Ind. 301, but, however this may be, we do not think it can be regarded as an authority in favor of the appellant's contention that an answer showing that a note was obtained by fraud is not sufficient unless it alleges that the plaintiff had notice of the fraud when he purchased the note. We hold that the paragraphs of the answer which allege facts showing that the note was obtained by fraud are sufficient. There is, however, at least one paragraph of the answer which is clearly bad, and that is the paragraph which pleads want of consideration. This paragraph is bad because it does not aver that the plaintiff was not a purchaser for value and in good faith. The authorities discriminate between cases in which a note is obtained by fraud and those in which there is a want or total failure of consideration. There is reason for this distinction. It often happens that one man executes a note without consideration for the accommodation of another, and no one would think of declaring that it would not be valid in the hands of one who paid value for it before maturity, although he may have known that it was executed without consideration. *Hinkley v. St. Louis Fourth Nat. Bank*, 77 Ind. 475." The opinion from which the foregoing quotation is taken fails to notice the contrary cases of *Ruddell v. Fhalor*, 72 Ind. 533, and *Glover v. Jennings*, 6 Blackf. (Ind.) 10, in which latter case the court said: "Take for example the plea that the note was obtained from

the makers by fraud, covin, and misrepresentation. That would be good were the suit brought by the payee, but it is insufficient where, as in this case, an indorsee is the plaintiff. *Bramah v. Roberts*, 1 Bing. N. Cas. 469, 27 E. C. L. 460. The plea should have gone further and shown that the indorsee was in privity with the payee, and the suit thus subject to the same equities attached on the note to which the payee's suit would have been liable. That could only appear by showing that the indorsement was made without consideration, or with notice of the fraud, or after the note became due." In *Bemis v. Horner*, 44 Ill. App. 317, affirmed on this point in 145 Ill. 567, the present doctrine in *Indiana* was thus condemned: "Though proof of fraud, illegality, etc., in the making or original circulation of a note will cast upon the holder the burden of showing that he is such for value, etc., yet this is a rule of evidence only, and not of pleading, as the Supreme Court of Indiana regarded it in *Huntington First Nat. Bank v. Ruhl*, 122 Ind. 279." Other cases which deny that the rule of evidence governs the rule of pleading are *Harvey v. Towers*, 6 Exch. 656; *Lane v. Krekle*, 22 Iowa 399.

1. *Limerick Nat. Bank v. Adams*, (Vt. 1898) 40 Atl. Rep. 166.

2. Gould Pl., c. 6, § 47; *Shippey v. Eastwood*, 9 Ala. 200; *Robinson v. Howard*, 7 Cush. (Mass.) 611, note; *Dixie v. Abbott*, 7 Cush. (Mass.) 610. See *McKyring v. Bull*, 16 N. Y. 297; and article CONTRACTS, vol. 4, p. 952, where it is also shown that the doctrine was abrogated in England by the Hilary Rules which are there quoted; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261. In connection with the case last cited, see the comments in the opinion written by Hon. T. W. Dwight as referee in *Marie v. Garrison*, 13 Abb. N. Cas. (N. Y. Super. Ct.) 388, note.

In *Shippey v. Eastwood*, 9 Ala. 200, it was held that illegality making the note absolutely void by statute may be shown under the general issue, but

under the plea of *non est factum* in an action on a sealed obligation,¹ unless the objection appeared upon the face of the instrument.²

By Statute, in some of the United States illegality must be set up by special plea or by specification of defense under the general issue.³

In Code Pleading the defense of illegality is deemed to be new matter which must be specially pleaded and cannot be proved under a general denial,⁴ nor under an answer setting up want of consideration,⁵ or failure of consideration,⁶ where the illegality does not appear on the face of the complaint, or necessarily from the plaintiff's evidence.⁷

b. SUFFICIENCY OF AVERMENT. — A plea or answer setting up illegality of consideration must fully and clearly allege all the facts which entered into the consideration and rendered the same illegal.⁸ It need not be stated in addition to an allegation of

that if the illegality makes it merely voidable "then perhaps it might be necessary to plead the statute specially."

Consideration in Violation of Foreign Statute. — In *Roop v. Delahaye*, 2 Colo. 307, decided in 1874, and evidently upon common-law principles — for the court remarked that the defense of illegality may ordinarily be shown under the general issue — it was held that if the defendant in a suit wherein the plaintiff declares specially on a promissory note would avoid the contract as in contravention of the law of another state, "he ought to plead specially the fact that the contract was made abroad, and show the law of the foreign jurisdiction."

1. In such an action the defense must be specially pleaded. *Greathouse v. Dunlap*, 3 McLean (U. S.) 303; *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473; *Morton v. Fletcher*, 2 A. K. Marsh. (Ky.) 137, holding that the rule applies even where the illegality renders the instrument not only voidable but absolutely void. See also *Colton v. Goodridge*, 2 W. Bl. 1108; *Sharon v. Sharon* 68 Cal. 29.

Compounding Felony. — That the instrument was given to compound a felony, is a defense which must be specially pleaded. *Harmer v. Rowe*, 2 Chit. Rep. 334, 18 E. C. L. 358; *sub nom.* *Harmer v. Wright*, 2 Stark. 35, 3 E. C. L. 306.

2. Illegality in the consideration may be taken advantage of by general demurrer, in arrest of judgment, or by writ of error, where the objection ap-

pears upon the face of the instrument. *Greathouse v. Dunlap*, 3 McLean (U. S.) 316.

3. *Bradford v. Tinkham*, 6 Gray (Mass.) 494, and *Chenery v. Barker*, 12 Gray (Mass.) 345, where the illegality consisted in the sale of liquor in violation of law; *Johnson v. Ballingall*, 1 Ga. 68. See also *Butman v. Forshay*, 21 La. Ann. 165; and article CONTRACTS, vol. 4, p. 953.

4. *Dillon v. Darst*, 48 Neb. 803; *May v. Burras*, 13 Abb. N. Cas. (N. Y. City Ct.) 384; *Boswell v. Welshoefer*, 9 Daly (N. Y.) 196; *Marie v. Garrison*, 13 Abb. N. Cas. (N. Y. Super. Ct.) 388, note [*commenting upon* *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261]; *Durham Fertilizer Co. v. Pagett*, 39 S. Car. 69. See also *Milbank v. Jones*, 127 N. Y. 370; and article ANSWERS IN CODE PLEADING, vol. 1, p. 844.

5. *May v. Burras*, 13 Abb. N. Cas. (N. Y. City Ct.) 384, an action against the drawer of a check, the defendant seeking to prove that it was given in settlement of a gaming transaction. *Lyts v. Keevey*, 5 Wash. 606.

6. *Durham Fertilizer Co. v. Pagett*, 39 S. Car. 69.

7. For cases recognizing the qualification indicated by the last clause of the text, see *Sharon v. Sharon*, 68 Cal. 29; *Milbank v. Jones*, 127 N. Y. 375; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

8. *Fisher v. Fisher*, 113 Ind. 474; *Kain v. Rinker*, 1 Ind. App. 86. See also *Coyle v. Fowler*, 3 J. J. Marsh. (Ky.) 473.

facts showing the consideration to be in violation of a statute

Gaming and Swindling — "**Bohemian Oats**. — In *Kain v. Rinker*, 1 Ind. App. 86, the note was given for "Bohemian" oats with a collateral contract by the payee, and the answer was held insufficient because it merely characterized the transaction as based upon a gaming and swindling consideration without showing it to be such by any allegation of matter of fact, and without alleging that any of the acts or promises of the parties was made dependent upon any uncertain act or event. See also *Ebersole v. Morrison* First Nat. Bank, 36 Ill. App. 267.

Gambling in Futures. — In *Fisher v. Fisher*, 113 Ind. 474, a demurrer was sustained to an answer which alleged "that the only consideration for such note was the payment of margins on wheat that had never been delivered to defendant by plaintiff or by any one for him." The court said: "For aught that was alleged to the contrary in the second paragraph of answer, it might well have been that the wheat therein mentioned, upon which the 'margins' were paid for which the note in suit was given, was to be, and was in fact, delivered to some third person at defendant's request; or that, if such wheat was to be delivered to defendant, he had prevented such delivery thereof by his refusal to receive such wheat; or that the wheat 'had never been delivered to defendant by plaintiff' because the time for such delivery had not yet arrived. In *Whitesides v. Hunt*, 97 Ind. 191, after an exhaustive examination of the question which defendant intended and attempted to present by the second paragraph of his answer herein, it was held, substantially, that where any commodity is bought for future delivery, without regard to the form of the contract, if the parties mutually understand and intend that the purchaser shall pay for, and the seller shall deliver, the commodity sold at the maturity of the contract, the transaction is legal and valid; and the fact that the purchaser is required to deposit a margin, and to increase the same at any time the market may require it, to secure the payment of the purchase price at maturity, or that the seller shall deposit a margin, and increase the same like the purchaser, to secure the delivery of the commodity sold at

maturity, does not, and will not, vitiate such contract."

Settlement of Criminal Prosecution — Compounding Felony. — In *Graham v. Marks*, 98 Ga. 67, the plea by a surety attempted to allege that the note was given in settlement of a criminal prosecution, and it was held bad on demurrer for failure to allege that the principal had committed any offense and for omitting the averment of any facts from which the court could determine that he was being prosecuted or the nature of the offense charged against him. See, however, *Howk v. Eckert*, 4 Thomp. & C. (N. Y.) 300, where the answer alleged in very general terms that the note was obtained under menace of a prosecution for felony, but on appeal from a judgment in favor of the defendant the answer was considered as amended to conform to the proof which established the defense. As to the propriety of such amendments in support of a judgment see generally article AMENDMENTS, vol. 1, pp. 578, 582.

For an answer sufficiently showing that the note was given in consideration of the dismissal of a pending criminal prosecution see *Collier v. Waugh*, 64 Ind. 456; and for another answer held sufficient to show that the note was based upon an agreement to stifle a criminal prosecution although it did not positively allege that the party had actually committed the crime, see *Welborn v. Norwood*, 1 Tex. Civ. App. 614.

An answer does not show a compounding of a felony where it denies that any felony was in fact committed and shows that no prosecution for one was pending. *Catlin v. Henton*, 9 Wis. 476.

Election Wager. — Under a statute making void all notes for the repayment of money lent to be wagered where the money is so lent "at the time of such wager" an answer alleging that the consideration of the note was money given for the purpose of betting on an election does not aver sufficient facts to constitute a defense unless it clearly shows that the loan was contemporaneous with the wager. *Ensley v. Patterson*, 19 Ind. 95.

An answer alleging that the note was given upon an election wager should state "what election, between

that the instrument was executed in the state where the action

whom it was pending, and the particulars of the transaction." *Sybert v. Jones*, 19 Mo. 86, where the answer held insufficient alleged that the note was given as a bet on the August election, 1852, for state and county officers, authorized by the constitution and laws of the state of Missouri.

Violation of Liquor Law.— Illegality consisting in the sale of spirituous liquor without a license is not shown by an answer merely alleging a sale of spirituous liquor and negating a license. *Johnson v. Meeker*, 1 Wis. 436.

Variance.— Descriptive averments of essential facts must be proved as alleged. On this principle it was held that an answer alleging that the note was given for intoxicating liquors sold by the plaintiff to the defendant in violation of law was not supported by evidence of such sales by a third party to the defendant and an assignment of accounts therefor to the plaintiff which constituted the consideration of the note. *Hurlbut v. Bagley*, 99 Iowa 127.

Violation of Sunday Law.— An answer alleging that the note was given for goods sold on Sunday negating the existence of any of the facts or conditions which would withdraw it from the operation of the statute interdicting "all contracts made on Sunday, unless," etc., was held sufficient without showing that the sale was also offensive to another section of the statute which made the sale of goods an indictable misdemeanor. *Wadsworth v. Dunnam*, (Ala. 1898) 23 So. Rep. 699.

A plea alleging that the note sued on was executed, delivered, and received on Sunday, without any averment that the payee knew that it was made on Sunday, was held insufficient in *Ray v. Catlett*, 12 B. Mon. (Ky.) 534.

Drugs Illegally Sold.— A statute made it a misdemeanor for a person to keep a drug store "without first obtaining a license therefor from the medical board of his own school." A plea alleging as a defense to a note given for drugs purchased from the plaintiffs that the latter kept a drug store "without first obtaining a license," etc., following the language of the statute as above quoted, was held to be insufficient on demurrer, because "the material issuable fact as to what school the plaintiffs belonged and from what board

they would be required to show a license at the trial is not alleged." *Taliaferro v. Moffett*, 54 Ga. 150.

Knowledge of Unlawful Purpose.— In *Wallace v. Lark*, 12 S. Car. 576, the defendant's answer alleged that the note was given for a horse to be used in the Confederate service and that the horse was actually so used. A demurrer was sustained because the answer failed to aver that the vendor knew at the time of the sale the purpose for which the horse was bought, even assuming, which the court did not admit, that such knowledge would defeat the action.

Conclusion of Law.— An averment that the note was based upon a "gambling transaction" by the defendant in cotton futures was held to be a mere statement of a legal conclusion and insufficient. *McCamant v. Batsell*, 59 Tex. 363.

Definiteness and Certainty.— A statutory provision that "the answer shall set forth in clear and precise terms" the substantive facts relied upon in avoidance does not require more clearness and precision than is necessary in a technical plea in bar. So held in *Chenery v. Barker*, 12 Gray (Mass.) 345, where, under an answer alleging that the note was given for spirituous and intoxicating liquors sold to the defendant in violation of law, the defendant was permitted to prove that the note was made in renewal of two former notes which were given on the same illegal consideration. The court said: "In *Hay v. Ayling*, 16 Q. B. 423, 71 E. C. L. 423, which was an action against the acceptor of two bills of exchange of the same date, each for £50, the defendant pleaded that he accepted the bills at the request of a third person named, to whom he had lost £100, by betting on a horse race, and that he had accepted the bills in consideration of said sum of £100 so lost by betting, and to secure the payment thereof, contrary to the statute in such case made. Upon the trial of an issue on the replication *de injuria*, etc., the proof was that the defendant at first accepted, in consideration of the gaming transaction mentioned in his plea, a bill drawn by the plaintiff for £100, which was dishonored, and that the plaintiff then gave him time, and took the acceptances declared upon, by

is brought, for this is a legal presumption.¹ An answer alleging that the consideration was property sold contrary to law need not contain an offer to return the property.²

c. AVERMENT OF NOTICE, ETC., IN ACTION BY INDORSEE. — Where the alleged illegality does not render the instrument absolutely void and the plaintiff is *prima facie* entitled to protection by the law merchant, the plea or answer must show that he was not a *bona fide* holder for value before maturity.³

6. Averment of Diligence. — At Common Law, in an action against an indorser of a note or drawer of a bill of exchange, the general issue of *non assumpsit* requires the plaintiff to prove due diligence in making demand of payment and giving notice of non-payment.⁴

In Code Pleading, it has been held under the rule requiring specific denials,⁵ that where the complaint against the indorser of a note alleges demand, refusal, protest, and notice of protest, an answer denying protest, or notice thereof, is not a denial of a demand;⁶ and that an averment of "due and legal notice" of dishonor is not traversed by denial of "due" notice, but legal notice is

way of renewal. It was decided that there was no variance between the plea and the proof, but that as the first bill was for an illegal consideration, the two others were for the same, according to the averments in the defendant's plea. That decision conforms to our view of the law."

A plea alleging that the note was executed on Sunday, specifying the day of the month and year, in consideration of drugs "then and there" sold to the defendant by the plaintiffs in the transaction of the ordinary business of the plaintiffs, was rejected as insufficient to show a transaction of business in violation of the Sunday law, for the reason that the plea did not state in terms the day of the month on which the sale was made, nor that it was done on Sunday, nor that the drugs were delivered, "nor show what was done toward a sale, or in relation to it so as to enable the court to say that the plaintiffs did in fact labor in their own or any other trade or calling on the sabbath." Ray v. Catlett, 12 B. Mon. (Ky.) 534.

In Ford v. Ragland, 25 Ark. 612, the defendant pleaded that the consideration of the note sued upon "was certain tickets, checks or notes, purporting that money would be paid to the receiver, holder or bearer, which said tickets, notes or checks were intended to be used as a currency or medium of trade, in lieu of money, the said tick-

ets, notes or checks not being authorized so to be used or put in circulation." The court said: "This plea was clearly demurrable upon the ground of uncertainty. It does not show the character of the tickets, notes, or checks set up as the consideration of the note, nor by whom issued — whether by a state, county, or a city corporation, or by a private corporation, or an individual. The pleader is required to inform his adversary, by his pleading, of the nature and character of the defense relied upon, with sufficient certainty to enable him to reply understandingly."

1. Bowen v. Kemerer, 11 Phila. (Pa.) 557, 33 Leg. Int. (Pa.) 170.

2. Barker v. Justice, 41 Miss. 245.

3. Johnson v. Meeker, 1 Wis. 436; Johnston v. Dickson, 1 Blackf. (Ind.) 256; Bailey v. Bidwell, 13 M. & W. 73. See also Ebersole v. Morrison First Nat. Bank, 36 Ill. App. 267; Bemis v. Horner, 44 Ill. App. 319; Baldwin v. Brogden, 2 Stew. (Ala.) 9; Coyle v. Fowler, 3 J. J. Marsh. (Ky.) 473; Howk v. Eckert, 4 Thomp. & C. (N. Y.) 300; Bailey v. Bidwell, 13 M. & W. 73. And see *supra*, c. Averment of Notice, etc., in Action by Indorsee; and for an answer held sufficient in this particular, see Collier v. Waugh, 64 Ind. 456.

4. Peters v. Hobbs, 25 Ark. 67.

5. See generally article ANSWERS IN CODE PLEADING, vol. 1, p. 777.

6. Brennan v. Lowry, 4 Daly (N. Y.) 253.

thereby admitted;¹ a denial by an indorser of receipt of notice of protest may be stricken out as irrelevant.² If a notarial protest is filed as an exhibit to the complaint, an answer averring want of knowledge or information sufficient to form a belief is not a sufficient denial of the alleged presentation, demand, refusal of payment, and protest.³

Avoiding Effect of Notary's Certificate.—In *New York* an affidavit denying receipt of notice of dishonor, in order to destroy the effect of a notary's certificate of protest as presumptive evidence under the code⁴ must be positive and unqualified,⁵ not upon information and belief,⁶ and must be annexed to, but distinct from, the answer.⁷ The original affidavit must be served; service of a copy is insufficient.⁸ If the defendant is allowed to testify, without objection, that no notice of protest was received, the legal sufficiency of the notice is open to inquiry, regardless of the

1. *Treadwell v. Hoffman*, 5 Daly (N. Y.) 207; *Young v. Miller*, 63 Cal. 302.

In *Huffaker v. National Bank*, 12 Bush (Ky.) 292, a denial that the note was "duly" protested was held insufficient. See generally as to the sufficiency of denial that an act was "duly" done, article ANSWERS IN CODE PLEADING, vol. 1, p. 807. But in *Stoeckle v. Gray*, (Del. 1897) 39 Atl. Rep. 775, an action on a note against an indorser, an affidavit of defense setting up that "the said promissory note was never protested according to law," was held sufficient to prevent judgment on the pleadings.

2. *Edgerton v. Smith*, 3 Duer (N. Y.) 614; *Harbeck v. Craft*, 4 Duer (N. Y.) 123. See also *Gawtry v. Doane*, 51 N. Y. 90; *Bartlett v. Benson*, 14 M. & W. 733. Compare *Ward v. Waterhouse*, 2 Robt. (N. Y.) 653.

Reception of notice cannot be denied on information and belief. *Gridler v. Farmers', etc., Bank*, 12 Bush (Ky.) 336.

3. *Huffaker v. National Bank*, 12 Bush (Ky.) 292; *Gridler v. Farmers', etc., Bank*, 12 Bush (Ky.) 335. *Contra*, where the protest of the notary does not accompany the complaint. *Dickerson v. Kimbal*, 1 Code Rep. (N. Y. Special Term) 49; *Bailey v. Lane*, 13 Abb. Pr. (N. Y. Supreme Ct.) 354.

4. New York Code Civ. Pro., § 923, provides as follows: "The certificate of a notary public of the state, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or nonpayment, of a prom-

issory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto; is presumptive evidence of the facts certified, unless the party, against whom it is offered, has served upon the adverse party, with his pleading, or within ten days after joinder of an issue of fact, an original affidavit to the effect that he has not received notice of nonacceptance, or of nonpayment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section."

5. *Harbeck v. Craft*, 4 Duer (N. Y.) 122.

"The statute only applies where no notice has been received at any time." *Union Bank v. Gregory*, 46 Barb. (N. Y.) 102, holding that it is not a sufficient denial where the defendant admits that he received notice but alleges that it was not until a certain date, long after the note fell due.

An affidavit admitting receipt of notice, but alleging a want of knowledge or information sufficient to form a belief as to whether it was due notice, does not meet the requirement of the code. *Pierson v. Boyd*, 2 Duer (N. Y.) 39.

6. *Gawtry v. Doane*, 51 N. Y. 84.

7. *Gawtry v. Doane*, 51 N. Y. 84, where the court also said that "the denial to be inserted in the affidavit is not a proper one to be inserted in an answer."

8. *Gessner v. Smith*, (City Ct.) 18 N. Y. St. Rep. 1013.

notary's certificate, although no affidavit was served.¹ In *New Jersey* a notary's certificate of protest is conclusive evidence of the facts certified, unless the defendant gives notice with his plea that he intends to dispute the facts.² But if the certificate offered in evidence is defective, the defendant may object to its competency, though no notice was given by him.³

7. **Mistake.** — At common law, in an action between the immediate parties to the instrument, evidence of a mistake whereby, in whole or in part, there was an original absence of consideration for the contract, has been held to be admissible under the general issue of *non assumpsit*.⁴ But if mistake is specially pleaded, the facts and grounds thereof should be distinctly stated;⁵ although an objection for mere generality of averment should be taken by demurrer pointing out the defect,⁶ or in code pleading by motion to make the answer more definite and certain.⁷ Mistake cannot be proved under an answer of payment,⁸ nor under an answer

1. *Cuming v. Roderick*, 28 N. Y. App. Div. 253.

2. Gen. Stat. N. J., 1895, p. 1401, § 20.

3. *Burk v. Shreve*, 39 N. J. L. 214.

4. *Blakely v. Hampton*, 3 McCord L. (S. Car.) 469, where parol proof was admitted to show that the note in suit was given in substitution for two other notes, and that by miscalculation it was made for a wrong sum; *Hunter v. Graham*, 1 Hill L. (S. Car.) 370. Compare *Downs v. Webster*, Brayt. (Vt.) 79; *McDuffie v. Magoon*, 26 Vt. 518.

In Equity a mistake may be corrected so as to make the instrument express the real intention of the parties, even though at law some authorities hold that parol evidence of mistake, without fraud or imposition is inadmissible. See 4 Am. and Eng. Encyc. of Law (2d ed.), p. 153. Hence, where equitable defenses are allowed in actions at law mistake may, in proper cases, be set up in the answer. *Claxon v. Demaree*, 14 Bush (Ky.) 172. See, in general, article EQUITABLE DEFENSES, vol. 7, p. 799, and as to the sufficiency of averments of mistake in equity pleading, see article MISTAKE, *ante*, p. 32; and article RESCISSION, REFORMATION, AND CANCELLATION.

5. *Mansfield v. Barber*, 59 Ga. 851; *Gains v. Park*, 3 B. Mon. (Ky.) 223, where the plea alleged that the note sued on was given "to secure the payment of the amount which fell due to the plaintiffs upon a settlement of accounts and notes between the parties;

and the defendants in fact aver that the balance was produced against the defendants by mistake, when, upon a correct settlement of their accounts, nothing was due." To this plea a demurrer was sustained, the court indicating the defect in the plea by italics, as in the following extract from the opinion: "It is averred that the note was given for the balance found due upon a settlement of *accounts* and *notes*, between the parties, when upon a correct settlement of their *accounts* only, nothing was due. This may be true, and yet if *notes* be taken into the settlement, the whole amount of the note sued on may be due." For other cases where mistake was insufficiently pleaded, see *McCormack v. Klingensmith*, 29 Ind. 296; *Lyman v. Campbell*, 34 Mo. App. 213; *Marion, etc., Gravel Road Co. v. Kessinger*, 66 Ind. 549.

6. *Donaldson v. Cleburne First Nat. Bank*, (Tex. Civ. App. 1893) 22 S. W. Rep. 543.

7. *Seeley v. Engell*, 13 N. Y. 542 [*reversing* 17 Barb. (N. Y.) 530], where, in an action to recover a balance on a note, the answer alleged that the note "was by mistake given for a greater sum than was due from the maker to the payee, to wit, a sum sufficient to cancel the balance claimed." The court held that by taking issue on the answer and going to trial the objection for indefiniteness was waived. See generally article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

8. *Lowry v. Shane*, 34 Ind. 495.

alleging actual fraud,¹ nor under the plea of *non est factum* in a common-law action on a sealed obligation.²

Equitable Relief by Cross Complaint. — In code practice if the instrument does not express the real intention of the parties, by reason of mutual mistake, the defendant may have it reformed under a cross complaint.³

8. Duress. — At common law duress was admissible as a defense under the plea of *non assumpsit*,⁴ but not under the plea of *non est factum* in an action on a sealed obligation,⁵ and now by force of statute or of code provisions the defense must be specially pleaded,⁶ and the facts constituting the alleged duress must be distinctly averred.⁷ Where the action is not between the immediate parties to the instrument, the plea or answer must also state facts showing that the plaintiff had notice of the duress or acquired title in such a manner as to subject him to the defense.⁸

9. Extension of Time — *a.* IN ACTION AGAINST MAKER. — Extension of time by the plaintiff is a good defense,⁹ but being

1. Leighton v. Grant, 20 Minn. 345.

2. Hunter v. Graham, 1 Hill L. (S. Car.) 370.

3. Norris v. Scott, 6 Ind. App. 18.

4. Gould. Pl., c. 6, § 47. See also Hardy v. Ross, 4 Ill. App. 505.

5. In such an action duress must be specially pleaded. Edwards v. Brown, 1 Tyrw. 182, 1 Cromp. & J. 307, 3 Y. & J. 423, 9 L. J. Exch. 84, 35 Rev. Rep. 720; 1 Chitty Pl. (16th Am. ed.) 511, note.

6. Richardson v. Hittle, 31 Ind. 119. See also article DURESS, vol. 7, p. 247 et seq.

7. Garriott v. Abbott, 28 Ind. 9; Graham v. Marks, 98 Ga. 67, where the answer was held insufficient because it did not appear that the arrest and imprisonment which was alleged as duress was without authority of law, nor that if legal it was accomplished for an illegal purpose.

Marital Coercion. — In Richardson v. Hittle, 31 Ind. 119, husband and wife were sued upon a negotiable note executed by both, and the wife answered "that she was induced by the persuasions of said payee and the coercion of her said husband to execute said note." The answer was held insufficient for the reason that the facts were not averred "so that the court could determine the question as to whether they amounted to legal coercion or not." See also Klots v. Fincke, 2 Thomp. & C. (N. Y.) 580.

Sufficient Averment. — In Bush v. Brown, 49 Ind. 573, the answer showed

by a detailed statement of facts that the defendant executed the note in fear of threatened arrest and imprisonment at the instance of the plaintiff for a pretended crime of which the defendant was innocent. It was held on demurrer that the answer disclosed a good defense.

8. McClintick v. Johnston, 1 McLean (U. S.) 414.

9. Davis v. Weaver, (Tex. Civ. App. 1894) 27 S. W. Rep. 902; Gentry v. Walker, 101 Ga. 123, where judgment was reversed for error in striking out a plea which set up a written agreement between the plaintiff and the defendant purporting to have been founded upon a valuable consideration, whereby the time for payment had been extended to a sale subsequent to the commencement of the action, although at the time of trial the note, even under the terms of the agreement, was past due.

Contra. — Payne v. Weible, 30 Ill. 166, holding that if the plaintiff has failed to perform his agreement he is liable to an action on his contract for damages, or, if he has acted in fraud of his agreement, a court of equity will interpose to stay the proceedings at law, but that the agreement for extension forms no bar to an action at law. Culver v. Johnson, 90 Ill. 91 (by a divided court) following Archibald v. Argall, 53 Ill. 307, and holding that "when an action is prematurely brought, because of an agreement to extend the time of payment, which has not elapsed, it is matter in abatement

matter in excuse of performance, should be specially pleaded.¹ The plea or answer should allege an agreement² upon a valuable consideration³ and a breach thereof.⁴

b. IN ACTION AGAINST INDORSER OR SURETY — Defense under General Issue. — At common law in an action against an indorser or surety he may prove under the general issue of *non assumpsit* that he was discharged by the plaintiff's binding agreement with the principal debtor for an extension of time,⁵ and it seems that a special plea setting up the defense is bad on special demurrer as amounting to the general issue.⁶

Requisites of Special Plea. — In a suit against a surety or indorser, a plea or answer alleging an extension of time by the plaintiff to the maker, acceptor, or prior indorser, must show that the plaintiff promised to extend the time⁷ for a definite period⁸ upon a valuable consideration⁹ which must be fully pleaded,¹⁰ and with-

only, and not in bar of the action." See also article ABATEMENT IN PLEADING, vol. I, p. 22.

1. See *Paddock v. Jones*, 40 Vt. 474, an action by an assignee, the plea alleging that the plaintiff had notice of the defense before transfer of the note to him.

2. *Paddock v. Jones*, 40 Vt. 474.

3. *Costello v. Wilhelm*, 13 Kan. 229. See also *Archibald v. Argall*, 53 Ill. 307.

Sufficiency of Evidence of Consideration.

— A plea alleging that the agreement was made "in consideration of certain valuable securities then placed in their hands as collateral security for the payment of said note" was held sufficient on general demurrer. *Paddock v. Jones*, 40 Vt. 474.

In *Juchter v. Boehm*, 63 Ga. 71, the plea alleged an agreement for a good and valuable consideration, but was held bad because it did not set out the consideration nor state whether the agreement was executed or executory.

In *Aiken v. Posey*, 13 Tex. Civ. App. 607, an answer alleging an agreement for a "valuable consideration" was held sufficiently definite as against a demurrer.

In *Union Nat. Bank v. Cross*, (Wis. 1898) 75 N. W. Rep. 992, on motion of the plaintiff the defendant was required to make more definite and certain his answer setting up an agreement for extension of time, by stating the consideration therefor, and when it was paid, and whether the agreement was in writing.

4. In *Costello v. Wilhelm*, 13 Kan. 229, the answer alleged that after the

note was given a parol agreement was entered into between the parties that the note should be paid at maturity if convenient and practicable, but if not convenient and practicable, then that the time for the payment of the same should be extended until the defendant should receive certain money which, as he alleged, he had not received when he filed his answer. On demurrer the answer was held insufficient because there was no allegation that it was inconvenient or impracticable for the defendant to pay the note at maturity.

5. *Warner v. Crane*, 20 Ill. 148; *Winne v. Colorado Springs Co.*, 3 Colo. 158. Compare *Duplantier v. Newcomb*, 2 La. Ann. 279.

As to the requisites of such agreement in order to operate as a discharge of an indorser or surety, see Am. and Eng. Encyc. of Law (2d ed.), title *Bills and Notes*, vol. 4, p. 505.

6. *Warner v. Crane*, 20 Ill. 148, where the court was of that opinion, but based its decision partly upon other grounds.

7. *Prather v. Young*, 67 Ind. 480, where the answer did not clearly show an agreement by the plaintiff.

8. *Smith v. Freyler*, 4 Mont. 498; *Prather v. Young*, 67 Ind. 480. It must state the time to which payment was extended. *Glickauf v. Hirschhorn*, 73 Ill. 574.

9. *Glickauf v. Hirschhorn*, 73 Ill. 574; *Smith v. Freyler*, 4 Mont. 498. See also *Scharf v. Moore*, 102 Ala. 468.

10. *Winne v. Colorado Springs Co.*, 3 Colo. 158, where a plea averring that the time was extended "for a good and valuable consideration," was held to be a mere statement of legal conclu-

out the consent of the defendant.¹ If the defendant was apparently a joint maker and is sued as such he cannot defend on the ground that he was a surety and was discharged by extension of time to the principal without alleging that the plaintiff had notice of the suretyship at the time of the agreement for extension.²

10. Failure to Proceed Against Principal at Request of Surety. — In an action against a surety a plea setting up as a defense at common law that the plaintiff failed to proceed against the principal at the request of the defendant is bad, unless it appears therefrom that the principal was solvent in the sense that payment could have been coerced by action, judgment, and execution against him.³ Where a like defense is based upon a statutory request and failure to comply therewith, the plea or answer must show such a notice as the statute requires,⁴ and expressly aver noncompliance by the plaintiff.⁵

11. Tender. — See generally article TENDER.

Readiness to Pay at Time and Place. — In an action against the maker or acceptor of a note or bill payable at a particular time and place the defendant may bar the recovery of interest and costs by pleading that he was ready to pay at the time and place.⁶ The tender, as in an ordinary plea of tender, must be pleaded with a *profert in curia*.⁷

sion, and therefore insufficient. See also *Union Nat. Bank v. Cross*, (Wis. 1898) 75 N. W. Rep. 992.

1. *Green v. Brandon*, Walk. (Miss.) 372; *Prather v. Young*, 67 Ind. 480.

An Approved Precedent of an answer by a surety, setting up as a defense that the plaintiff had given time to the principal, will be found in *Holland v. Johnson*, 51 Ind. 347.

2. *McCloskey v. Indianapolis Manufacturers', etc.*, Union, 67 Ind. 89. Citing *Davenport v. King*, 63 Ind. 64, and *Neel v. Harding*, 2 Metc. (Ky.) 247.

3. *Darby v. Berney Nat. Bank*, 97 Ala. 643, holding the plea insufficient where it merely averred in this behalf that when the note became due and the defendant requested the plaintiff to proceed against the principal, the latter had "ample means wherewith to pay said indebtedness." In many jurisdictions it is held that the defense is not available at common law. See Am. and Eng. Encyc. of Law (1st ed.), vol. 20, p. 799.

4. Averment of Request "to Collect" the note out of the defendant's principal is not sufficient where the statute provides for notice "to bring suit thereon" against the principal. *Darby v. Berney Nat. Bank*, 97 Ala. 643.

Where the Statute Requires Notice in Writing it must be averred that the notice was in writing. *Ward v. Stout*, 32 Ill. 399; *Mendel v. Cairnes*, 84 Ind. 141; *Darby v. Berney Nat. Bank*, 97 Ala. 646. *Contra*, *Coats v. Swindle*, 55 Mo. 31, holding that although the statute provides that the request shall be in writing, it is sufficient to allege the fact of request, and then it must be shown by the evidence that the statute has been complied with.

5. *Marshall v. Mathers*, 103 Ind. 458.

6. *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271, holding that the plea should be in bar of the damages and not of the action. See also *Edwards v. Hasbrook*, 2 Tex. 578; *Central Bank v. Thein*, 76 Hun (N. Y.) 571.

7. *Carley v. Vance*, 17 Mass. 389; *Hill v. Place*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 18; *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271; *Westcott v. Patton*, 10 Colo. App. 544.

"The plea in such case, to be a good one, must state that the maker was ready to pay the money at the time and place named, that he has ever since been ready there to pay the same, and that he brings the money into court for the plaintiff." *Lyons v. Williamson*,

12. Payment. (See generally article PAYMENT.)—In an action by an assignee of a note or bill against a maker or acceptor an answer alleging payment before assignment, and that the plaintiff had notice thereof prior to such assignment, states a good defense.¹ Usury, payment, and extension of time to the principal whereby the defendant, a surety, was discharged, are not inconsistent defenses,² nor are payment and denial of plaintiff's ownership,³ but payment and denial of execution have been held to be inconsistent defenses.⁴

13. Fraud in Obtaining Execution of Instrument — Under the General Issue.—At common law fraud relating to the execution of the instrument⁵ may be proved under the general issue of *non assumpsit* where the action is on an unsealed instrument or under *non est factum* in an action on a specialty.⁶ Nevertheless the defense may be specially pleaded.⁷

27 Me. 152. To the same point, see *Greeley v. Whitehead*, 35 Fla. 523.

1. *Cromwell v. Yandes*, 61 Ind. 495.

But where the defendant pleaded payment to the assignor before the issuance of the summons in the case, and the declaration alleged an assignment long before the commencement of the suit, it was held that the plea tendered an irrelevant and immaterial issue and should have been treated as a nullity. *Robinson v. Keys*, 9 Humph. (Tenn.) 144.

Answer Preventing Judgment on Pleadings.—In *Farmers', etc., Sav. Bank v. Christensen*, 51 Cal. 571, an action by an assignee against the maker, it was held that an answer alleging payment at maturity to the payee while he was the "holder" without any notice of the alleged prior assignment was held sufficient to raise an issue of fact so as to prevent judgment for the plaintiff on the pleadings.

Definiteness in Plea of Payment.—In *Hawkins v. Fellowes*, 6 Dana (Ky.) 128, the defendant pleaded that the plaintiff indorsed and delivered the note to a third party to whom the note was paid, but did not state by whom it was paid. The plea was held bad, because it did not negative the supposition that the plaintiff had paid it as indorser, taken up the note, erased the indorsement, and sued in his own name.

2. *Shed v. Augustine*, 14 Kan. 282; *Osborne v. Waller*, (Minn. 1898) 75 N. W. Rep. 732, where the court said: "The time of payment may have been extended, and the notes paid after they became due."

3. "Non constat but the defendant

may have paid the notes to the true owner." *Cavitt v. Tharp*, 30 Mo. App. 134.

4. *Sheppard v. Starrett*, 35 Mo. 367. See also *May v. Burk*, 80 Mo. 679. *Contra*, *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462. See also *Nelson v. Brodhack*, 44 Mo. 596.

5. **Fraud Relating to Execution of Instrument.**—The fraud discussed in this section is not such as relates to the consideration, but that which concerns the execution of the instrument, as, for instance, misreading the instrument, or by artifice obtaining the party's signature to an instrument which he did not intend to sign. In some of the cases cited in the following notes it is not entirely clear whether the defense pleaded in general terms was intended to attack the consideration or the execution. In *McClintick v. Johnston*, 1 McLean (U. S.) 417, and in *Dorr v. Munsell*, 13 Johns. (N. Y.) 430, however, the distinction above noticed was explicitly referred to. The defense of fraud in the consideration of the instrument has been discussed *supra*, p.—

6. *Ausem v. Byrd*, 6 Ind. 475; *Hildreth v. Tomlinson*, 2 Greene (Iowa) 360; *Woolson v. Shirley*, 6 Dana (Ky.) 309; *Banks v. McCosker*, 82 Md. 518; *Soper v. Peck*, 51 Mich. 563; *Dorr v. Munsell*, 13 Johns. (N. Y.) 430; *Van Valkenburgh v. Rouk*, 12 Johns. (N. Y.) 337; *Stacy v. Ross*, 27 Tex. 3; *Taylor v. King*, 6 Munf. (Va.) 358; *McClintick v. Johnston*, 1 McLean (U. S.) 417.

7. *McClintick v. Johnston*, 1 McLean (U. S.) 417, holding that the plea does not amount to the general issue, in-

Sufficiency of Special Plea or Answer.—According to the weight of authority at common law, an averment that the instrument, whether sealed or unsealed, was obtained from the defendant by fraud, covin, and misrepresentation, is not objectionable for generality.¹ Other well-considered cases hold that the facts constituting the fraud must be specified,² and this is the rule in code pleading.³ In an action by an assignee against a maker or acceptor the plea or answer should aver the additional facts which would be necessary, as already shown,⁴ in a plea or answer impeaching the consideration of the instrument in an action between the same parties,⁵ unless the circumstances alleged are such as to render the instrument void in the hands of a *bona fide* holder for value before maturity.⁶

14. Alteration of Instrument—*a.* **NECESSITY OF PLEA OR ANSWER.**—The fact that the instrument has been altered since its execution must be put in issue by the defendant by some proper plea or answer.⁷

asmuch as it does not amount to a denial of any allegation which the plaintiff is bound to prove in support of his declaration.

1. *Strawser v. Johnson*, 2 *Greene* (Iowa) 373; *Hildreth v. Tomlinson*, 2 *Greene* (Iowa) 360; *Whitehead v. Root*, 2 *Metc.* (Ky.) 584; *Evans v. Stone*, 80 Ky. 78; *Ross v. Braydon*, 2 *Dana* (Ky.) 161; *Sharp v. White*, 1 J. J. *Marsh.* (Ky.) 106, holding, however, that it is the usual and better practice to specify the fraud. *McClintick v. Johnston*, 1 *McLean* (U. S.) 414. See also the form of plea passed *sub silentio* in *Harvey v. Towers*, 6 *Exch.* 646.

2. *Giles v. Williams*, 3 *Ala.* 316; *Hazard v. Griswold*, 21 *Fed. Rep.* 178, quoted in article **FRAUD**, vol. 9, p. 693, note 2. See also *Munson v. Nichols*, 62 *Ill.* 111, where the plea held sufficient as against a demurrer is set forth in full; *Kimble v. Christie*, 55 *Ind.* 140, where the answer held insufficient in substance is set forth in full; and *Butler v. Carns*, 37 *Wis.* 61, where the answer, alleging substitution of an instrument which the defendant did not intend to sign, is set forth in full and was held sufficient.

Certainty in Averment.—In *Black v. Halstead*, 39 *Pa. St.* 64, an action by an indorsee against the maker of a note, the defendant pleaded that the payee claimed to have two of the defendant's notes of like date and amount, one of which was a forgery or fraudulently obtained. The averment was held insufficient because it did not distinctly state that the particu-

lar note in suit was the one which was open to the defense.

3. *McMurray v. Gifford*, 5 *How. Pr.* (N. Y. Supreme Ct.) 14; *Cummings v. Thompson*, 18 *Minn.* 246, where certain averments relating to the misreading of the instrument were discussed by the court and held sufficient to show fraud. *Gushee v. Leavitt*, 5 *Cal.* 160; *Frits v. Frits*, 32 *Ark.* 327. See also *Mitchell v. Tomlinson*, 91 *Ind.* 167; *Thomas v. Ruddell*, 66 *Ind.* 326; *Glenn v. Porter*, 49 *Ind.* 500.

4. See *supra*, p. 641.

5. *Banks v. McCosker*, 82 *Md.* 518; *McClintick v. Johnston*, 1 *McLean* (U. S.) 414; *Harvey v. Towers*, 6 *Exch.* 646. See also *Parkison v. Boddiker*, 10 *Colo.* 505.

For averments of notice of the fraud held sufficient to admit proof of notice see *Cummings v. Thompson*, 18 *Minn.* 246.

Contra in Indiana.—See *supra*, p. 644, note 4, and *Mitchell v. Tomlinson*, 91 *Ind.* 167.

6. For the conflicting authorities on this question of substantive law see *Am. and Eng. Encyc. of Law* (2d ed.), title *Bills and Notes*, vol. 4, p. 326 *et seq.* For an answer setting forth fraud and held sufficient as against a *bona fide* holder for value see *Butler v. Carns*, 37 *Wis.* 61; and for an insufficient answer in that behalf see *Ruddell v. Fhalor*, 72 *Ind.* 533.

7. *Warner v. Spencer*, 7 J. J. *Marsh.* (Ky.) 340; *Hunt v. Mitchell*, 4 *Thomp. & C.* (N. Y.) 57, 1 *Hun* (N. Y.) 621. See also *Cantrelle v. Percy*, 17 *La.* 520.

b. SUFFICIENCY OF GENERAL ISSUE.—An alteration of the instrument since its execution may be shown, at the common law, under a plea of the general issue, and in code states under a general denial, where the plaintiff declares on the instrument as it was originally made.¹ There is no distinction in principle between the denial contained in a plea of *non est factum* that the instrument set up is the defendant's act and deed, and a denial in an answer under the code that the instrument declared on is the defendant's instrument and was in the form and effect set up in the complaint made and executed by him.²

c. DENIAL OF EXECUTION OF INSTRUMENT.—A plea or answer denying the execution of the instrument sued on is suffi-

1. *Henderson v. Wilson*, 6 How. (Miss.) 65; *Oakey v. Wilcox*, 3 How. (Miss.) 330; *Whitmer v. Frye*, 10 Mo. 348; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, in which case the court cited *Schwarz v. Oppold*, 74 N. Y. 307, 7 Daly (N. Y.) 121; *Boomer v. Koon*, 6 Hun (N. Y.) 645, in which case the court cited 1 Chitt. Pl. 482, 483; *Fairhaven v. Cowgill*, 8 Wash. 686, in which case the court cited *Smith v. U. S.*, 2 Wall. (U. S.) 219, and *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596.

Distinction Where Instrument Is Declared on as Altered and as Originally Made.—It is held by the weight of authority that the alteration of the instrument need not be specially pleaded when the instrument is declared on in its altered state, but where the plaintiff declares on the instrument in its original condition the alteration must be specifically pleaded. *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, in which case it was said: "In the latter case the plaintiff sues on the actual contract made, and the defendant is seeking to defeat a recovery because it had been subsequently tampered with, and this defense must be pleaded and sustained by a preponderance of proof." *Citing Hirschman v. Budd*, L. R. 8 Exch. 171.

Distinction Where Instrument Is Altered Before or After Execution.—In *National Bank v. Nickell*, 34 Mo. App. 295, it was declared that where an instrument has been fraudulently altered after it has been executed, the alteration must be specially pleaded, and the general denial is not sufficient, but that evidence that before the delivery of the instrument or before any legal liability to pay it had attached, it was altered without the consent of the defendant, is admissible under the general denial.

But see *Goss v. Whitehead*, 33 Miss. 213, holding that under a general denial the defendant may show that an agent who filled up the the instrument after it had been signed in blank exceeded his authority, and inserted a sum larger than that intended, and that the plaintiff knew of these facts. And see *Hemphill v. Alabama Bank*, 6 Smed. & M. (Miss.) 44, holding that under a plea of *non assumpsit* the defendant cannot show that the instrument was indorsed in blank and was afterwards filled up and used for a purpose different from that for which it was intended.

Connecticut Statute.—In *Mahaiwe Bank v. Douglass*, 31 Conn. 170, it was held that under Comp. Laws 1854, p. 80, § 90, providing that under the plea of the general issue the defendant may, without notice, give in evidence any special matter of defense and justification except "matter in avoidance or a defense consistent with the truth of the material allegations" of the declaration, where the plaintiff alleges that the defendant indorsed a bill of exchange, the defendant, under a plea of the general issue, may show that he indorsed the bill of exchange, and that after such indorsement the instrument was altered without the defendant's consent by the insertion of other words and figures than those which had been agreed upon.

2. *Boomer v. Koon*, 6 Hun (N. Y.) 645. *Citing Schermerhorn v. Van Allen*, 18 Barb. (N. Y.) 29; *Andrews v. Bond*, 16 Barb. (N. Y.) 633, and *Beaty v. Swarthout*, 32 Barb. (N. Y.) 293.

Alteration Not New Matter.—The alteration of the instrument since its execution is not new matter, such as is required by the code to be set up in an answer in avoidance or discharge of an

cient to admit evidence that the instrument was materially altered after its execution.¹

d. SPECIAL PLEA ALLEGING ALTERATION — (1) Appropriateness of Plea. — Although a plea or answer denying the execution of the instrument is sufficient to admit proof of its alteration, since it was executed, it is very proper and more appropriate, and perhaps the better practice, to set up the facts specially, to avoid surprise at the trial.² A plea setting up an alteration of the instrument after its execution is, in effect, a special plea of *non est factum*.³

(2) *Requisite Allegations.* — The plea or answer must not be uncertain and indefinite,⁴ but it would seem that an answer denying that the defendant had at any time executed the instrument in its present form, and alleging that since its execution it has been fraudulently altered, with intent to cheat and defraud the defendant, is sufficient.⁵

By Whom and When Made. — It would seem that it is necessary to allege that the plaintiff made the alteration, or that it was made at his instance or by his authority.⁶ It must be alleged that the

admitted cause of action. *Boomer v. Koon*, 6 Hun (N. Y.) 645, *distinguishing* *McKyring v. Bull*, 16 N. Y. 297, and *Quin v. Lloyd*, 41 N. Y. 349.

1. *Soaps v. Eichberg*, 42 Ill. App. 375; *Boomer v. Koon*, 6 Hun (N. Y.) 645.

2. *Vandergrift v. Hollis*, 6 Houst. (Del.) 90; *Soaps v. Eichberg*, 42 Ill. App. 375; *Pankey v. Mitchell*, 1 Ill. 383; *Palmer v. Poor*, 121 Ind. 135; *Conner v. Sharpe*, 27 Ind. 41; *Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Ortmann v. Merchants' Bank*, 41 Mich. 482; *Boomer v. Koon*, 6 Hun (N. Y.) 645; *McVey v. Ely*, 5 Lea (Tenn.) 438.

Demurrer to Answer Setting Up Facts. — An answer under oath denying that the defendant executed the instrument is in *Indiana* sufficient to admit evidence that the instrument was materially altered after its execution, and consequently, where such answer is put in, error, if any, in sustaining a demurrer to so much of the answer as in terms alleges an alteration of the instrument, is harmless. *Conner v. Sharpe*, 27 Ind. 41.

3. *Wiltfong v. Schafer*, 121 Ind. 264; *Woolfolk v. Bank of America*, 10 Bush (Ky.) 504; *Law v. Crawford*, 67 Mo. App. 150.

4. *Scharf v. Moore*, 102 Ala. 468, which was an action against an indorser. It was held that a plea that the plaintiff erased and changed the instrument, whereby another indorser

was released, was defective for its generality and indefiniteness, in that it did not aver with any degree of certainty in what the alleged release consisted. See also *Murray v. Peterson*, 6 Wash. 418.

5. *Law v. Crawford*, 67 Mo. App. 150. See also *Wiltfong v. Schafer*, 121 Ind. 264, holding that it is sufficient to admit the defendant's signature, and to aver that since he signed the instrument it was changed in certain material respects, setting out the changes.

6. *Emmons v. Meeker*, 55 Ind. 321; *Murray v. Peterson*, 6 Wash. 418, in which case it was declared that an answer alleging that said instrument "was, without the authority, knowledge, or consent of the defendants, or either of them, altered," etc., was sufficient. But see *contra*, *Bowman v. Mitchell*, 79 Ind. 84; *Cochran v. Nebeker*, 48 Ind. 459.

Indorsee's Knowledge of Alteration. — In *Woolfolk v. Bank of America*, 10 Bush (Ky.) 504, it was held in an action by an indorsee that where it is alleged by the defendant that after the drawing and delivery of the paper, the same was, without his knowledge and consent, falsely and fraudulently altered and changed in a material particular, it must be averred that the plaintiff had knowledge of the facts constituting the fraud, *i. e.*, such facts as would satisfy one of ordinary prudence and judgment of the infirmity in the paper.

alteration was made after the delivery of the instrument,¹ but it need not be averred that the defendant did not ratify and affirm the alteration.²

(3) *Admission of Execution of Instrument.* — A plea or answer alleging that the instrument has been altered since its execution, and that therefore the defendant is not liable on the same, does not put in issue the execution of the instrument or the genuineness of the defendant's signature.³

c. *PLEA OR ANSWER UNDER OATH.* — In many of the states in which the question has arisen it has been held that statutes providing that the execution of the instrument or the genuineness of the defendant's signature shall not be denied by the defendant, except by a plea or answer accompanied by an affidavit of its

Sufficient Replication. — Where the defendant alleges merely that the instrument was "altered," and not that it was altered by the plaintiff, a reply admitting that the instrument "was changed as in said answer stated," and alleging that it was not changed by the plaintiff or by his authority, but that said change and alteration were made without his authority, knowledge, or consent, is as definite as the affirmative allegation in the answer, and is sufficient to prevent a judgment for the defendant on the pleadings. *Murray v. Peterson*, 6 Wash. 418.

1. *Emmons v. Meeker*, 55 Ind. 321.

Alteration Before Delivery. — A plea that the defendant signed and sealed the instrument in blank, and that it was since filled up in his absence and without his knowledge, and that therefore it is not his deed, is good, notwithstanding its failure to allege that he did not deliver it after it had been so filled up. *Franklin v. Cox*, 4 Rand. (Va.) 448.

2. *Whitesides v. Northern Bank*, 10 Bush (Ky.) 501, in which case it was held that this is a matter which the plaintiff may or may not rely on to avoid the effect of the plea, and that the defendant is not bound to anticipate it.

Insufficient Answer. — In *Wyckoff v. Johnson*, 2 S. Dak. 91, the plaintiff described the instrument as it was originally made, and an answer was held insufficient which alleged that the defendant made an instrument of the tenor of the one described in the complaint; that since its delivery to the payee it had been, without the defendant's knowledge or consent, and at the instigation of the payee, materially altered; that the instrument so altered

was the one upon which the action was brought; that by reason of such alteration it was not the defendant's note, and that the defendant never made or delivered it, because the answer did not constitute a denial of the execution of the instrument described in the complaint.

Approved Precedent. — See *Collier v. Waugh*, 64 Ind. 456, for the form of an answer alleging a material alteration, which was considered sufficient.

Distinction Between Alteration and Spoliation. — An answer to a bill in equity which alleges in substance that the instrument had been changed or altered so as to make it bear interest from date, by some one without the defendant's authority or assent, after he had signed it, is sufficient, and is not open to the objection that it does not aver an alteration but only a spoliation, as the answer avers in terms an alteration, and the word has a legal signification. *McVey v. Ely*, 5 Lea (Tenn.) 438.

Acceptance of Draft After Alteration. — An admission in the answer, in an action against the acceptors of a draft, that the defendants accepted the altered draft, puts the effect of the alteration out of the issue, and estops them from raising the objection. *Hunt v. Mitchell*, 4 Thomp. & C. (N. Y.) 57, 1 Hun (N. Y.) 621.

3. *Barclift v. Treece*, 77 Ala. 528, holding that the genuineness of the defendant's signature need not be proven; *Graham v. Rush*, 73 Iowa 451; *Rosenfield v. Rosenthal*, (Tex. Civ. App. 1897) 39 S. W. Rep. 193; *Muckleroy v. Bethany*, 27 Tex. 551; *Wells v. Moore*, 15 Tex. 521; *Pullen v. Hutchinson*, 25 Me. 254.

truth, require the defendant to swear to the truth of a plea or answer averring an unauthorized alteration of the instrument;¹ but in other states a different construction has been put upon the statutes, and it has been held that the defendant need make no affidavit of the truth of the plea or answer under which he seeks to make the defense.²

f. **BURDEN OF PROOF.**—Where the defendant admits the genuineness of his signature and alleges that the instrument has been altered, or denies the execution of the instrument and the plaintiff proves the genuineness of the signature, the plaintiff may read the instrument in evidence without any additional evidence,

1. *Lesser v. Scholze*, 93 Ala. 338, in which case the court said: "These pleas were, therefore, in legal effect, to say that the instrument declared on was not the instrument signed by the defendant, but that he signed another and different paper; and hence each of them was a plea of *non est factum*, and insufficient to present the issue sought to be raised, for want of verification." See also to the same effect, *Smith v. Hiles-Carver Co.*, 107 Ala. 272; *Mahe v. Reynolds*, 38 Cal. 560, in which case the plaintiff declared upon the instrument as altered, and it was not incumbent upon him to account for an erasure appearing upon its face, because there was no answer under oath denying its execution; *Thackaray v. Hanson*, 1 Colo. 365; *Dewey v. Warriener*, 71 Ill. 198; *Coen v. Funk*, 18 Ind. 345; *Moorman v. Barton*, 16 Ind. 206, holding that an answer alleging an alteration is in substance a plea of *non est factum*, and that unless it is verified it is equivalent to a general denial only; *Archer v. Ward*, 9 Gratt. (Va.) 622. See also *Feeney v. Mazelin*, 87 Ind. 226.

Demurrer to Answer Without Oath.—An answer setting up an alteration of the instrument is perhaps not demurrable because it is not accompanied by an affidavit of its truth, but it amounts to no more than a general denial, and consequently there is no harm in sustaining a demurrer to it when the defendant's answer contains a general denial also. *Moorman v. Barton*, 16 Ind. 206.

2. *Vandergrift v. Hollis*, 6 Houst. (Del.) 90; *Hollis v. Vandergrift*, 5 Houst. (Del.) 521; *Whitmer v. Frye*, 10 Mo. 348; *Ruiz v. Campbell*, 6 Tex. Civ. App. 714.

Matter Subsequent to Execution.—In

Henderson v. Wilson, 6 How. (Miss.) 65, it was held that alterations might be made under the plea of *non assumpt* unaccompanied by any oath, the court saying: "Such alteration operates as a discharge by matter subsequent to the execution of the note or bill; hence it is not necessary to deny the execution by oath." *Citing Oakley v. Wilcox*, 3 How. (Miss.) 330.

Massachusetts Statute Inapplicable.—The failure of the defendant to deny the genuineness of his signature and to demand that it shall be proved, although it amounts to an admission of the genuineness of his signature under the statute, does not prevent him from insisting, under a denial that he made the instrument declared on, that the instrument had been materially altered since he signed it, nor does it relieve the plaintiff from the burden of proving that the instrument is in the same condition as it was when it was signed. *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596. *Citing Lincoln v. Lincoln*, 12 Gray (Mass.) 45; *Davis v. Travis*, 98 Mass. 222, and *Simpson v. Davis*, 119 Mass. 269. See also *Holden v. Jenkins*, 125 Mass. 446.

Admission of Execution of Instrument Described.—The defendant's failure to deny the execution of the instrument is only an admission of its execution in the manner and form in which it is set up in the complaint. *Pierce v. Northey*, 14 Wis. 9, in which case the complaint purported to contain a complete copy of the note, and the note when introduced in evidence had attached thereto a memorandum that it was collaterally secured by a deposit. It was held that it was not error to allow the defendant to give evidence for the purpose of showing that the instrument had been altered by inserting in it such

and it is incumbent upon the defendant to prove that it has been altered.¹

15. Denial of Plaintiff's Title — a. AVAILABILITY OF DEFENSE. — As a general rule a plea or answer denying by apt averments and in accordance with the rules hereinafter stated that the plaintiff is the owner or holder of the instrument presents a good defense. It is a denial of a material allegation of the declaration or complaint, and will make it incumbent upon the plaintiff to prove his ownership of the instrument and right to bring an action thereon.²

memorandum, although the defendant had not denied the execution of the instrument.

1. *Barclift v. Treece*, 77 Ala. 528, in which case no alteration of the instrument was apparent on its face; *Truesdell v. Hunter*, 28 Ill. App. 292; *Stayner v. Joyce*, 120 Ind. 99, in which case it was held that it was not incumbent upon the plaintiff to introduce evidence explaining alterations upon the face of the instrument; *Bumpass v. Timms*, 3 Sneed (Tenn.) 459; *Conner v. Fleshman*, 4 W. Va. 693, in which case an alteration was apparent upon the face of the instrument. See also *Muckleroy v. Bethany*, 27 Tex. 551, in which case the court cited *Wells v. Moore*, 15 Tex. 521, and *Pullen v. Hutchinson*, 25 Me. 254.

Instrument Declared on as Altered. — Where the plaintiff declares on the instrument in its altered state and the defendant puts in a general denial, the burden is upon the plaintiff to prove the execution of the instrument in the form in which it is described in the complaint, and the burden is not shifted by the introduction of evidence showing *prima facie* that the instrument was so executed. *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354.

Joint Plea by Joint Makers. — Where, in an action against joint makers, all the defendants unite in a joint plea of *non est factum*, the plea is not sustained by proof that the instrument was altered after its execution by one of the defendants, and consequently the plea is false as to all the defendants, and there should be a judgment for the plaintiff. *U. S. v. Linn*, 1 How. (U. S.) 104, in which case the instrument was declared on in its altered form. The court said: "The reason is because the plea, being entire, cannot be good in part and bad in part, an entire plea not being divisible, and consequently, if the matter jointly pleaded be insuffi-

cient as to one of the parties, it is so *in toto*." Citing *Manchester v. Vale*, 1 Saund. 28, note 2.

2. *Bryant v. Owen*, 2 Stew. & P. (Ala.) 134; *Mahe v. Reynolds*, 38 Cal. 560; *Reilly v. Rucker*, 16 Ind. 303; *Swift v. Ellsworth*, 10 Ind. 205; *McIntosh v. Robison*, 68 Ind. 120; *Shaw v. Jacobs*, 89 Iowa 713; *Walker v. Land Title, etc., Co.*, (Kan. 1898) 53 Pac. Rep. 476; *M'Connell v. Morrison*, 1 Litt. (Ky.) 206; *Moore v. Polk*, 24 La. Ann. 216, *per* *Howe, J.*; *Morton v. Jackson*, 2 Minn. 219; *Freeman v. Curran*, 1 Minn. 169; *Anderson v. Patrick*, 7 How. (Miss.) 347, *per* *Sharkey, C. J.*; *Central City Bank v. Rice*, 44 Neb. 594; *Martens v. Burton Co.*, 7 Misc. Rep. (N. Y. City Ct.) 244; *Metropolitan Bank v. Lord*, 4 Duer (N. Y.) 630; *Smyth v. Carden*, 1 Swan (Tenn.) 28; *Boggs v. Wann*, 58 Fed. Rep. 681; *Stroud v. Harrington*, Hempst. (U. S.) 116.

Reply Denying Defendant's Title. — Where the defendant by his answer relies upon a negotiable instrument as the foundation of a set-off, a reply denying the defendant's title to the instrument and setting up facts showing that the title is in another is good. *Reilly v. Rucker*, 16 Ind. 303.

Under the Code a denial that the plaintiff is the owner of the instrument presents a good defense. *Swift v. Ellsworth*, 10 Ind. 205; *Boggs v. Wann*, 58 Fed. Rep. 681, in which case it was held that such a denial is good under the code of *Ohio*.

Answer Not Frivolous. — An answer putting in issue, in a form prescribed by the code, all the allegations relied on in the complaint to show the title and possession of the instrument to be in the plaintiff, is not frivolous. *Duncan v. Lawrence*, 6 Abb. Pr. (N. Y. Super. Ct.) 304, 3 Bosw. (N. Y.) 103. See also *Wayland v. Tysen*, 45 N. Y. 281, holding that an answer under oath

b. NECESSITY OF PLEA OR ANSWER. — The plaintiff's title to the instrument and his right to maintain an action thereon, as alleged in the declaration or complaint, stand admitted unless the defendant by an appropriate plea or answer puts these facts in issue, and, in the absence of such a plea or answer, no proof as to these facts will be required or permitted.¹

denying each and every allegation in the complaint is good and cannot be stricken out as sham.

In an Action by an Indorsee Against the Indorser, an answer denying that the plaintiff is the owner and holder of the instrument is not frivolous, and puts the plaintiff upon proof that he is the owner of the instrument, although that fact may be established by the mere production of the instrument and its introduction in evidence. *Western Carolina Bank v. Atkinson*, 113 N. Car. 478.

Denial of Title to Unindorsed Instrument. — Where the instrument is payable to the order of a named person, and there is no indorsement thereon, in an action by a third person as holder, an answer denying that the plaintiff is the owner of the instrument, and that the plaintiff received it in due course of trade, is good. *Louisville Banking Co. v. McDonald*, 1 Cleve. L. Rep. (Ohio) 173.

Denial of Title to Instrument Payable to Bearer. — A plea that the plaintiff was not, at the time of filing his declaration or at the time of entering the plea, the owner or holder or bearer of an instrument which is payable to bearer, is not bad upon general demurrer, although the defense which it sets up may be made under a plea of the general issue. *Pendleton County v. Amy*, 13 Wall. (U. S.) 297. See also *Smyth v. Carden*, 1 Swan (Tenn.) 28, holding that the plaintiff must show that he came by the instrument *bona fide* and for a valuable consideration.

1. *Colorado.* — *Solomon v. Brodie*, 10 Colo. App. 353, holding that an allegation that the instrument was indorsed to the plaintiff is admitted unless it is denied in the answer.

Georgia. — *Leitner v. Miller*, 49 Ga. 486. See also *Hazlehurst v. Morrison*, 48 Ga. 397.

Florida. — *Raney v. Baron*, 1 Fla. 367.

Illinois. — *Hayden v. Olinger*, 5 Ill. App. 632; *McHenry v. Ridgely*, 3 Ill. 309. See also *Hakes v. National State Bank*, 164 Ill. 273.

Indiana. — *Felton v. Smith*, 84 Ind. 485; *Harris v. Smith*, 4 Blackf. (Ind.) 550; *Gully v. Remy*, 1 Blackf. (Ind.) 68.

Kansas. — *Linney v. Thompson*, 44 Kan. 765.

Kentucky. — *Garrison v. Combs*, 7 J. Marsh. (Ky.) 84; *Crosthwait v. Misener*, 13 Bush (Ky.) 543; *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180. In the last case the court *distinguished* *Cope v. Daniel*, 9 Dana (Ky.) 415.

Louisiana. — *Burns v. Haynes*, 13 La. 12; *Lecourt v. McBean*, 9 La. Ann. 459.

Minnesota. — *Frasier v. Williams*, 15 Minn. 288; *Downer v. Read*, 17 Minn. 493.

Nebraska. — *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625.

New York. — *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 50 N. Y. St. Rep. 15, 61 N. Y. Super. Ct. 51; *Ogden v. Raymond*, 5 Bosw. (N. Y.) 16; *Robbins v. Richardson*, 2 Bosw. (N. Y.) 248. See also *Wheeler v. Ruckman*, 7 Robt. (N. Y.) 447.

Tennessee. — *Stone v. Bond*, 2 Heisk. (Tenn.) 425; *Blackwell v. Fitzpatrick*, 9 Baxt. (Tenn.) 218.

Texas. — *Abercrombie v. Stillman*, 77 Tex. 589; *Barnett v. Logue*, 29 Tex. 282; *Wimbish v. Holt*, 26 Tex. 673.

In Justices' Courts. — In an action in a justice's court, even though by reason of the fact that an answer under oath is not required no written pleading is necessary, the defense that the plaintiff has not title in the instrument must be pleaded orally. *Blackwell v. Fitzpatrick*, 9 Baxt. (Tenn.) 218, in which case it was not considered sufficient to object to the reading of the instrument in evidence without specifying the grounds of objection. *Distinguishing* *Richardson v. Cato*, 9 Humph. (Tenn.) 464, in which case the defendant objected to the reading of the indorsement or assignment in evidence without proof thereof. See also *Stone v. Bond*, 2 Heisk. (Tenn.) 425.

Non Est Factum Not Appropriate. — A plea of *non est factum* does not put the plaintiff upon proof of anything more than that the defendant executed the

c. STATUTES AND RULES OF COURT — DENIALS UNDER OATH — (1) *In General*. — In the absence of any statutory provision, a plea or answer denying the plaintiff's title to the instru-

instrument, and does not question or deny the fact that the plaintiff is the owner. *Gully v. Remy*, 1 Blackf. (Ind.) 68; *Harris v. Smith*, 4 Blackf. (Ind.) 550, which case is *distinguishable* from *Bates v. Hunt*, 1 Blackf. (Ind.) 67, in that the latter case the action was debt and the plea was *nil debet*; *Lecourt v. McBean*, 9 La. Ann. 459; *Barnett v. Logue*, 29 Tex. 282.

Failure of Consideration. — A plea that there was a failure of consideration does not put in issue the plaintiff's title. *Harris v. Smith*, 4 Blackf. (Ind.) 550.

Agent's Authority to Make Assignment.

— Where the assignment purports to have been made by an agent of the payee, the plaintiff need not prove the authority of the agent to make the assignment, where there is no plea impeaching the assignment. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84. See also *Ogden v. Raymond*, 5 Bosw. (N. Y.) 16, holding that where the due indorsement of an instrument by a corporation is admitted by the answer, evidence as to what officer was in the habit of indorsing the instruments of the company is immaterial.

Authority of Agent to Sue. — Where an instrument is given to the plaintiff, describing him as agent, etc., and there is no allegation in the answer that he is not the proper person to receive and enforce payment, or that he has not the legal capacity to sue upon the instrument, that defense, if it exists, will be taken to have been waived. *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 50 N. Y. St. Rep. 15, *affirming* 61 N. Y. Super. Ct. 51.

Action by Personal Representatives.

— Plaintiffs who sue as personal representatives of the payee are not required to prove that they have been legally appointed executors or administrators, unless the plaintiff by proper plea denies that they are the decedent's representatives or that they are entitled to maintain the action in their representative capacity. *Hazelhurst v. Morison*, 48 Ga. 397; *Raney v. Baron*, 1 Fla. 367.

Purchase of Instrument by Attorney for Collection. — The defense that the plaintiff is an attorney at law and that in violation of a statute he purchased

the instrument for collection cannot be made, unless it is set up in the answer. *Wheeler v. Ruckman*, 7 Robt. (N. Y.) 447. See also *Randall v. Baird*, 66 Mich. 312, holding that this defense, under How. Stat. Mich., § 7189, can be made only when notice thereof has been given, and that under the circumstances existing in that case, the court did not abuse its discretion by refusing leave to amend the notice.

Requisites of Answer. — An answer alleging that the plaintiff who sues as an indorsee "is an attorney at law and if he is the owner of the note he obtained it for the purpose of prosecuting it contrary to the statute in such cases made and provided," is sufficient and is not bad because it is hypothetical or because it does not set out in detail facts and circumstances as to the procurement of the instrument by the plaintiff. *Brown v. Ryckman*, 12 How. Pr. (N. Y. C. Pl.) 313. See also generally article CHAMPERTY AND MAINTENANCE, vol. 4, p. 368.

Admission of Plaintiff's Ownership —

At Prior Time. — An admission of ownership at a time previous to the institution of the action is not an admission of ownership at the time the suit was brought. *Murphy v. Hobbs*, 8 Colo. 130.

By Admission of Execution. — The fact that the defendant admits in his answer that he executed the instrument is not an admission that at the time of the trial the plaintiff owns the instrument and has a right to judgment thereon. *Dowden v. Wilson*, 71 Ill. 485, in which case it was held that without proof that the instrument had been lost or destroyed the instrument should have been produced, and that the court should not have permitted parol evidence of its contents. See also *Lustig v. McCulloch*, 10 Colo. App. 41, holding that an answer admitting that a bill was drawn and accepted and that it has not been paid, as alleged in the complaint, does not admit the drawer's ownership of the acceptance.

Plea of Payment. — The plaintiff's right to sue in the character in which he brings the action is admitted by a plea of payment. *Raney v. Baron*, 1 Fla. 367.

ment, or the genuineness of an indorsement or assignment under which he claims title, need not be sworn to;¹ but in many states statutes have been enacted prohibiting the defendant from putting in such a plea or answer except under oath, or providing that unless the defendant does put in such a denial, accompanied by an affidavit of its truth, the plaintiff shall not be required to prove his title to the instrument or the genuineness of the indorsement.²

Objection on Face of Declaration.—The failure of the answer to deny the plaintiff's ownership of the instrument is not an admission that he is the owner, where ownership is not alleged in the complaint. *Lustig v. McCulloch*, 10 Colo. App. 41. And the defendant without demurring to the declaration, or denying the plaintiff's title, may object to the instrument as evidence, where the instrument is such that an action cannot be maintained on it by a person other than the payee and the action is brought by another person. *Hubbard v. Mosely*, 11 Gray (Mass.) 170.

Time of Acquisition of Title.—Evidence tending to show that the instrument was indorsed to the plaintiff after it had become due is not admissible, unless a plea is filed raising that issue. *Hayden v. Olinger*, 5 Ill. App. 632.

Laws of Another State.—The defense that the plaintiff cannot maintain an action in his own name under the laws of another state than that in which the suit is brought and in which the instrument was executed is a matter of defense which must be pleaded and proved like any other fact. *Hakes v. National State Bank*, 164 Ill. 273. See also article FOREIGN LAWS, vol. 9, p. 514.

Stipulation Waiving Plea.—Under an agreement that proof may be made as to any fact that could have been properly pleaded, an averment of the complaint that the instrument was indorsed to the plaintiff is not admitted by failure to put in an answer denying it. *Allison v. Hubbell*, 17 Ind. 559. See also article STIPULATIONS.

Effect of Proof Without Proper Plea or Answer.—The defense that the instrument was never transferred and delivered by the payee to the plaintiff, unless it is set up in the answer, will not avail the defendant, although it is proved on the trial. *Robbins v. Richardson*, 2 Bosw. (N. Y.) 248. *Following Field v. New York*, 6 N. Y. 179, and *Brazill v. Isham*, 12 N. Y. 9.

Motion to Set Aside Summons and to Dismiss Action.—Where the plaintiff alleges that he is the owner and indorsee of the instrument the question whether or not he is the owner and indorsee cannot be made by a motion to set aside the summons and the service and to dismiss the action, but the defendant should put in answer and the question should be tried by a jury. *Linney v. Thompson*, 44 Kan. 765, *following Drea v. Carrington*, 32 Ohio St. 595.

Denial of Plaintiffs' Partnership.—An allegation in the petition that the plaintiffs were partners doing business under a certain firm name and that the defendant executed the instrument to them is a material one, and, unless it is denied by the answer, evidence that the plaintiffs were partners doing business under the name alleged is not necessary. *Hartzell v. McClurg*, (Neb. 1898) 74 N. W. Rep. 625, *citing Slater v. Skirving*, 51 Neb. 108.

1. *Grogan v. Ruckle*, 1 Cal. 193; *Mahe v. Reynolds*, 38 Cal. 560; *Robinson v. Lair*, 31 Iowa 9; *Hardman v. Chamberlin*, 1 Morr. (Iowa) 104; *Hinkley v. Weatherwax*, 35 Mich. 510; *Saville v. Huffstetter*, 63 Mo. App. 273; *Klyce v. Black*, 7 Baxt. (Tenn.) 277; *Richardson v. Cato*, 9 Humph. (Tenn.) 464; *Stroud v. Harrington*, Hempst. (U. S.) 116.

2. *Alabama.*—*Cunyus v. Guenther*, 96 Ala. 564; *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606; *Hanna v. Ingram*, 93 Ala. 482; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505; *Manning v. Maroney*, 87 Ala. 563; *Mobile L. Ins. Co. v. Egger*, 67 Ala. 134; *Berry v. Ferguson*, 58 Ala. 314; *Broadhead v. Jones*, 39 Ala. 96; *Price v. Lavender*, 38 Ala. 389; *Smith v. Harrison*, 33 Ala. 706; *Nesbitt v. Pearson*, 33 Ala. 668; *Savage v. Walshe*, 26 Ala. 619; *Agee v. Medlock*, 25 Ala. 281; *Bancroft v. Paine*, 15 Ala. 834; *Bragg v. Nall*, 14 Ala. 619; *Frazer v. Brownrigg*, 10 Ala. 817; *Jennings v. Cummings*, 9 Port. (Ala.) 309; *Tarver v. Nance*, 5 Ala. 712; *Cass v. Northrop*,

Purpose of Statutes. — It was intended by these statutes to make the possession of any assignable instrument purporting to have been regularly assigned a sufficient authority to justify the maker in paying it to the assignee or recognizing him as the holder, except in those cases in which the assignments through which the holder derives his title are forged. With this exception, the plaintiff is relieved from the necessity of proving his title and the maker is exempted from controversies between intermediate holders respecting the validity of or consideration for any one or more of the contracts of assignment to which he is a stranger, thus leaving any party aggrieved by the maker's recognition of the holder's title to pursue his own appropriate remedy.¹

Statutes Requiring Denial of Execution of Instrument. — Statutes providing that in an action upon a written instrument, the genuineness and due execution thereof shall be deemed admitted unless the plea or answer denying the same be verified, or that no person sued

1 Stew. & P. (Ala.) 89; Beal v. Snedecor, 8 Port. (Ala.) 523; Dew v. Garner, 7 Port. (Ala.) 503.

Arkansas. — Dickinson v. Burr, 15 Ark. 372; Herndon v. Higgs, 15 Ark. 389; Sanger v. Sumner, 13 Ark. 280.

California. — Delano v. Jacoby, 96 Cal. 275; Randolph v. Harris, 28 Cal. 561; Morrill v. Morrill, 26 Cal. 288.

Georgia. — Habersham v. Lehman, 63 Ga. 380.

Illinois. — Bailey v. Valley Nat. Bank, 127 Ill. 332; Walker v. Krebaum, 67 Ill. 252; Templeton v. Hayward, 65 Ill. 178; Hall v. Freeman, 59 Ill. 55; Grier v. Gibson, 36 Ill. 521; Foy v. Blackstone, 31 Ill. 538; Goodrich v. Reynolds, 31 Ill. 490; Davis v. Cleghorn, 25 Ill. 212; Lockridge v. Nuckolls, 25 Ill. 178; Frye v. Menkins, 15 Ill. 339; Hudson v. Dickinson, 12 Ill. 407; Archer v. Bogue, 4 Ill. 527; McIntire v. Preston, 10 Ill. 64; Hayden v. Olinger, 5 Ill. App. 632.

Indiana. — Wells v. Sutton, 85 Ind. 70; Jennings v. McFadden, 80 Ind. 531; Wallace v. Reed, 70 Ind. 263; McIntosh v. Robison, 68 Ind. 120; Stebbins v. Goldthwait, 31 Ind. 159; Lawson v. Sherra, 21 Ind. 363; Patterson v. Crawford, 12 Ind. 241; Allison v. Hubbell, 17 Ind. 559; Gaskin v. Wells, 15 Ind. 253; Nimmon v. Worthington, 1 Ind. 376; Faught v. Crosby, 5 Blackf. (Ind.) 554; Berger v. Henderson, 5 Blackf. (Ind.) 545; Bates v. Hunt, 1 Blackf. (Ind.) 67; Wheeler v. Barr, 7 Ind. App. 381; Zink v. Dick, 1 Ind. App. 269.

Iowa. — Shaw v. Jacobs, 89 Iowa 713; Sheldon v. Middleton, 10 Iowa 17;

Steinhelber v. Edwards, 2 Greene (Iowa) 366; Shaw v. Jacobs, 89 Iowa 713; Richmond Second Nat. Bank v. Martin, 82 Iowa 442; Robinson v. Lair, 31 Iowa 10; Oliver v. Depew, 14 Iowa 490; Merritt v. Daniels, 10 Iowa 196; Knipper v. Chase, 7 Iowa 145.

Kansas. — Hoyt v. Carpenter, 6 Kan. App. 305; Eggan v. Briggs, 23 Kan. 710; Washington v. Hobart, 17 Kan. 275; Morris v. Case, 4 Kan. App. 691.

Kentucky. — Burks v. Howard, 2 B. Mon. (Ky.) 66.

Texas. — Grounds v. Sloan, 73 Tex. 662.

In North Carolina an answer denying the plaintiff's ownership need not be verified where the complaint is not verified. Rankin v. Allison, 64 N. Car. 673.

Authority of Attorney to Bring Action.

— In Massachusetts, by a rule of court, if the defendant desires to deny the authority of the attorney of record to bring the action, he is required to take the objection at the first stage, and unless the matter is discovered since the last continuance, it cannot avail the defendant after he has pleaded it in chief. Troeder v. Hyams, 153 Mass. 536.

In Mississippi, the practice has been pursued, where the interest of the plaintiff in the instrument has been denied under oath, of putting the plaintiff's attorney under a rule requiring him to show his authority for using the name of the plaintiff. Anderson v. Patrick, 7 How. (Miss.) 347.

1. Per Watkins, C. J., in Dickinson v. Burr, 15 Ark. 372.

as the maker or indorser of an instrument shall be permitted to deny the execution or the indorsement of the instrument respectively, except under a plea verified by affidavit, apply to the immediate parties to the action, and do not forbid the maker or indorser of the instrument to deny an indorsement made by another person by an unverified plea or answer.¹

(2) *Pleadings and Transfers to Which Statutes Apply*—(a) **In General.**—The statutes under consideration requiring a plea or answer in which the defendant denies the plaintiff's title to the instrument, or the genuineness of an indorsement to the plaintiff, to be under oath, preclude the defendant from denying the assignment to the plaintiff for any purpose, so as to put the plaintiff on any proof of it, unless the plea is supported by the kind of affidavit prescribed.²

1. *Stroud v. Harrington, Hempst.* (U. S.) 116, in which case the court, in construing a statute of Arkansas Territory, providing that it should not be lawful for the defendant to deny the execution of the instrument, except by a plea supported by the affidavit of the party putting in such plea, said, "What is meant by the execution of the writing? Unquestionably, the making, signing, and delivery of the note or bond. The indorsement constitutes no part of the execution of the note. Its only operation is to transfer it from one person to another after it has been duly executed. We are equally clear in the opinion that the indorsement of a note is not embraced by the spirit and intention of our statute, unless the action is founded on the indorsement against the indorser. The indorsers may be, and frequently are, strangers to the maker of the note, who cannot be presumed to know their handwriting." *Distinguishing Mills v. U. S. Bank, 11 Wheat. (U. S.) 431.* See also *Richardson v. Cato, 9 Humph. (Tenn.) 464*, decided under a statute providing that no person sued as the indorser of any bond or note, or drawer or indorser or acceptor of any bill of exchange, shall plead any plea directly or indirectly denying such drawing, indorsement, or acceptance, unless his plea be accompanied with an affidavit of the truth of the plea. See further *Grogan v. Ruckle, 1 Cal. 158, 193; Mahe v. Reynolds, 38 Cal. 560; Hardman v. Chamberlain, 1 Morr. (Iowa) 104; Robinson v. Lair, 31 Iowa 9; Hinkley v. Weatherwax, 35 Mich. 510*, in which case the court followed *Spicer v. Smith, 23 Mich. 96; Saville v. Huffstetter, 63*

Mo. App. 273 [in which case the court cited *Cavitt v. Tharp, 30 Mo. App. 131*, and *Worrell v. Roberts, 58 Mo. App. 197*]; *Klyce v. Black, 7 Baxt. (Tenn.) 277* [in which case the court cited *Stone v. Bond, 2 Heisk. (Tenn.) 425; Richardson v. Cato, 9 Humph. (Tenn.) 465; and Oliver v. State Bank, 2 Swan (Tenn.) 59*].

Iowa Statute.—In *Steinhelber v. Edwards, 2 Greene (Iowa) 366*, it was held that a statute providing that "the signature to all bills * * * or other instruments, or to any assignments thereon, on which suit is or may be commenced, * * * shall be considered *prima facie* evidence of their execution, and the party denying the same, his agent or attorney, shall deny the same by oath, when the party introducing the instrument shall prove the signature by extrinsic evidence," applies to the signature of a party who transfers an instrument by an indorsement which is relied upon in an action against the maker.

2. *Dickinson v. Burr, 15 Ark. 372; Sanger v. Sumner, 13 Ark. 280*, holding that a plea which admits the execution of the instrument, and yet controverts the facts, or a material part of the facts, which the assignment evidences, must be sworn to.

Terms of Denial Immaterial.—In *Kentucky* it has been held that no denial of the assignment of the instrument to the plaintiff will be effectual unless accompanied by an oath of its truth; and that although the statute provides that the plaintiff shall not be required to make proof of the assignment unless the defendant shall annex to his plea denying such assignment "an affidavit

(b) **Denial of Transfer Not in Writing.** — Under the statutes of some of the states requiring a plea or answer denying the genuineness of written indorsements to be sworn to, it has been held that where the plaintiff alleges merely that the instrument was sold,

stating his belief that such assignment was forged," the statute is not applicable alone to pleas which deny the assignment by charging that it was forged, and that whatever the language of the plea may be, if it would be supported by proof of forgery, or would require any proof of the assignment if issue were taken on it, it must be supported by an oath. *Burks v. Howard*, 2 B. Mon. (Ky.) 66.

In an Action by the Payee, although he does not sue in the character of assignee, indorser, or transferee, and so does not come within the letter of the statute, its intention and spirit require that a plea alleging that he has parted with his right to a portion of the money due on the instrument, and is not therefore entitled under the statutes of the state to maintain an action in his own name, should be verified. *Hirschfelder v. Mitchell*, 54 Ala. 419. *Citing Broadhead v. Jones*, 39 Ala. 96, in which case the action was bottomed on an instrument payable to a named person or bearer.

After Indorsement by Payee. — In an action by the payee of the instrument, notwithstanding the fact that the instrument introduced in evidence bears an indorsement by the plaintiff to a third person who is a stranger to the action, a denial of the plaintiff's title must be under oath. *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606, in which case the plaintiff introduced the instrument in evidence, but did not offer the indorsement in evidence.

Indorsement in Blank. — In an action by the payee against the indorser of an instrument made by a third person, although the indorsement is in blank, the plaintiff is an assignee within the statute and is not required to prove his interest in the cause of action, unless the same is put in issue by plea verified by affidavit. *Price v. Lavender*, 38 Ala. 389.

Indorsement by One Payee to Another. — Where one of the payees alleges that another payee transferred and assigned to him for a valuable consideration all his right, title, and interest in the instrument, that he is now holder and

sole owner thereof, and the complaint is verified, a general denial does not put in issue the plaintiff's ownership of the instrument. *Delano v. Jacoby*, 96 Cal. 275.

Transfer in Fraud of Bankruptcy Act. — In *Alabama*, it has been held, under a bankruptcy act which declared transfers made by the debtor, after he had gone into bankruptcy, void, that in an action by an indorsee it might be shown under the general issue that the payee had taken the benefit of the bankrupt law before he indorsed the instrument, and that no plea supported by affidavit was necessary. *Birch v. Tillotson*, 16 Ala. 387, *citing Pinkerton v. Adams*, 2 Esp. N. P. 611. *Compare Frenzel v. Miller*, 37 Ind. 1, and *Smith v. Hall*, 5 Bosw. (N. Y.) 319.

Lost Instrument. — In *Texas* the case of a lost instrument is not within the provisions of the statute dispensing with proof of the assignment of the instrument to the plaintiff unless it is denied under oath. *Erskine v. Wilson*, 20 Tex. 77.

Denial by Personal Representatives. — In *Indiana* the statute contains a clause expressly providing that executors, administrators, and guardians need not deny the assignment of the instrument under oath, but the same must be proved as if it were so denied. *Jennings v. McFadden*, 80 Ind. 531.

Plea in Abatement. — In *Texas*, in an action by the payee upon an instrument, which has been assigned to others, an answer that the legal, as well as the equitable, interest in said instrument is not, and was not at the time of the commencement of the action, in the plaintiff, but is in one of the indorsees of the instrument, or some other person holding under them or one of them, is a plea in abatement within the meaning of the statute providing that no plea in abatement shall be admitted or received unless the same shall be verified. *Tinnin v. Weatherford*, Dall. (Tex.) 590.

Misnomer of Payee. — Where the plaintiff alleges that the defendant executed an instrument payable to Elnathan Platter by the name and description of L. Nathan Platter, if the defendant

assigned, or transferred to him, and that he is now the owner thereof, and does not allege that it was transferred to him in writing, the defendant's plea or answer, by which he denies the plaintiff's title, need not be sworn to.¹

(c) *Indorsements by Agents.* — A plea under which it is sought to assail the authority of one who indorsed the instrument as the agent of the indorser must be sworn to.²

intends to insist on the trial that the promise was not in fact made to Elnathan Platter he should put the question in issue by a plea under oath. *Frye v. Menkins*, 15 Ill. 339.

Variance as to Payee's Christian Name. — Where Henry Luther declares on an instrument payable to H. Luther, a plea of *non assumpsit* verified by affidavit is sufficient to enable the defendant to prove that the instrument was executed and delivered to Hulbert Luther and not the plaintiff, and a plea in abatement for a misnomer is not necessary, as this is not a question of misnomer but a question of variance. *Ingraham v. Luther*, 65 Ill. 446, following *Simons v. Waterman*, 17 Ill. 371.

Averment that Transfer Was Colorable. — In *Indiana* it has been held that an answer averring that the instrument was transferred and assigned to the plaintiff without consideration and solely for the purpose of enabling him to sue upon and collect the same for the benefit and use of the real owner thereof, is good, under a statute (Rev. Stat. 1881, § 251) providing that every action must be prosecuted in the name of the real party in interest. Such an answer is not a plea in abatement but a plea in bar of the action, and hence need not be verified. *Bostwick v. Bryant*, 113 Ind. 448, citing *State v. Ruhlman*, 111 Ind. 17.

Time of Assignment. — In *Arkansas*, a plea that the assignment was not made at the time set forth in the declaration, but after the commencement of the suit, must be sworn to. *Sanger v. Sumner*, 13 Ark. 280.

In *Illinois*, it is the fact of the assignment that must be denied by plea verified by affidavit, and the question as to the time when the assignment was made may be raised by a plea not sworn to. *Hayden v. Olinger*, 5 Ill. App. 632.

Character in Which Plaintiffs Sue. — In *Indiana* it was provided by an early statute that proof of the names of the parties should not be necessary, unless

the same should be put in issue by some form of pleading verified by affidavit. *Abernathy v. Reeves*, 7 Ind. 306, in which case the instrument was payable to a partnership, and several parties, describing themselves as the partners constituting the partnership, sued upon the instrument. It was held that it was not incumbent upon them to prove that they constituted the firm, in the absence of a sworn plea denying that fact, and that this statutory provision was not abrogated by the code.

In *Mississippi*, it has been provided by statute that the plaintiff need not prove his description of the character in which he sues, unless it is denied by a plea the truth of which is verified by an oath. *Prewitt v. Bennett*, 7 Smed. & M. (Miss.) 101. See also *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507.

Replication Denying Defendant's Title. — In *Alabama* it has been held that the statute is applicable to defendants alone, and that where the defendant claims a set-off based on an instrument that has been assigned to him, no denial by the plaintiff under oath of the genuineness of the assignment is necessary to enable him to contest its genuineness. *Cass v. Northrop*, 1 Stew. & P. (Ala.) 89, in which case the court cited *Parks v. Greening*, Minor (Ala.) 178. But see *contra*, the dissenting opinion of Taylor, J., in the first mentioned case; *Hudson v. Tindall*, 1 Stew. & P. (Ala.) 237; and a dictum by Brickell, C. J., in *Walker v. Bentley*, 64 Ala. 92.

1. *Washington v. Hobart*, 17 Kan. 275; *Morris v. Case*, 4 Kan. App. 691; *Ford v. Oliphant*, (Tex. Civ. App. 1895) 32 S. W. Rep. 437, in which case the court considered a general denial sufficient, and cited *Kinnard v. Herlock*, 20 Tex. 48; *Clason v. Parrish*, 93 Va. 24.

2. *Habersham v. Lehman*, 63 Ga. 380, in which case the instrument purported to have been indorsed by an attorney, and it was held that no power

(d) *In Justices' Courts.* — These statutes are applicable to actions in justices' courts.¹

(3) *Effect of Failure to Deny under Oath.* — Where the defendant does not put in an appropriate plea or answer under oath, as required by statute, the plaintiff is not required to prove the genuineness of the indorsement under which he claims title.² But it has been held that the defendant, by a denial not sworn to, may put in issue an allegation that the instrument was indorsed to the plaintiff, and require that the indorsement be produced and be given in evidence.³

of attorney or other evidence of authority was necessary in the absence of a denial under oath; *Goodrich v. Reynolds*, 31 Ill. 490, in which case the court cited *Frye v. Tucker*, 24 Ill. 180; *Nimmon v. Worthington*, 1 Ind. 376.

1. *Hudson v. Dickinson*, 12 Ill. 407; *Archer v. Bogue*, 4 Ill. 527; *Stebbins v. Goldthwait*, 31 Ind. 159.

On Appeal from a Justice's Court, upon the filing of a formal complaint by the plaintiff, the plaintiff is not put to the proof of the indorsement under which he claims title, unless the defendant denies its genuineness under oath. *Stebbins v. Goldthwait*, 31 Ind. 159.

2. *Stebbins v. Goldthwait*, 31 Ind. 159; *Eggar v. Briggs*, 23 Kan. 710.

In *Grounds v. Sloan*, 73 Tex. 662, it was declared that if evidence that the indorsement was not genuine should be improvidently admitted, without the answer required by the statute, it would go for nothing; Henry, J., saying: "A valid judgment cannot be rendered on evidence unsupported by a proper pleading. Without the prescribed plea the language of the statute is that the assignment 'shall be regarded as fully proved.' This includes delivery and everything else required to give the assignment legal effect. The statute would be of very little value to the assignee if it left it necessary for him to bring proof of the actual delivery of the assigned instrument or left that fact open to attack under a general denial."

Evidence Introduced by Defendant. — In *Illinois* it has been held that the statute dispenses with proof of the assignment before the instrument is admitted in evidence unless the act of assignment is denied by a plea verified by affidavit, but that it does not prohibit the defendant, even though there be no sworn plea, from denying the assignment by evidence in rebuttal. *Lockridge v. Nuckolls*, 25 Ill. 178, in which case it

was said: "The language of the fifty-ninth section is different from the other. It dispenses with proof of the assignment, before the instrument is admitted, unless the act of assignment is denied by plea verified by affidavit, whilst the maker under the fourteenth section is not permitted to deny the execution of the instrument, except in that mode. [Section fourteen provides that "no person shall be permitted to deny on the trial the execution of any instrument in writing, unless his plea is verified by affidavit."] This section [fifty-nine] does not prohibit the defendant from denying the assignment by rebutting evidence. It only provides that until the assignment is denied in the mode indicated, the plaintiff shall not be required to make the proof. In the one case the maker is not permitted to deny the execution of the instrument, and in the other the holder is not required to prove the assignment. The one is conclusive, and the other is presumptive. When the note and assignment are produced, they may unquestionably be read in evidence, if otherwise unobjectionable, unless their execution is denied, in the mode prescribed, and when read, we have seen the defendant has no right to deny or question the execution of the note, as he is expressly prohibited from doing so by the statute; but the fifty-ninth section contains no prohibition against denying the assignment after it is admitted in evidence."

Effect of Stipulation. — Where it is agreed by the parties that proof may be made as to any fact that could have been properly pleaded, an averment in the complaint that the instrument was indorsed to the plaintiff is not admitted by failure to put in an answer under oath denying it. *Allison v. Hubbell*, 17 Ind. 559.

3. *Wallace v. Reed*, 70 Ind. 263; *McIntosh v. Robison*, 68 Ind. 120.

(4) *Effect of Denial under Oath.* — Where the defendant, in compliance with the statute, puts in an appropriate plea denying that the instrument was indorsed to the plaintiff, it is incumbent upon the plaintiff to prove the genuineness of the indorsement.¹

d. REQUISITES AND SUFFICIENCY OF ALLEGATIONS —

(1) *Definiteness and Certainty.* — In denying the plaintiff's title, the general rule of pleading obtains that the plea or answer should be definite and certain.²

(2) *Allegation and Denial of Legal Conclusions — Necessity to Allege Facts.* — The plea or answer must with proper definiteness and certainty allege facts affirmatively showing how or why the plaintiff is not the owner of the instrument, and it is not sufficient to allege mere conclusions of law.³

See also *Belton v. Smith*, 45 Ind. 291.

1. *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157; *Saville v. Huffstetter*, 63 Mo. App. 273. In the latter case it was held that the fact that the defendant fails to deny under oath the execution of the instrument does not relieve the plaintiff from the necessity of proving his title to the instrument.

2. *Hubler v. Pullen*, 12 Ind. 567; *Doyle v. Watt*, 12 Ind. 342, 423; *Wells v. Sutton*, 85 Ind. 70, holding that in an action by an indorsee an answer denying that he is the real party in interest must be clear and unequivocal. See also *Oliver v. Depew*, 14 Iowa 490.

Negative Pleading. — An answer in which "the defendant denies that plaintiff holds against him any such notes as are described in his petition" is bad, as it puts stress on the description used in the petition and presents the issue, if at all, in a negative form, instead of affirming that the instrument is the property of another, naming him, and that such other person is the real party in interest. *Allen v. Newberry*, 8 Iowa 65.

Argumentative Denial. — The denial of the plaintiff's ownership of the instrument should not be argumentative. *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294.

Matters Alleged in Complaint. — The plea need not allege facts which are alleged in the complaint. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, in which case it appeared on the face of the complaint that the instrument was payable at a bank or banking house. It being required by statute (Code Ala. 1886, § 2596), that an action on such instrument must be instituted in the name of the person having the legal

title, it was held that a plea averring that the plaintiff was not, at the commencement of the action, the legal owner of the instrument, was not open to the objection that it did not aver that the instrument was payable at a bank or banking house.

3. *Savage v. Walshe*, 26 Ala. 619; *Reynolds v. Roth*, 61 Ark. 317; *Felch v. Beaudry*, 40 Cal. 439; *Poorman v. Mills*, 35 Cal. 118; *Weaver v. Zollman*, 5 Ind. App. 488; *Richmond Second Nat. Bank v. Martin*, 82 Iowa 442; *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 295, in which case the court cited *Vanbuskirk v. Levy*, 3 Metc. (Ky.) 134; *Graham v. Fahnestock*, 5 Gill (Md.) 215; *Plant v. Schuyler*, 7 Robt. (N. Y.) 271, 4 Abb. Pr. N. S. (N. Y.) 146; *Ran-kin v. Allison*, 64 N. Car. 673; *Stouten-burg v. Lybrand*, 13 Ohio St. 228.

Denial of Corporation's Power to Contract. — In an action by an indorsee on an instrument payable to a corporation, a plea that the said corporation at the date of the said instrument had no power or authority to make the contract and that the said instrument is null and void, is bad, because it asserts legal conclusions instead of facts. *Savage v. Walshe*, 26 Ala. 619.

Authority to Transfer Instrument. — Where the defense sought to be made is that the instrument was not transferred to the plaintiff by any one authorized to do so, the defendant must allege facts rather than mere conclusions of law. *Reynolds v. Roth*, 61 Ark. 317; *Graham v. Fahnestock*, 5 Gill (Md.) 215.

Ownership of Another Person. — An answer admitting the indorsement of the instrument to the plaintiff and alleging that another person is the owner must aver how such other person became the

Denial of Plaintiff's Conclusions as to Ownership. — Where the plaintiff alleges facts from which the law presumes that he is the legal owner and holder of the instrument, and also avers that he is the legal owner and holder of the instrument, a plea or answer denying merely the plaintiff's conclusion that he is the owner or holder, without denying the facts alleged by the plaintiff upon which such conclusion is based, presents no issue and is immaterial and irrelevant.¹

owner. *Rankin v. Allison*, 64 N. Car. 673. But see *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

1. *Monroe v. Fohl*, 72 Cal. 568, in which case the court cited *Poorman v. Mills*, 35 Cal. 119; *Wedderspoon v. Rogers*, 32 Cal. 571, and *Hook v. White*, 36 Cal. 302; *Goldstein v. Krause*, 2 Idaho 271; *Weaver v. Zollman*, 5 Ind. App. 488; *Elder v. Smith*, 16 Ind. 466; *Hawes v. Ryder*, 100 Mass. 216; *Hayward v. Grant*, 13 Minn. 165; *Freeman v. Curran*, 1 Minn. 169; *State Bank v. Smith*, 33 Mo. 364; *Allen v. Reilly*, 15 Nev. 452; *Catlin v. Gunter*, 1 Duer (N. Y.) 253; *Fleury v. Roget*, 5 Sandf. (N. Y.) 646; *Tullis v. Shannon*, 3 Wash. 716; *Stamper v. Gay*, 3 Wyoming 322. See also *Tullis v. Shannon*, 3 Wash. 716. But see an intimation to the contrary in *Agee v. Medlock*, 25 Ala. 281, and *Tamisier v. Cassard*, 17 Abb. Pr. (N. Y. Supreme Ct.) 187, holding that an answer denying that the plaintiff is the owner and holder of the instrument and averring that another person, naming him, is the real owner and holder thereof, puts in issue the question whether the plaintiff is the real party in interest, as by statute he is required to be, and is not frivolous.

Instrument Made and Indorsed by Defendant. — In *McKnight v. Hunt*, 3 Duer (N. Y.) 615, the complaint averred that the instrument had been made and indorsed by the defendant, and that the plaintiff was the lawful holder and owner of it, but did not aver that the instrument had been transferred and delivered to the plaintiff by the defendant. It was held that an answer containing only a denial that the plaintiff was such owner and holder, owing to the peculiar form of the complaint, might fairly be construed not as a denial of a conclusion of law, but of an issuable fact.

In an action on an instrument payable to the maker's order and indorsed and delivered by the maker to the plaintiff, an answer simply denying

that the plaintiff is the legal owner and holder of the instrument is frivolous. *Per Ingraham, J.*, in *Smith v. Mead*, 14 Abb. Pr. (N. Y. Supreme Ct.) 262.

Capacity in Which Plaintiff Sues. — An answer denying that the plaintiff is entitled to sue in the capacity in which he has brought the action must aver facts sufficient to warrant his conclusions. *Claiborne v. Yoeman*, 15 Tex. 44, in which case the plaintiff was an administrator. See also *Leach v. Lewis*, 38 Ind. 160, in which case the instrument was payable to the plaintiff in his fiduciary capacity as executor, and it was considered sufficient to aver that the instrument was the property of the estate, and that since the execution of the instrument the decedent's will had been set aside, and the plaintiff's letters testamentary had been revoked.

Denial of Plaintiff's Possession in His Own Right. — A plea in an action on an instrument payable to a named person or bearer that the plaintiff at the time of the commencement of the action did not possess and was not seized in his own right of the legal title to the instrument, and that it had not been transferred or assigned to him by the payee thereof, is bad, because (1) it is not necessary that the plaintiff should be possessed of the instrument in his own right, and (2) a holder for value without notice of an instrument payable to bearer may bring an action thereon against the maker, even though the instrument had been lost by the payee or had not been assigned by him for value. The plea should allege that the plaintiff is possessed *mala fide* or by casualty and without consideration. *Gregory v. McNealy*, 12 Fla. 578.

Denial that Indorsement Transferred Title. — An allegation that the instrument was not indorsed "so as to transfer the title" is not a denial of the transfer, but is an allegation as to the effect of the indorsement and is not sufficient to put the indorsement in

(3) *Denial Of or On Information and Belief.* — In *New York* and a few other code states, in an action by an indorsee, an answer denying that the defendant has knowledge or information sufficient to form a belief that the instrument was indorsed and delivered to the plaintiff, as alleged in the complaint, or alleging on information and belief that the instrument was not indorsed to the plaintiff, is sufficient to render proof of the indorsement necessary on the trial, and is neither frivolous, irrelevant, nor sham; and it has been declared that as the indorsement of the instrument by others than the maker is not a matter which the maker is supposed to know, an answer in this form, when it is sworn to, is not only good but is peculiarly proper, although no distinction whatever is made in this respect, whether the answer is or is not verified.¹

issue. *Richmond Second Nat. Bank v. Martin*, 82 Iowa 442.

Action by One Other than Indorsee. — In an action on an instrument specially indorsed, brought by a person, other than the indorsee, who alleges that the instrument was duly sold and delivered to him, an answer alleging that the plaintiff is not the owner and holder of the instrument puts the title of the plaintiff in issue. *Walker v. Land Title, etc., Co.*, (Kan. 1898) 53 Pac. Rep. 476. *Citing* *Washington v. Hobart*, 17 Kan. 275; *Pattie v. Wilson*, 25 Kan. 327; *Morris v. Case*, 4 Kan. App. 691.

Denial of Assignment by Partnership. — Where an instrument is payable to N. & Co., and the declaration alleged an assignment to the plaintiff subscribed by N. and three others, and avers that they constitute the members of the firm of N. & Co., a plea alleging that "the plaintiff's assignors are not the obligees in the instrument of writing sued on" is insufficient. *Burks v. Howard*, 2 B. Mon. (Ky.) 66, in which case the court said: "The plea, construed strictly, might be true, and yet the note might be effectually assigned; for if Joseph Nevill and one only of the other assignors constituted the firm of Joseph Nevill & Co., the note would be effectually assigned, and yet the plaintiff's assignors, four in number, would not be the obligees. Taken in this sense, the plea amounts to nothing, and its rejection could not be complained of. Rejecting this interpretation, it is still uncertain whether the plea means to assert that all of the obligees did not assign the note, or that none of them did assign it, or whether it asserts that other persons than the obligees have put their own names to

the assignment, or have put the names of the obligees or some of them to it without authority."

Plea that Indorsers Are Real Parties in Interest. — A plea that the payee who indorsed the instrument to the plaintiff is the real party in interest and should be made a party plaintiff, alleging no fact to show that the indorsement did not vest in the plaintiff the real and beneficial interest in the instrument, is bad. *Lung v. Sims*, 14 Ind. 467, in which case the court intimated doubts as to whether such fact could be shown against the legal effect of the assignment. *Citing* *Garrison v. Clark*, 11 Ind. 369.

1. *Snyder v. White*, 6 How. Pr. (N. Y. Supreme Ct.) 321, *per* Wells, J.; *Robert Gere Bank v. Inman*, 51 Hun (N. Y.) 97, 115 N. Y. 650, in which latter case, and in *Caswell v. Bushnell*, 14 Barb. (N. Y.) 393, 7 How. Pr. (N. Y.) 171, it was held that such an answer should not be stricken out as sham under Code Civ. Pro. (N. Y.), § 538, even though the affidavits upon which the motion to strike out is heard show beyond question that the answer is sham in fact, and was interposed in bad faith and solely for the purpose of delay. To these three cases particular reference is made. See also the following cases which support the proposition stated in the text: *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150; *Hays v. Hathorn*, 74 N. Y. 486; *Farmers' Nat. Bank v. Leland*, 50 N. Y. 673; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Roby v. Hallock*, 55 How. Pr. (N. Y. Supreme Ct.) 412, 5 Abb. N. Cas. (N. Y.) 86; *Fellows v. Muller*, 48 How. Pr. (N. Y. Super. Ct.) 82, 38 N. Y. Super. Ct. 137; *Chadwick v. Booth*, 22 How. Pr. (N. Y. Supreme Ct.) 23, 13 Abb. Pr.

(4) *Partial Ownership of Third Persons.* — Where the plaintiff is not the sole owner of the instrument, a plea or answer under which it is sought to show this fact must not allege mere legal conclusions, but must aver facts showing that the plaintiff is not

(N. Y.) 249; *Flood v. Reynolds*, 13 How. Pr. (N. Y. Supreme Ct.) 112; *Brown v. Ryckman*, 12 How. Pr. (N. Y. C. Pl.) 313; *De Santes v. Searle*, 11 How. Pr. (N. Y. C. Pl.) 477; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y. Supreme Ct.) 321; *Duncan v. Lawrence*, 6 Abb. Pr. (N. Y. Super. Ct.) 304, 3 Bosw. (N. Y.) 103; *Leach v. Boynton*, 3 Abb. Pr. (N. Y. Supreme Ct.) 1; *Hecker v. Mitchell*, 5 Abb. Pr. (N. Y. Super. Ct.) 453, 6 Duer (N. Y.) 687; *Hughes v. Wilcox*, 17 Misc. Rep. (N. Y. Supreme Ct.) 32; *Henderson v. Manning*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 221; *Wilson v. Eastman, etc., Co.*, 56 Hun (N. Y.) 194; *Metropolitan Bank v. Lord*, 4 Duer (N. Y.) 630; *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365; *Schultze v. Rodewald*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 365.

In *Roby v. Hallock*, 55 How. Pr. (N. Y. Supreme Ct.) 412, 5 Abb. N. Cas. (N. Y.) 86, the court *disapproved* *Kay v. Whitaker*, 44 N. Y. 565, and *People v. McCumber*, 18 N. Y. 315, in which latter case, as was declared by Grover, J., in *Wayland v. Tysen*, 45 N. Y. 281, the point was not involved.

In *California* an answer under oath denying upon information and belief that the instrument was transferred to the plaintiff by an indorsement of the same, as alleged in the complaint or in any other manner, that the instrument was ever delivered to the plaintiff, or that he paid any value therefor, or was ever a *bona fide* owner or holder, is sufficient to raise an issue as to the ownership of the instrument, and to prevent a judgment for the plaintiff without proof of his title. *Mair v. Forbes*, (Cal. 1889) 21 Pac. Rep. 552.

In *Colorado* a denial on information and belief that the instrument was ever indorsed by the payee or delivered to the plaintiff, or that the plaintiff is the owner or holder thereof, is not sufficient. *Solomon v. Brodie*, 10 Colo. App. 353, in which case the court declared that such a denial is not equivalent to an allegation that the defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. *Citing James v. McPhee*, 9 Colo. 490; *Haney v. People*, 12 Colo. 348;

Pratt Mfg. Co. v. Jordan Iron, etc., Co., 33 Hun (N. Y.) 544, and *Swinburne v. Stockwell*, 58 How. Pr. (N. Y. Supreme Ct.) 312.

In *Minnesota* an answer in which the defendant denies any knowledge or information sufficient to form a belief as to the plaintiff's allegation that the instrument was indorsed to him, and therefore denies said allegation, and demands that the plaintiff be put to strict proof of the same, is in substance a general denial of the plaintiff's allegation, and puts the transfer of the instrument and the plaintiff's ownership in issue. *Nunnemacker v. Johnson*, 31 Minn. 390; *Morton v. Jackson*, 2 Minn. 219, in which latter case the court *cited* and relied upon several New York cases. See also *Stone v. Quaal*, 36 Minn. 46.

In *Missouri* it has been held, under Prac. Act, art. 6, § 7, cl. 1, that in an action on an instrument payable to a partnership an answer admitting the execution of the instrument and alleging that the defendant does not know the names of the persons composing the said partnership, and that he has not any knowledge thereof sufficient to form a belief, and requiring proof of all the averments and allegations of the petition, is sufficient to put the plaintiffs upon proof that they constituted the firm to which the instrument is payable. *Wales v. Chamblin*, 19 Mo. 500.

Hypothetical Denial of Ownership. — An answer denying that the defendant made the instrument, alleging that he does not know whether it was indorsed or delivered to the plaintiff, denying any knowledge or information on the subject sufficient to form a belief, and alleging that if the plaintiff is the owner of the instrument, he took it with notice of the failure of consideration which is circumstantially set forth, is not bad because the denial of the plaintiff's ownership is hypothetical. *Brown v. Ryckman*, 12 How. Pr. (N. Y. C. Pl.) 313.

Denial of Allegations Not Admitted. — An answer admitting some of the allegations of the complaint, of which the allegation as to the indorsement to the

entitled to maintain the action without joining the other owner or owners.¹

(5) *Denial of Title of Payee.* — According to some authorities, where the instrument appears to have been made payable to the plaintiff, and not to have been assigned or indorsed by him, a plea or answer alleging that the plaintiff is not the legal owner or holder of the instrument, or that he is not the real party in interest, without averring any facts upon which such conclusions are based, as that a stranger to the action is the owner of the instrument, is bad.² There are other authorities, however, holding that a denial that the payee was, at the time of the commencement of the action, or at any time thereafter, the lawful owner and holder of the instrument, and denying that the defendant is

plaintiff is not one, and denying on information and belief each and every allegation in the complaint, not theretofore admitted, puts in issue the indorsement and transfer of the instrument to the plaintiff. *Morton v. Jackson*, 2 Minn. 219; *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y. Supreme Ct.) 321.

1. *Tompkins v. Acer*, 10 How. Pr. (N. Y. Supreme Ct.) 309.

Present Existence of Rights of Others. — It is not sufficient to allege that a person other than the plaintiff had an interest in the instrument, without stating the time, but it must be averred that the interest of such other person exists at the time of the action. *Jones v. Hawkins*, 17 Ind. 550. See also *Shafer v. Bronenberg*, 42 Ind. 89, in which case an answer alleging that the plaintiff is not the real party in interest, and that the instrument was sold and assigned by the payee to the plaintiff and others, including the defendant, was considered bad, because, notwithstanding these facts, the instrument might have been afterwards transferred to the plaintiff. *Citing Lamson v. Falls*, 6 Ind. 309; *Swift v. Ellsworth*, 10 Ind. 205; *Garrison v. Clark*, 11 Ind. 369, and *Elder v. Smith*, 16 Ind. 466.

Intervention of Other Owner. — In *Moran v. Le Blanc*, 6 La. Ann. 113, the defendant alleged that he had received notice from a third person that half the instrument belonged to him, and prayed that said third person be cited to appear in the suit, and it was held that the third person was entitled to appear and file an intervention. See also, generally, article INTERVENTION, vol. 11, p. 494.

2. *Bryan v. Wilson*, 27 Ala. 208, in which case Rice, J., declared, *obiter*, on the authority of *Bancroft v. Paine*, 15 Ala. 834, that in the absence of any statute requiring the action to be brought in the name of the real party in interest, a plea "that plaintiff is not the party really interested in said note mentioned in said complaint," is bad on demurrer; *Shasta Bank v. Boyd*, 99 Cal. 604; *Monroe v. Fohl*, 72 Cal. 568 [in which case the court cited *Hook v. White*, 36 Cal. 302; *Poorman v. Mills*, 35 Cal. 119, and *Wedderspoon v. Rogers*, 32 Cal. 571]; *Frost v. Harford*, 40 Cal. 165; *Felch v. Beaudry*, 40 Cal. 439; *Johnson v. Conklin*, 119 Ind. 109; *Blacker v. Dunbar*, 108 Ind. 217; *Wheeler v. Barr*, 7 Ind. App. 381; *Offutt v. Rucker*, 2 Ind. App. 350; *Nicolay v. Fritschle*, 40 Mo. 67; *Allen v. Reilly*, 15 Nev. 452.

Alabama Statute. — In *Bryan v. Wilson*, 27 Ala. 208, it was held, under a statute providing that the action must be prosecuted in the name of the party really interested, whether he have the legal title or not, that a plea by the maker in an action by the payee that "plaintiff is not the party really interested in said note mentioned in said complaint" is a good plea in bar. *Bryan v. Wilson*, 27 Ala. 208.

Denial that Plaintiffs Are Partners. — Where the plaintiffs allege that they are partners, and declare upon an instrument executed to the partnership of which they are members, but do not allege that the instrument was executed to them as partners, the allegation of the partnership is not essential to the cause of action, and a denial of the partnership by the defendant does not present a material issue. *Hayward v. Grant*, 13 Minn. 165.

indebted to the plaintiff, as alleged by him, is good.¹

(6) *Denial of Indorsement or Assignment to Plaintiff* — In General. — In an action by an indorsee or assignee of an instrument a plea or answer denying that the instrument was ever transferred to the

1. *Stockton v. Kenney*, 24 Misc. Rep. (N. Y. Supreme Ct.) 300, in which case it was held that an answer, verified by the defendant's affidavit, denying any knowledge or information sufficient to form an opinion as to the truth of any of the allegations contained in the complaint, was not frivolous, and it was declared that *Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y. Supreme Ct.) 187, and other early cases to the same effect, are now regarded as *overruled*; *Colt v. Davis*, 50 Hun (N. Y.) 366, in which case the instrument was payable to the plaintiff's order, and the answer denied, on information and belief, that the plaintiff was the owner of the instrument, and alleged that another person was the owner, and set up a good defense as against such other person; *Hays v. Southgate*, 10 Hun (N. Y.) 511, 18 Alb. L. J. 318; *Seeley v. Engell*, 17 Barb. (N. Y.) 530, in which case the instrument was payable to the plaintiff or bearer; *Robert Gere Bank v. Inman*, 51 Hun (N. Y.) 97, 115 N. Y. 650; *Northwestern Cordage Co. v. Galbraith*, 9 S. Dak. 634; *Boggs v. Wann*, 58 Fed. Rep. 681, holding that a denial that the payee is the lawful owner of the instrument is a good defense under the code of *Ohio*. But see *contra*, *Witherspoon v. Van Dolar*, 15 How. Pr. (N. Y. Supreme Ct.) 266; *Fleury v. Roget*, 5 Sandf. (N. Y.) 646.

Defense Under General Issue. — In *Lake v. Hastings*, 24 Miss. 490, it was held that even where the plaintiff sues in the character of payee the defendant may show under the general issue that the plaintiff has not the legal title, and that under a statute requiring a denial under oath of the execution of the instrument, the defendant, by pleading the general issue, admitted only that he had executed the instrument. See also *Herbert v. Nashville Bank*, 1 Stew. & P. (Ala.) 286, holding that the plaintiff's capability to contract and sue is put in issue by a plea of the general issue.

Agreement by Payee to Deliver Up Instrument. — An answer alleging that the payee agreed to receive back the property for which the instrument was given, and to cancel and deliver up to

the defendant the said instrument, is not a denial of the plaintiff's allegation that he holds the instrument. *Diven v. Spicer*, 1 Kan. 103.

Allegation that Payee Is Agent of Owner. — In an action by the payee named in the instrument, an answer alleging that he is not the owner thereof, and that he has not any interest in it, and is merely the agent of another person who procured the instrument to be made payable to the plaintiff to enable the plaintiff to collect it as agent, is bad because it does not aver that the plaintiff is not the owner of the instrument, and that the other party named has any right thereto or beneficial interest therein, and shows that the plaintiff is under the statute the trustee of an express trust, and that as such he is authorized to maintain the action in his own name. *Waddle v. Harbeck*, 33 Ind. 231, in which case the question was whether or not the defendant could set off a debt due to him from the payee's alleged principal.

Action by Indorser Against Indorsee. — In *Fales v. Hicks*, 12 How. Pr. (N. Y. Supreme Ct.) 153, it was held that where an indorser is sued by his indorsee, he should either admit or deny positively that he had indorsed the instrument, or that the same had ever been transferred to the plaintiff, as presumptively he has knowledge of the facts; and that a denial of knowledge or information sufficient to form a belief, without showing how it happens that he has no knowledge or information on the subject, is insufficient.

Denial of Matter Not Alleged by Plaintiff. — In *De Santes v. Searle*, 11 How. Pr. (N. Y. C. Pl.) 477, the complaint alleged that the instrument had been made payable to the plaintiff and delivered to him, and the court considered insufficient an answer in which the defendant alleged that he had not any knowledge or information sufficient to form a belief whether the plaintiff was the lawful owner and holder of the instrument; the court saying: "The facts alleged are the making of the bill and the delivery to the plaintiff, to whose order it was payable. On either of these allegations the defendant, by

plaintiff, and that he is the legal owner and holder thereof as alleged, tenders a good and material issue as to the genuineness of the indorsement or the fact that the instrument has been assigned to the plaintiff.¹

Authority of Agent to Transfer Instrument. — An answer alleging upon information and belief that the payee never had at any time indorsed the instrument to the plaintiff, or to any other person or persons whomsoever, and further averring that the payee expressly refused, and at all times has refused, to indorse said instrument or to do or perform any other act which would make the instrument negotiable, is not a denial that the instrument had been assigned by the payee, as charged in the complaint, or that the payee's agent had authority to make the indorsement.²

a denial, could take issue. If he cannot do so, he has no defense to make by way of denial. If the plaintiff, since he received the bill, has passed it away to another person, that fact should be set up affirmatively in the answer, and in that way an issue would arise on the pleadings."

Requisite Proof of Ownership. — In *Bryan v. Wilson*, 27 Ala. 208, the court remarked that when the payee takes issue on a plea denying his ownership, the mere introduction of the instrument as evidence will make out a *prima facie* case for him. Citing *Grigsby v. Nance*, 3 Ala. 347.

1. *Mair v. Forbes*, (Cal. 1889) 21 Pac. Rep. 552, in which case the answer denied that the drawer of a bill of exchange transferred the bill to the plaintiff by indorsing the same as alleged in the complaint, or in any other manner, and that the bill was delivered to the plaintiff; *Mahe v. Reynolds*, 38 Cal. 560; *Mendenhall v. Baylies*, 47 Ind. 575, in which case the defendant in addition to denying the assignment of the instrument to the plaintiff averred that the plaintiff was the holder and owner thereof, and that he had a good defense to the instrument as against the payee; *McIntosh v. Robison*, 68 Ind. 120; *M'Connell v. Morrison*, 1 Litt. (Ky.) 206; *Tarbox v. Gorman*, 31 Minn. 62; *Mechanics' Bank v. Fowler*, 36 Mo. 33; *Central City Bank v. Rice*, 44 Neb. 594; *Schroeder v. Nielson*, 39 Neb. 335; *Hays v. Hathorn*, 74 N. Y. 486, in which case the plaintiff alleged that the instrument was payable to the order of the defendant and had been by him indorsed and transferred to the plaintiff.

Denial of Indorsement by One Payee to Another. — Where an instrument is made payable to two persons and one of the payees indorsed it to the other in an action by such other payee against the maker, a denial of the indorsement presents a material issue. *Mahe v. Reynolds*, 38 Cal. 560.

Denial of Indorsement by Defendant to Plaintiff. — In an action on an instrument payable to the maker's order and alleged to have been indorsed and delivered by him to the plaintiff, an answer denying that the defendant ever indorsed the instrument to the plaintiff, without denying that he indorsed it or setting up any matter assailing the plaintiff's possession of it presents no defense, because when an instrument is payable to the order of the maker and is indorsed by him it is in legal effect indorsed to any person who may hold it, and a denial of the mere act of indorsement or delivery to the holder is not the denial of a material averment. *Kamlah v. Salter*, 1 Hilt. (N. Y.) 558, 6 Abb. Pr. (N. Y.) 226.

Denial of Assignment in Writing. — In *Randolph v. Harris*, 28 Cal. 561, the complaint alleged that the payee by an instrument in writing duly stamped and delivered conveyed and assigned to the plaintiff all his interest in the instrument, and it was held that a denial that the assignment was in writing and that it was made for a valuable consideration was not a denial of the assignment. Following *Burke v. Table Mountain Water Co.*, 12 Cal. 403; *Morrill v. Morrill*, 26 Cal. 292.

2. *Murphy v. Dunning*, 30 Wis. 296, in which case the payee was a corporation, and the court said: "It was only

Where an Agent Is Named as Payee, a plea alleging that fact, and that he had no interest whatever in the instrument, and that the principal is the owner of the instrument, is not sufficient as a denial of the indorsement of the instrument by the payee, for it does not aver that the payee had or obtained authority to make the alleged assignment.¹

(7) *Transfer of Instrument by Plaintiff* — (a) *Before Commencement of Action*. — A plea or answer alleging that before the commencement of the action the plaintiff assigned the instrument to a named person, who is a stranger to the action, and delivered the instrument to him, and that such stranger was, at the commencement of the action, the lawful owner and holder of the instrument, is good.²

(b) *After Institution of Action*. — According to some authorities a

intended as a denial that the company 'indorsed' the note 'by writing its name upon the said note for that purpose,' which fact, in the judgment of the pleader, was deemed necessary to 'make said note negotiable.' It was merely a denial of the negotiation and transfer of the note in that particular form. * * * If the defendants had intended to raise any question, as to the authority of the president and secretary to make the transfer, so as to require the plaintiffs to show the authority on trial, they should have made such intention known by their pleadings, either by putting the fact distinctly in issue by answer, or at least by a general denial of the facts alleged in the complaint. The answer, if not in words, certainly by inference, admitted the transfer and delivery as alleged in the complaint, and took no issue as to their regularity or validity, except as above stated. It contained no general or specific denial, but only matters in avoidance."

1. *Wells v. Sutton*, 85 Ind. 70, in which case it was held that an allegation in the present tense that the payee "is the owner thereof" is at most a mere statement of a legal conclusion, and does not aid the plea. See also *Zink v. Dick*, 1 Ind. App. 269; *Downer v. Read*, 17 Minn. 493.

Allegation that Indorsee Is Mere Agent. — An answer setting up that the plaintiff is the agent of the person who indorsed the instrument to him, and hence has no equitable interest in the instrument, without averring that the plaintiff is an agent for the collection of the instrument, is too vague. *Hubler v. Pullen*, 12 Ind. 567.

2. *Thomas v. Wash*, 1 Mo. 665; *Wagoner v. Colvin*, 11 Wend. (N. Y.) 27; *Smith v. Mead*, 14 Abb. Pr. (N. Y. Supreme Ct.) 262; *Trezevant v. McNeal*, 2 Humph. (Tenn.) 352.

Allegation of Facts. — In *Carpenter v. Reynolds*, 58 Wis. 666, *Coles, C. J.*, declared that there are authorities which seem to lay down the rule that it is not enough to allege that the plaintiff is not the real party in interest, and that the answer should state the facts which show why he is not, but it is not obvious what other facts the defendant can state, other than that the payee has never indorsed or transferred the instrument to the plaintiff, and that the latter is not the lawful holder or owner thereof.

Answer Not Frivolous. — In *Smith v. Mead*, 14 Abb. Pr. (N. Y. Supreme Ct.) 262, it was held that such an answer is not frivolous; *Ingraham, J.*, saying: "If the defendants should prove this on the trial, it would prevent a recovery by the plaintiff, unless he showed that the title to the note had again been vested in him. There is ground for supposing the defense a very doubtful one, but if not true, the remedy is by a motion to strike out the answer as false, on the plaintiff's affidavit. To warrant the court in striking it out as frivolous, it must be clearly bad on inspection merely, and not require an argument to convince the court thereof."

Plaintiff's Present Ownership Must Be Negatived. — A plea that the instrument was assigned and delivered by the plaintiff before the commencement of the action is not sufficient as a denial of the plaintiff's ownership at the time

plea *puis darrein continuance* that the plaintiff has, since the commencement of the action, assigned, transferred and made over the instrument to a named person, who thereby acquired, and still has, the vested right to maintain an action on the instrument, and that the plaintiff has no present legal right or title in or to the said instrument, is good.¹

of the institution of the action, as plaintiff might have assigned the instrument and afterward acquired title thereto from the assignee. *Hawkins v. Fellows*, 6 Dana (Ky.) 128.

Insufficient to Deny Plaintiff's Possession.—An allegation in the answer that the plaintiff is a non-resident, and is not now in possession of the instrument, and that at the time the action was commenced, and before that time, the instrument was in the hands and possession of a stranger to the action, within the state, is immaterial and irrelevant. *Hayward v. Grant*, 13 Minn. 165.

Plaintiff Not Divested of Legal Title.—In *Caldwell v. Lawrence*, 84 Ill. 161, it was held in an action by an indorsee that a plea that the plaintiff had, for a valuable consideration, delivered the instrument back to the payee, and thereby parted with all his right and interest in and to the instrument, and that the right of action had revived in the payee, was considered bad on demurrer, as the facts averred showed simply that the payee was equitably entitled to the proceeds, and not that the plaintiff had parted with the legal title to the instrument.

Dilatory Plea.—In *Kentucky* an answer alleging that the plaintiff is not the holder and owner of the instrument, and that the plaintiff had assigned the instrument to a named person for the benefit of his creditors, shows no matter which is a bar to the action, or even a sufficient ground of abatement. *Vanbuskirk v. Levy*, 3 Metc. (Ky.) 133. *Citing Carpenter v. Miles*, 17 B. Mon. (Ky.) 602, in which case the court said, with reference to an answer substantially similar in all respects: "An answer presenting such objection may be regarded as a dilatory plea; not, however, resulting, even when sustained by proof, in a dismissal or abatement of the action, but furnishing a ground for an order of court requiring the additional parties to be made, on pain of dismissal without prejudice." And it was declared in the case first cited that the only

question presented by the pleadings was whether the court should have required the assignee to be made a party, which was a question for the court and not for the jury.

1. *Gray v. Real Estate Bank*, 5 Ark. 93; *Beebe v. Real Estate Bank*, 5 Ark. 183. In these cases it was held that such a plea is a good plea in bar to the further maintenance of the action by the plaintiff, and that the precise manner in which the plaintiff made the assignment need not be specially set out.

Time of Transfer Must be Alleged.—An answer denying "that plaintiff holds against him any such notes as are described in the petition," relates to the time of the commencement of the action, and under it proof is not admissible that after the suit was commenced, the plaintiff had assigned the instrument, and all his interest in the action, and in the judgment to be recovered, whether it occurred before or after the defendant had answered. *Allen v. Newberry*, 8 Iowa 65.

Plea in Abatement.—Where it is provided by statute that after an assignment by the plaintiff the action shall abate upon the plea of the defendant, the proper mode to make the defense is by plea in abatement. *Lanier v. Trigg*, 6 Smed. & M. (Miss.) 641, *following Planters' Bank v. Sharp*, 4 Smed. & M. (Miss.) 17.

Continuance of Action in Name of Original Plaintiff.—In *Ivey v. Drake*, 36 Ark. 228, which was an action by an assignee, the defendant filed an amended answer alleging that since the last continuance, by a decree of court, the contract between the plaintiff and the payee had been canceled, and the plaintiff had been ordered to give up the instrument to the payee, and asked that the plaintiff and the payee be required to litigate their respective rights to the fund, whereupon the payee asked to be allowed to interplead. It was held that the fact that the property in the instrument and the right to the proceeds had been transferred during the litigation was not a

(8) *Transfer of Instrument for Collection* — (a) *To Plaintiff*. — A plea or answer in an action by an indorsee or assignee of the instrument that the transfer of the instrument to the plaintiff was colorable only and for the sole purpose of enabling the plaintiff to bring an action on it in behalf of the real owner, without alleging that the defendant is being deprived of any substantial defense which he has against the real owner, is bad.¹

(b) *By Plaintiff*. — An answer in an action by a payee alleging that the instrument has been assigned to a named person who is authorized to collect it and apply the proceeds upon a debt due from the payee to the defendant shows the beneficial interest in the instrument to be in such transferee and is not demurrable.²

(9) *Transfer of Instrument as Collateral Security* — (a) *To Plaintiff*. — A plea or answer denying that the instrument is the property of the plaintiff and alleging that he holds it merely as collateral security for a debt due to him from the indorser or assignor is bad in substance.³

ground of defense at law; the court saying: "Although the court, in its discretion, might allow the name of the person to whom the plaintiff's right had been transferred to be substituted as plaintiff, with proper orders as to security for costs (Gantt's Digest, § 4471), it is not such a matter of right as to enable the defendant to set it up in bar of further proceedings, by way of plea *puis darrein continuance*. The suit may be continued in the original name."

1. *McCallum v. Driggs*, 35 Fla. 277, citing *Livingston v. Clinton*, an unreported case decided in 1799, which was cited in *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 264, and in *Gregory v. McNealy*, 12 Fla. 578; *Woollen v. Vankirk*, 61 Ind. 497, in which case the court cited *Overshiner v. Wisheart*, 59 Ind. 135; *Murphy v. Lucas*, 58 Ind. 360; *Cornell v. Nebeker*, 58 Ind. 425; *Kline v. Spahr*, 56 Ind. 296, and *Hunter v. McLaughlin*, 43 Ind. 38. See also *Shaw v. Jacobs*, 89 Iowa 713.

In *Indiana* it has been held, under a statute (Rev. Stat. 1881, § 251), providing that the action must be brought in the name of the real party in interest, that an answer averring that the instrument was transferred and assigned to the plaintiff without consideration and solely for the purpose of enabling him to collect the same for another person who is the real owner thereof, is good. *Bostwick v. Bryant*, 113 Ind. 448, in which case the court dis-

tinguished *Hardin v. Helton*, 50 Ind. 319; *Deuel v. Newlin*, 131 Ind. 40, in which case an answer alleging a fictitious assignment of the instrument to the plaintiff for the purpose of enabling him to collect it and to prevent the defendant from pleading a set-off was considered good; *Pixley v. Van Nostern*, 100 Ind. 34. See also *State v. Ruhlman*, 111 Ind. 17; *Curtis v. Gooding*, 99 Ind. 45; *Hereth v. Smith*, 33 Ind. 514; *Lewis v. Sheaman*, 28 Ind. 427; *Wilson v. Clark*, 11 Ind. 385.

Deprivation of Defense. — In *Pennsylvania* an affidavit of defense setting up that the payee is still the owner and real holder of the instrument, that the plaintiff holds it for the use of the payee, and that the action is brought in the name of the plaintiff to prevent a set-off against the payee which is asserted in the affidavit, is sufficient to put the plaintiff upon proof of his *bona fide* holding. *Newbold v. Pennock*, 154 Pa. St. 591; *Graphic Co. v. Marcy*, 12 Phila. (Pa.) 218, 34 Leg. Int. (Pa.) 248; *Louchheim v. Maguire*, 6 Pa. Super. Ct. Rep. 635; *Eyre v. Yohe*, 67 Pa. St. 477.

2. *Gillispie v. Ft. Wayne, etc., R. Co.*, 12 Ind. 398.

3. *Jones v. Hawkins*, 17 Ind. 550, in which case the answer alleged that the liability secured had not matured, but was nevertheless considered bad; *Sheldon v. Middleton*, 10 Iowa 17; *Moody v. Andrews*, 39 N. Y. Super. Ct. 302, 64 N. Y. 641; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213.

(b) **By Plaintiff.** — A plea or answer alleging that the plaintiff has assigned and delivered the instrument to a named person as collateral security, and that the instrument is still lawfully held by the plaintiff's assignee, is good, as the facts alleged show that the plaintiff is not the real party in interest.¹

(10) **Fraudulent Transfer to Oust Court of Jurisdiction.** — An answer averring that the use of the plaintiff's name and the indorsement on the instrument are but fraudulent contrivances to divest the district court of the county in which the defendant resides of jurisdiction, and confer jurisdiction upon the district court of the county in which the indorsee has his residence, and thereby improperly change the venue, is good.²

(11) **Plaintiff's Bona Fide Holding — Necessity of Plea or Answer.** — The defense that the plaintiff is not a *bona fide* holder of the instrument, and that he took the instrument with notice of its infirmities, cannot be made except under an appropriate plea or answer.³

Requisite Allegations. — An allegation that the plaintiff is not an innocent holder for value is not sufficient. The charge of *mala fides* must be averred with certainty, and the facts upon which the charge is based should be alleged distinctly, so as to inform the plaintiff what issue he is to meet.⁴

1. Felton v. Smith, 84 Ind. 485; Johnson v. Chilson, 29 Neb. 301.

2. Pool v. Pickett, 8 Tex. 122.

Indorsement to Confer Jurisdiction on United States Court. — A plea in the style and form of a plea to the jurisdiction, alleging that the instrument is not the property of the plaintiff, but that the title thereto is in a corporation having its legal domicile in the district to which the action was brought, and that the indorsement of the instrument to the plaintiff, a citizen of another state, was purely colorable for the sole purpose of enabling the plaintiff to bring an action in the United States court, is in reality a plea in bar, as it is in substance a denial of the plaintiff's title and right to sue. A state statute (Code Ga., § 2789) providing that the defendant cannot inquire into the title of a *bona fide* holder, except to let in some defense, is not applicable, and, consequently, such plea is good, although the defendant does not set up any defense as against the payee. Lanning v. Lockett, 10 Fed. Rep. 451.

3. McHenry v. Ridgely, 3 Ill. 309, holding that where an instrument is payable to bearer, or is indorsed in blank, a holder thereof is not required to show an interest in it unless the question of *mala fide possessio* is raised

by the defendant by an appropriate plea; Richardson v. Fenner, 10 La. Ann. 599; Abercrombie v. Stillman, 77 Tex. 589, in which case the court cited Blum v. Loggins, 53 Tex. 136.

Action on Instrument Not Negotiable. — Where one other than the payee sues upon an instrument which is not negotiable, a general denial will put in issue the plaintiff's ownership for value. Gregg v. Johnson, 37 Tex. 558, citing Merrill v. Smith, 22 Tex. 53.

4. Uther v. Rich, 10 Ad. & El. 784, 37 E. C. L. 232; Harpham v. Haynes, 30 Ill. 404, in which case the defense was that the instrument was infected with usury, and a special plea that the instrument was assigned to the plaintiff by the maker without any consideration being paid therefor by the said plaintiff, or any one in his behalf, was considered sufficient to show that the plaintiff was a volunteer, and took the instrument subject to all its infirmities, as if he had had actual notice of them, or as if the instrument had been assigned after maturity; Bacon v. Scott, 154 Pa. St. 250 [in which case the court followed Moeck v. Littell, 82 Pa. St. 356]; Penn Nat. Bank v. Altoona Mfg. Co., 4 Pa. Dist. Rep. 46 [in which case the court cited Reznor v. Supplee, 81 Pa. St. 181; Delp v. Sowers, 5 W. N.

(12) *Fraud in Procurement of Transfer — Fraud upon Assignor.* —

It is a good plea or answer that the instrument is not the property of the plaintiff, that the same was never sold and delivered to him, or to any one for him, and that the plaintiff obtained possession of the instrument by fraud, and without the knowledge or consent of the maker or the indorser, or either of them.¹

167, and *Moeck v. Littell*, 82 Pa. St. 356, and *distinguished Newbold v. Pennock*, 154 Pa. St. 591; *Voorhees v. Fisher*, 9 Utah 303. See also *Plant v. Schuyler*, 7 Robt. (N. Y.) 271, 4 Abb. Pr. N. S. (N. Y.) 146, in which case an answer alleging on information and belief "that the plaintiff is not the *bona fide* owner and holder of said note, that he did not receive the same in the usual course of business, nor advance any new or valuable consideration therefor," was considered frivolous, because it did not deny the facts constituting ownership in the plaintiff, the court citing *Brown v. Ryckman*, 12 How. Pr. (N. Y. C. Pl.) 313, and *Seeley v. Engell*, 17 Barb. (N. Y.) 530; *Mumford v. Weaver*, 18 R. I. 801, in which case it was held that in an action by the holder of an instrument indorsed in blank, a plea that the plaintiff is not interested in the instrument because he received it after maturity and without consideration, and that he holds it as custodian and merely for the purpose of collecting it for another, without averring that his possession of the instrument is *mala fide*, is bad; Third Nat. Bank *v. Angell*, 18 R. I. 1. See further *Bank of America v. Senior*, 11 R. I. 376; *Hazard v. Spencer*, 17 R. I. 561; *Millard v. Barton*, 13 R. I. 601.

Actual Knowledge of Infirmities Must Be Alleged. — In *Clarion Second Nat. Bank v. Morgan*, 165 Pa. St. 199, it was held that an affidavit of defense alleging that the plaintiff took the instrument under such circumstances and with such knowledge of fraud in the inception of the instrument as were sufficient to put him upon inquiry, and that inquiry would have led to the discovery of the fraud, without alleging actual knowledge of the fraud when the assignment of the instrument was taken, was bad in substance. *Following Phelan v. Moss*, 67 Pa. St. 59.

Where the Complaint Tenders the Issue that the plaintiff took the transfer and delivery of the instrument before maturity and for a valuable consideration, and therefore is the owner and holder

of the instrument, the defendant has the right to controvert its allegations, and an answer denying knowledge or information sufficient to form a belief as to whether, before the commencement of the action and before the instrument became due, or at any other time, the payee for value received, sold, transferred, and delivered said instrument to the plaintiff, or as to whether the said plaintiff is the owner and holder thereof, is sufficient to enable the defendant to deny at the trial the transfer and delivery of the instrument to the plaintiff, and to contest the allegation that the plaintiff is the owner and holder thereof. It is not open to the objection that it contains no denial of any of the material allegations in the complaint. *Hughes v. Wilcox*, 17 Misc. Rep. (N. Y. Supreme Ct.) 32.

Allegations upon Information and Belief. — In *New York* an answer alleging upon information and belief that the plaintiff never gave any value for the instrument, and that he is not a *bona fide* holder thereof, and that the defendant has a substantial defense as against the payee is good. *Wirgman v. Hicks*, 6 Abb. Pr. (N. Y. Super. Ct.) 17.

In *Pennsylvania* an affidavit of defense which avers that the defendant is informed and believes, and expects to be able to prove, that the plaintiff is not a *bona fide* holder of the instrument for value before maturity, and that he took the same since maturity for the purpose of collection merely and for the purpose of avoiding the defense which the defendant would have against the instrument in the hands of the payee, is sufficient to put the plaintiff upon proof that he is a *bona fide* holder. *Louchheim v. Maguire*, 6 Pa. Super. Ct. Rep. 635.

1. *Bowman v. Van Kuren*, 29 Wis. 209, which was an action against the defendant as the indorser of an instrument payable to his order, of which the plaintiff claimed to be the lawful owner and holder by indorsement. See also *Carpenter v. Reynolds*, 58 Wis. 666.

Fraud upon Assignor's Creditors. — It has been held, however, that it is not sufficient to allege that the plaintiff is not the real party in interest, for the reason that he took the assignment of the instrument, and holds the same, for the purpose of cheating and defrauding the creditors of the indorser, or that the indorser was in failing circumstances and the indorsement was in fraud of the bankrupt laws of the United States.¹

(13) *Denial of Consideration for Transfer.* — Where it is not alleged that the instrument is affected with any infirmities, a mere denial that it was indorsed or transferred to the defendant for value is immaterial, and does not raise any issue as to the ownership of the instrument or present any defense.²

(14) *Allegation of Substantial Defense.* — It is held by numerous authorities that the apparent legal holder of a negotiable instrument may maintain an action on the same, and that a plea or answer alleging the mere fact that he is not the real owner, or that the instrument is the property of another, is not good unless it alleges some matter of defense which would be good against the payee or the alleged equitable owner, and, if the action be brought by the indorsee, that he is not a *bona fide* holder for value.³

Probative Matters Need Not Be Alleged.

— In averring that the plaintiff procured the transfer of the instrument from the payee by fraud upon the payee, it is not necessary to allege probative matters. Allegations of probative matters may not be strictly irrelevant, but they are redundant and may be stricken out on motion. *Per Coles, C. J.*, in *Carpenter v. Reynolds*, 58 Wis. 666.

1. *Frenzel v. Miller*, 37 Ind. 1. But see *Birch v. Tillotson*, 16 Ala. 387.

Preferential Assignment by Corporation.

— In *New York* it has been held that where the complaint alleges that the instrument was indorsed to the plaintiff by a corporation, to whose order it was payable, an answer denying that the corporation indorsed the instrument to the plaintiff, and averring that it was transferred to the plaintiff by some officer or officers of the corporation, when it was insolvent, with intent to give the plaintiff a preference over other creditors of the corporation, contrary to the statutes of that state, makes it essential for the plaintiff to prove that the corporation indorsed the instrument to the plaintiff, and that the making of the instrument was authorized by law, and by the charter and by-laws of the corporation. *Smith v. Hall*, 5 Bosw. (N. Y.) 319.

2. *Randolph v. Harris*, 28 Cal. 561; *Aspinwall v. Meyer*, 2 Sandf. (N. Y.) 180; *Brassington v. Rohrs*, 23 Civ. Pro. Rep. (N. Y. C. Pl.) 146, 3 Misc. Rep. (N. Y.) 258; *Queen City Bank v. Hudson*, 8 N. Y. App. Div. 27; *Cogswell v. Hayden*, 5 Oregon 22. See also *Guernsey v. Burns*, 25 Wend. (N. Y.) 411; *Hall v. Gird*, 7 Hill (N. Y.) 587.

3. *Gushee v. Leavitt*, 5 Cal. 160; *Price v. Dunlap*, 5 Cal. 483; *Caldwell v. Lawrence*, 84 Ill. 161; *Blacker v. Dunbar*, 108 Ind. 217; *Kincaid v. Higgins*, 1 Bibb (Ky.) 396, holding that a plea in an action by an indorsee denying the indorsement of the instrument to the plaintiff without averring any new matter is bad; *Peyroux v. Davis*, 17 La. 479; *Mitaine v. Ferguson*, 18 La. 92; *Ricard v. Harrison*, 19 La. Ann. 181; *Case v. Watson*, 21 La. Ann. 731; *McKinney v. Beeson*, 14 La. 254; *Newton v. Turner*, 5 La. 46; *West v. Wilson*, 4 La. 219; *Abat v. Wiltz*, 14 La. 448; *Findley v. Breedlove*, 4 Martin N. S. (La.) 105; *Banks v. Eastin*, 3 Martin N. S. (La.) 291; *Shaw v. Thompson*, 3 Martin N. S. (La.) 392; *Lacoste v. De Armas*, 2 La. 263; *Ticonic Bank v. Bagley*, 68 Me. 249; *Tittle v. Bonner*, 53 Miss. 578; *Grayson v. Brooks*, 64 Miss. 410; *Thompson v. Cartwright*, 1 Tex. 87, which was an action by the payee;

(15) *General Issue* — (a) *At Common Law*. — By the common-law rules of pleading a plea of the general issue denies all the material averments in the declaration and puts the plaintiff to the proof of his title to the instrument, and, under the code, in the absence of provisions to the contrary, a general denial is sufficient to raise an issue as to the plaintiff's title.¹

Brown v. Chenoworth, 51 Tex. 469, which was an action by an indorsee; *Allen v. Pannell*, 51 Tex. 165, which was an action by a payee; *Jackson v. Elliott*, 49 Tex. 69; *Butler v. Robertson*, 11 Tex. 142; *Andrews v. Hoxie*, 5 Tex. 183; *Fowler v. Willis*, 4 Tex. 46, which was an action by an indorsee; *Lipscomb v. Ward*, 2 Tex. 277; *McMillan v. Croft*, 2 Tex. 397; *Thompson v. Cartwright*, 1 Tex. 87; *Sturdivant v. Memphis Nat. Bank*, 23 U. S. App. 300, in which case the court cited *Goodman v. Simonds*, 20 How. (U. S.) 343.

Transfer of Instrument by Indorsee to Payee. — In an action by an indorsee a plea that he had delivered the instrument back to the payee and thereby had parted with all his right and interest therein, and that the right of action had revived in the payee, without alleging any defense to the instrument as against the payee, is bad. *Caldwell v. Lawrence*, 84 Ill. 161.

Instrument Payable to Bearer. — In *Louisiana*, where an instrument is payable to bearer or indorsed in blank, a mere denial of the plaintiff's right to the instrument, without averring that the transfer to the plaintiff was not made in good faith, and that the defendant has an equitable defense to oppose to the true owner of the instrument, is insufficient. *Bacon v. Smith*, 2 La. Ann. 441. See also *Davis v. Lusitanian Portuguese Benev. Assoc.*, 20 La. Ann. 24; *Scionneaux v. Waguespack*, 32 La. Ann. 283; *Butler v. Stewart*, 18 La. Ann. 554; *McKinney v. Beeson*, 14 La. 254.

Allegation of Facts. — A denial of the plaintiff's ownership of the instrument and allegation that the plaintiff has "a good, substantial, lawful and equitable defense," without stating what the defense is and why the defendant cannot avail himself of it in an action by the plaintiff, are not sufficient. *Blacker v. Dunbar*, 108 Ind. 217. To the same effect is *Epting v. Jones*, 47 Ga. 622.

In *Georgia* it has been provided by statute (Code 1882, § 2789) that the title of the holder cannot be inquired into, unless it is for the protection of the de-

fendant, or to let in a defense which he seeks to make; and in that state it has been repeatedly held that a denial of the plaintiff's title is of no avail unless it is made to appear that such denial is necessary for the purpose of the defendant's defense. *Johnson v. Cobb*, 100 Ga. 139; *Epting v. Jones*, 47 Ga. 622; *Varner v. Lamar*, 9 Ga. 589; *Hall v. Carey*, 5 Ga. 239; *Nisbet v. Lawson*, 1 Ga. 275; *Field v. Thornton*, 1 Ga. 306.

1. *Pinkerton v. Adams*, 2 Esp. N. P. 611, in which case Lord Kenyon held that proof that the indorsement of the instrument to the plaintiff had been made after the indorser had become a bankrupt was admissible under a plea of *non assumpsit*. This case was cited in *Birch v. Tillotson*, 16 Ala. 387. See also *Lynner v. Wood*, Cro. Car. 157, and *Webb v. Fox*, 7 T. R. 387, which cases were cited in *Coffin v. Anderson*, 4 Blackf. (Ind.) 395, which was an action of trover for the conversion of a negotiable instrument.

Among the numerous cases decided in this country in which the doctrine stated in the text finds support are the following:

Alabama. — *Evans v. Gordan*, 8 Port. (Ala.) 142.

California. — *Hastings v. Dollarhide*, 18 Cal. 390.

Illinois. — *Templeton v. Hayward*, 65 Ill. 178.

Indiana. — *Jackson Tp. v. Barnes*, 55 Ind. 136; *Wyant v. Pottorff*, 37 Ind. 512; *Wilson v. Black*, 6 Blackf. (Ind.) 509; *Scribner v. Bullitt*, 1 Blackf. (Ind.) 112; *Bates v. Hunt*, 1 Blackf. (Ind.) 67.

Louisiana. — *Anderson v. Irwin*, 6 La. Ann. 793.

Maryland. — *Herrick v. Swomley*, 56 Md. 439.

Massachusetts. — *Estabrook v. Boyle*, 1 Allen (Mass.) 412; *Boston Relief, etc., Co. v. Burnett*, 1 Allen (Mass.) 410.

Michigan. — *Reynolds v. Kent*, 38 Mich. 246.

Minnesota. — *Kingsley v. Gilman*, 12 Minn. 515, cited in *Tullis v. Shannon*, 3 Wash. 716.

Special Plea Unnecessary and Improper. — A special plea that the plaintiff is not the legal owner or holder of the instrument amounts to

Mississippi. — *Anderson v. Patrick*, 7 How. (Miss.) 347; *Netterville v. Stevens*, 2 How. (Miss.) 642; *Lake v. Hastings*, 24 Miss. 490.

Missouri. — *Worrell v. Roberts*, 58 Mo. App. 197; *Cavitt v. Tharp*, 30 Mo. App. 131. See also *Sturdevant v. Rehard*, 60 Mo. 152.

New York. — *Allis v. Leonard*, 46 N. Y. 688, 22 Alb. L. J. 28; *Duncan v. Lawrence*, 6 Abb. Pr. (N. Y. Super. Ct.) 304, 3 Bosw. (N. Y.) 103; *Wayland v. Tysen*, 45 N. Y. 281; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y. Supreme Ct.) 321; *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365; *Hull v. Wheeler*, 7 Abb. Pr. (N. Y. Supreme Ct.) 411, in which case the court followed *Stone v. Lackey*, an unreported case; *Andrews v. Bond*, 16 Barb. (N. Y.) 633.

Texas. — *Gregg v. Johnson*, 37 Tex. 558, in which case the court cited *Merrill v. Smith*, 22 Tex. 53.

Virginia. — *Clason v. Parrish*, 93 Va. 24.

Washington. — *Tullis v. Shannon*, 3 Wash. 716.

United States. — *Stroud v. Harrington*, Hempst. (U. S.) 116; *Pendleton County v. Amy*, 13 Wall. (U. S.) 297.

Not Matter In Avoidance. — The fact that the plaintiff does not own the instrument is not matter in avoidance but goes to the very foundation of the action, and it is for this reason that it may be shown under the general issue. *Reynolds v. Kent*, 38 Mich. 246. See also *Anderson v. Patrick*, 7 How. (Miss.) 347, holding that a plea of the general issue is a denial that the plaintiff has a cause of action.

Trover for Conversion of Instrument. — The proper plea in an action of trover for the conversion of a negotiable instrument, if the plaintiff has not such an interest in the property as will authorize him to maintain the action, is "not guilty." *Coffin v. Anderson*, 4 Blackf. (Ind.) 395. See also *Andrews v. Bond*, 16 Barb. (N. Y.) 633, holding that a general denial is sufficient.

By an Alabama Statute it is provided that an assignee by indorsement may bring an action on the instrument, but that when it is not indorsed the action must be brought in the name of the person having the legal title. It has been held that where the complaint

does not aver an indorsement by the payee to the plaintiff and the complaint is therefore demurrable, but the defendant fails to demur, he cannot avail himself of the defense on the general issue. *Phillips v. Sellers*, 42 Ala. 658.

In Tennessee, in an action by an indorsee, the indorsement cannot be put in issue, except by a special plea, and a plea of the general issue is not sufficient. *Oliver v. State Bank*, 2 Swan (Tenn.) 59, in which case the court said: "By a practice which seems to have obtained in this state from an early period, without legislative sanction, but too well established to be now questioned, an indorsee in such cases is not required to prove the transfer, or indorsement, of the note or bill, unless put in issue by the plea of non-assignment, as it is termed." See also *Richardson v. Cato*, 9 Humph. (Tenn.) 464; *Whitesides v. Caldwell*, 9 Yerg. (Tenn.) 421; *Shaw v. Bowen*, 1 Overt. (Tenn.) 249.

Where the Declaration Does Not Show Title in the plaintiff, the defendant, under a plea of *non assumpsit*, is at liberty to urge that the plaintiff cannot maintain the action. *Eakin v. Burger*, 1 Sneed (Tenn.) 417.

Denial of Allegations Not Admitted. — An answer specially admitting some of the allegations of the complaint, of which the allegation as to the plaintiff's ownership is not one, and denying each and every allegation of the complaint, except those expressly admitted, is sufficient to put in issue the plaintiff's allegation that he is the owner and holder of the instrument. *Allis v. Leonard*, 46 N. Y. 688, 22 Alb. L. J. 28; *Taylor v. Smith*, (Supreme Ct.) 29 N. Y. St. Rep. 365; *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. (N. Y. Supreme Ct.) 321; *Tullis v. Shannon*, 3 Wash. 716. In the last case the court cited *Becker v. Sweetzer*, 15 Minn. 427; *Kingsley v. Gilman*, 12 Minn. 515; *Mingst v. Bleck*, 38 Hun (N. Y.) 358, and *Burley v. German-American Bank*, 111 U. S. 216, which last case was decided under a statute of *New York*. But see *Plant v. Schuyler*, 7 Robt. (N. Y.) 271, 4 Abb. Pr. N. S. (N. Y.) 146, in which case the answer was considered frivolous because it averred merely that the plaintiff was not the *bona fide* owner and holder of

nothing more than the general issue, and is therefore bad; and it is especially unnecessary and improper where the defendant files a plea of the general issue.¹

(b) **Under Statutes Requiring Denial under Oath.** — Where it is provided by statute that the plaintiff shall not be put to the proof of the genuineness of the indorsement, unless the defendant's plea or answer is accompanied by an affidavit of its truth, a plea of the general issue or a general denial which is not verified by any affidavit does not put in issue the fact of the indorsement and transfer of the instrument.² And when the defendant files a plea of the general issue a mere affidavit that the plea is true is not sufficient, as it does not inform the plaintiff whether it is the maker's signature or the indorser's signature that is denied.³

the instrument, without denying the facts alleged by the plaintiff to show his ownership, and it was held that a denial "of all matters inconsistent with the answer" was merely a reavement or repetition of the matters previously averred and did not aid the answer.

In *Kansas*, an answer admitting the execution of the instrument, and denying every other allegation of fact in the petition contained, and averring that the action is not brought in the name of the real party in interest, puts in issue the ownership of the instrument. *Hoyt v. Carpenter*, 6 Kan. App. 305.

1. *Evans v. Gordon*, 8 Port. (Ala.) 142; *Bates v. Hunt*, 1 Blackf. (Ind.) 67; *Wilson v. Black*, 6 Blackf. (Ind.) 509; *Scribner v. Bullitt*, 1 Blackf. (Ind.) 112; *Anderson v. Patrick*, 7 How. (Miss.) 347; *Netterville v. Stevens*, 2 How. (Miss.) 642; *Bingham v. Sessions*, 6 Smed. & M. (Miss.) 13; *Green v. McCarroll*, 24 Miss. 427. See also *Coffin v. Anderson*, 4 Blackf. (Ind.) 395, which was an action of trover for the conversion of a negotiable instrument. It was held that a plea of "not guilty" was sufficient.

2. *Manning v. Maroney*, 87 Ala. 563; *Grounds v. Sloan*, 73 Tex. 662; *Clason v. Parrish*, 93 Va. 24, in which last case it was held that a plea of *nil debet* not sworn to is insufficient. See also *Hirschfelder v. Mitchell*, 54 Ala. 419.

In *Illinois* a plea of the general issue with a notice thereunder of special defense verified is not sufficient. *Bailey v. Valley Nat. Bank*, 21 Ill. App. 642.

Special Plea. — In *Indiana* it has long been the rule that the defense that the plaintiff is not the real party in interest must be specially pleaded. *Felton v. Smith*, 84 Ind. 485. *Citing Hereth v.*

Smith, 33 Ind. 514; *Swift v. Ellsworth*, 10 Ind. 205; *Garrison v. Clark*, 11 Ind. 369; *Lamson v. Falls*, 6 Ind. 309.

3. *Templeton v. Hayward*, 65 Ill. 178.

Form of Affidavit. — In *Alabama* a plea that the instrument was not at any time indorsed and delivered to the plaintiff and that he had not at the time of the commencement of the action, or at any time prior thereto, any equitable or legal interest in the same, and an affidavit attached to the plea stating that the defendant verily believes that the allegations of the plea are true, are not sufficient, because neither the plea nor the affidavit states in the language of the statute that the indorsement was forged. *Bancroft v. Paine*, 15 Ala. 234, *citing Tarver v. Nance*, 5 Ala. 712.

In *Pennsylvania* in an action against the acceptor of a draft an affidavit of defense that the draft does not belong to the payee, by whom the action is brought, but to the drawer, and that the drawer has been fully paid, is sufficient. *Thompson v. Clark*, 56 Pa. St. 33.

Denial that Indorsement Is in Payee's Handwriting. — Although the plea denies that the instrument was indorsed by the payee, an affidavit alleging only that the signature is not in the handwriting of the payee is not sufficient, as it may be true, yet the indorsement may be valid. *Davis v. Cleghorn*, 25 Ill. 212.

Writing Intended as Both Plea and Affidavit. — An affidavit put in as a special plea stating that the ownership of the instrument is not in the plaintiff and that such averment is true to the best of the knowledge, information and belief of the affiant, is insufficient. Although in some instances an affidavit

e. INCONSISTENT DEFENSES. — A plea of payment is not inconsistent with a denial of the plaintiff's title;¹ nor does an answer setting up a set-off or counterclaim growing out of the original transaction of which the instrument is a part constitute an admission of the plaintiff's ownership.²

f. DEMURRER TO PLEA OR ANSWER. — It has been held in some cases that a plea which is defective for the want of the verification required by statute, is demurrable.³

g. MOTION TO STRIKE OUT. — Another method of making the objection that the plea is not sworn to is by motion to strike it out.⁴

h. AMENDMENTS — (1) *In Matters of Substance.* — At any time before judgment leave may be given the defendant to amend his plea by setting out the facts and making it more definite and certain.⁵

(2) *By Filing Affidavit.* — At any time before the judgment the court may in its discretion allow the defendant to amend a plea denying that the instrument had been indorsed to the plaintiff, by filing an affidavit of the truth of such plea.⁶

i. BURDEN OF PROOF. — Where the plaintiff's ownership of the instrument is put in issue by an appropriate plea or answer, it is incumbent upon him to prove his title;⁷ and when he sues

of the truth of the averments in a plea may be qualified by statements of the information and belief of the affiant, yet the averments of the plea must be direct and positive, and such qualifications in the plea make it wholly insufficient. *Berry v. Ferguson*, 58 Ala. 314.

1. *Cavitt v. Tharp*, 30 Mo. App. 131.

2. *Wilson v. Reedy*, 32 Minn. 256.

3. *Jennings v. Cummings*, 9 Port. (Ala.) 309; *Beal v. Snedcor*, 8 Port. (Ala.) 523; *Tarver v. Nance*, 5 Ala. 712.

4. *Broadhead v. Jones*, 39 Ala. 96; *Sanger v. Sumner*, 13 Ark. 280. In the latter case the court said: "When we refer to these statutes [requiring a plea denying the execution of the instrument and one denying the assignment to the plaintiff to be sworn to] we find a very marked difference between them. That in regard to pleas of *nil debet* expressly authorizes the filing of such plea without affidavit, but provides that unless there is such affidavit of the truth of the plea, the plaintiff shall not be required to prove the execution of the note. But the statute in regard to assignments makes no such provision for filing pleas denying the assignment of an instrument sued upon, without affidavit." *Following Sevier v. Wilson*, 8 Ark. 496.

5. *Reynolds v. Roth*, 61 Ark. 317.

See also generally article AMENDMENTS, vol. 1, p. 458.

6. *Ennor v. Hodson*, 28 Ill. App. 455; *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606, in which latter case it was held that the court in its discretion may when the trial is in progress, and after the time for pleading has elapsed, refuse to allow defendant to file a special plea duly verified denying the plaintiff's title to the instrument.

7. *Walker v. Land Title, etc., Co.*, (Kan. 1898) 53 Pac. Rep. 476; *Freeman v. Curran*, 1 Minn. 169; *Cavitt v. Tharp*, 30 Mo. App. 131, wherein it was declared that a general denial is sufficient to put the plaintiff upon proof of his title; *Jackson v. Love*, 82 N. Car. 405.

Necessity to Fill In Blank Indorsement.

— Where an instrument indorsed in blank is delivered to another, such indorsement and delivery pass the title, and when the holder sues upon it, and alleges title in himself, he is entitled to recover, unless his title is denied by plea, the effect of which denial may be to make it necessary for him to fill up the indorsement in order to furnish evidence to overcome the denial. *Gaar v. Louisville Banking Co.*, 11 Bush (Ky.) 180, *distinguishing Cope v.*

in the character of indorsee, it is not sufficient to put the instrument in evidence, but the indorsement should also be read in evidence and proven.¹

XIII. REPLICATION OR REPLY, AND SUBSEQUENT PLEADINGS — In General. — As to the necessity and sufficiency of replications, replies, rejoinders, etc., so far as those pleadings relate to defenses not peculiar to actions on negotiable instruments, reference should be had to articles, REPLICATION AND REPLY; REJOINDER; SURREJOINDER; REBUTTER; SURREBUTTER.

Certainty. — In a replication the words "the note" refer with sufficient certainty to the note mentioned in the declaration and plea.²

Responsiveness to Plea or Answer. — The replication or reply must be responsive to the plea or answer,³ and should meet all of such

Daniel, 9 Dana (Ky.) 415. See also *Barret v. Ft. Pitt Nat. Bank*, (Ky. 1898) 44 S. W. Rep. 97.

1. *Wyant v. Pottorff*, 37 Ind. 512; *Jackson Tp. v. Barnes*, 55 Ind. 136; *Anderson v. Irwin*, 6 La. Ann. 793, holding that the plaintiff must prove the indorsement under which he claims title; *Moore v. Polk*, 24 La. Ann. 216, *per* Howe, J.; *Estabrook v. Boyle*, 1 Allen (Mass.) 412, holding that it is incumbent upon the plaintiff, where the maker denies each and every allegation in the declaration, to prove the indorsement; *Boston Relief, etc., Co. v. Burnett*, 1 Allen (Mass.) 410; *Morton v. Jackson*, 2 Minn. 219; *Netterville v. Stevens*, 2 How. (Miss.) 642; *Anderson v. Patrick*, 7 How. (Miss.) 347, in which case Sharkey, C. J., declared that at the common law the plaintiff is bound to prove the indorsement by proof of the handwriting; *Worrell v. Roberts*, 58 Mo. App. 197, in which case the court declared that it is not sufficient to read the indorsements against the plaintiff's objection, without any proof of their genuineness, and *cited* *National Bank of Commerce v. Pennington*, 42 Mo. App. 355, and *Reinhard v. Dorsey Coal Co.*, 25 Mo. App. 350; *Martens v. Burton Co.*, 7 Misc. Rep. (N. Y. City Ct.) 244; *Stroud v. Harrington*, Hempst. (U. S.) 116, wherein it was declared that at common law a plea of *non est factum* made it necessary for the plaintiff to prove the indorsement.

Contra. — In *Shaw v. Jacobs*, 89 Iowa 713, the court said, speaking of the note as to the burden of proving the genuineness of an indorser's signature: "It is the well-settled rule that the

genuineness of such a signature may be placed in issue by a denial not made by the person whose signature it purports to be, and that in such cases the burden of proof as to that issue is upon the party making the denial. Therefore evidence [offered by the defendant] to show that the signature in question was not genuine, was material."

Possession of the Instrument by the Payee is *prima facie* evidence of ownership, and notwithstanding a denial that the plaintiff has any property in the instrument it may be introduced in evidence without proof of the plaintiff's ownership, although the instrument bears indorsements with which the plaintiff is not connected. *Breckbill v. Stutyman*, 3 Greene (Iowa) 572. See also *Western Carolina Bank v. Atkinson*, 113 N. Car. 478, to the effect that in an action by an indorsee against the indorser, the plaintiff's ownership may be established by the mere production of the instrument.

An Undorsed Negotiable Instrument, in an action by the holder thereof who is not the payee, need only be produced and read in evidence without further proof of the plaintiff's title. *Jackson v. Love*, 82 N. Car. 405.

2. *Grover v. Gaunt*, 6 Smed. & M. (Miss.) 317.

3. *State Bank v. Sherrill*, 12 Ark. 183.

To a plea of no consideration as to part of a note sued on, a replication that the note was not made without consideration is bad. *Hawk v. Polard*, 6 Blackf. (Ind.) 108.

An answer alleged a failure of consideration in that the plaintiff had no

part of the defendant's pleading as it professes to traverse or avoid.¹ But matter that is immaterial² or not well pleaded need not be noticed in the replication or reply.³

Departure. — A replication or reply which sets up a title inconsistent with that disclosed in the declaration or complaint is bad as constituting a departure;⁴ but if it explains and fortifies the declaration or complaint⁵ or varies therefrom in an immaterial

title to the land which constituted the consideration of the note. It was held that the answer was met by a reply denying that the consideration of the note was the land described. *Spears v. Featheringill*, 14 Ind. 402.

In *Smythe v. Scott*, 124 Ind. 183, which was an action against an indorser of a note, the answer alleged that the indorsement was without consideration and that the defendant lent the money evidenced by the note, as an agent of the plaintiff, under an agreement that the defendant should not be liable if the maker was unable to pay. It was held that a reply alleging a consideration for the indorsement was bad because it did not avoid all the allegations in the answer.

1. *Bradner v. Demick*, 20 Johns. (N. Y.) 406. Thus in code pleading a reply should meet all the paragraphs of answer to which it is directed. *For-dice v. Scribner*, 108 Ind. 85.

2. Where the plea alleged that the defendant gave the note in consideration of land which the plaintiff falsely and fraudulently represented that he owned, and that the plaintiff was not the owner, a reply denying fraud was held sufficient as it answered the whole substance of the plea, the averment that plaintiff was not the owner being immaterial if there was no fraud. *Bradner v. Demick*, 20 Johns. (N. Y.) 404.

3. *Numbers v. Bowser*, 29 Ind. 491.

4. *Wilson v. Johnson*, (N. J. 1894) 29 Atl. Rep. 419.

Instances of Departure. — Where the plaintiff in an action on a note described himself as guardian of an insane person, but sued in his own right alleging an indorsement of the note to himself, a reply stating a cause of action in favor of his ward was held bad for departure. *Bearss v. Montgomery*, 46 Ind. 544.

In *Bolling v. McKenzie*, 89 Ala. 470, an action by the indorsee against his indorser, who was the payee, the complaint was a single special count on the

indorsement, alleging protest and notice. The defendant's plea denied notice. The replication averred that "the defendant is the real debtor owing the debt represented by the bill of exchange, the consideration thereof being goods and merchandise sold by the plaintiffs to defendant." It was held on demurrer that by counting on the consideration of the indorsement, there being no count in the complaint for goods sold and delivered, the replication was a departure from the cause of action set forth in the complaint.

5. *Bishop v. Travis*, 51 Minn. 183; *Shirts v. Irons*, 47 Ind. 445; *Smith v. Marsack*, 6 C. B. 486, 60 E. C. L. 486; *Wilders v. Stevens*, 15 M. & W. 208; *Prince v. Brunatte*, 1 Bing. N. Cas. 435, 27 E. C. L. 447; *Morris v. Walker*, 15 Q. B. 589, 69 E. C. L. 589.

Estoppel. — Where one of several partners, who were sued as makers of a note, answered denying the allegation that he was a partner, a reply setting up facts showing that the defendant was estopped to make such denial was held to be consistent with the complaint. *Rainsford v. Massengale*, (Wyoming 1894) 35 Pac. Rep. 774.

Explaining Plaintiff's Title. — Where a plea denies the plaintiff's allegation of ownership of the note in suit, a replication setting forth the transactions whereby the plaintiff became the owner, is not a departure, although it avers a different source of title from that stated in the complaint. *Berney v. Steiner*, 108 Ala. 111. See also *Smith v. Marsack*, 6 C. B. 486, 60 E. C. L. 486.

In *White v. Joy*, 13 N. Y. 83, the plaintiff described himself as receiver of a bank, without setting out the facts showing how he was appointed, and alleged that the note in suit was transferred "to the said plaintiff who is now the holder and owner thereof." The answer alleged that the note never belonged to the bank but was made and transferred to the receiver after the effects of the bank were vested in him,

matter ¹ there is no departure.²

Duplicity. — In common-law pleading if the plea alleges in avoidance two or more facts which are distinct and independent of each other a replication traversing the plea must be limited to the denial of a single allegation,³ except where the other allegations may be regarded as surplusage.⁴

Replication or Reply of Bona Fide Holder. — In some jurisdictions if the plaintiff desires to invoke protection as an innocent holder before maturity against defenses set up in the plea or answer, he must

but did not aver that he was a different person from the plaintiff. The reply averring that the receiver mentioned in the answer was the plaintiff in the suit was held not to be a departure, as it did not show title in the plaintiff by force of his appointment as receiver, but simply by transfer to him as stated in the answer. The court conceded that if the reply had set up title as receiver it would have been a fatal departure from the complaint which did not show a cause of action in the plaintiff's character as receiver.

New Promise. — In an action by the indorsee against the maker of a note the answer alleged that the note was obtained by the payee by fraud and without consideration. A reply alleging a new promise by the defendant upon consideration of an extension of time was held not to be a departure. *Brown v. Indianapolis First Nat. Bank*, 115 Ind. 572.

Stating Consideration of Note. — In an action against the maker of a note, the plea alleged that the note was made within the state and that the consideration thereof was certain goods sold by the payee to the defendant within the state and that the payee was a foreign corporation which had not complied with the statutory requirement to enable it to do business in the state. The replication alleged facts showing that the goods sold were subjects of interstate commerce, and on demurrer it was held that there was no departure from the complaint. *Culberson v. American Trust, etc., Co.*, 107 Ala. 457.

1. Where the complaint against the maker of a note alleged a transfer by the payee directly to the plaintiff and the answer alleged payment to the payee and redelivery of the note to the defendant, there was held to be no departure in a replication which admitted the redelivery but alleged that for a

valuable consideration the defendant reissued the note to another person who transferred it to the plaintiff, as the date and precise manner in which the plaintiff acquired ownership of the notes was not material. *Bishop v. Travis*, 51 Minn. 183.

Where an assignee of a note sued the maker, alleging that the assignment was for value received, and the defendant pleaded the bankruptcy of the indorser, a replication that the note was given to the indorser in trust for the plaintiff was not a departure inasmuch as the averment in the declaration of a consideration for the assignment was immaterial. *Wilson v. Codman*, 3 Cranch (U. S.) 207.

2. See generally article DEPARTURE, vol. 6, p. 460.

3. Thus in *McClintick v. Johnston*, 1 McLean (U. S.) 414, which was an action by an assignee of a note against the maker, the defendant pleaded a want of consideration in the note, and that the plaintiff had full notice thereof, and that the note was assigned to him without consideration. The plaintiff replied that the note was not given without consideration, that it was not assigned without consideration, and that he had no notice. On demurrer to the replication, it was held bad for duplicity. See also *Paddock v. Jones*, 40 Vt. 477. Compare *Deut v. Coleman*, 10 Smed. & M. (Miss.) 83. See generally article DUPLICITY, vol. 7, p. 243.

4. In *Elminger v. Drew*, 4 McLean (U. S.) 388, the plea averred that the defendant was an accommodation indorser and that the plaintiff gave time to the maker of the note without the defendant's assent. A replication traversing both averments was sustained on demurrer for duplicity as the first averment in the plea was of no importance to the second and could be treated as surplusage.

present the facts in a replication,¹ but usually as hereinbefore stated, the plea or answer must allege the facts which subject the plaintiff to the alleged defense, and the plaintiff replies traversing those allegations and tendering an issue.²

XIV. PROCEEDINGS AFTER ISSUE JOINED — 1. Proceeding With or Without Intervention of Jury — When Jury Unnecessary. — As a general rule, in an action against a drawer or an indorser of a bill or note, a final judgment by default may be rendered without the intervention of a jury.³

Upon Withdrawal of Plea After Appearance. — In an action upon a promissory note, if, after appearance, the defendant withdraws his plea, judgment may be rendered by the court without the intervention of a jury, and without regard to the amount of damages laid in the declaration, for the amount of the note and interest thereon.⁴

1. *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157, where the pleas set up failure of consideration, breach of warranty, and fraud. The same rule obtains in *Indiana* where the plea alleges fraud in the consideration but not where it alleges a want of consideration. *Huntington First Nat. Bank v. Ruhl*, 122 Ind. 279; *Zink v. Dick*, 1 Ind. App. 269.

In *Bramah v. Roberts*, 1 Bing. N. Cas. 469, 27 E. C. L. 460, an action by an indorsee against the acceptor of a bill, the defendant pleaded that he had been defrauded of the acceptance, that the plaintiff had notice of the fraud, and received the bill by indorsement without a full and valuable consideration. The replication averred that before the maturity of the bill it was indorsed and delivered to the plaintiff fairly and for a good and valuable consideration; that is to say, for money advanced by, and due and owing to the plaintiff, and that the latter had no notice whatever of the premises in the plea mentioned. It was held that the replication was sufficient without alleging a more distinct consideration for the indorsement; moreover, the court declared its opinion to be that if the replication had simply denied the allegation of want of consideration, it would have been sufficient.

2. See *Lexington v. Butler*, 14 Wall. (U. S.) 283.

3. *Henderson v. Howard*, 2 Ala. 342; *Malone v. Hathaway*, 3 Stew. (Ala.) 29; *McKenzie v. Clanton*, 33 Ala. 528. In the latter case it is held that, in an action on an inland bill of exchange, duly

protested for non-payment, by indorsee against payee as indorser, the Alabama statute (Code, § 2366), authorizes the rendition of a final judgment by default, without the intervention of a jury, for the amount of the bill, with interest and damages.

In *Martin v. Woodall*, 1 Stew. & P. (Ala.) 244, a paper, promising to pay a certain sum of money for staves (subject to a deduction for any number not procured) at two dollars a thousand, was held not subject to the same rules of decision which regulate promissory notes; so as to authorize the court to give judgment on it without the intervention of a jury. See also *Driver v. Spence*, 3 Ala. 98.

4. *Kennedy v. Young*, 25 Ala. 563. In this case the court said: "The appearance of the defendants, and withdrawal of their plea, is, as we have often decided, a waiver of any defect in the service of process, and an admission of the legal liability charged and averred in the declaration; so that, whether this suit was commenced by ordinary or extraordinary process, is not, in the aspect presented by this record, material. They were present in court, and made no objection, either as to the manner in which they were brought there, or to the plaintiff's recovery. The demand is on a promissory note; and upon a default or *nil dicit*, it is competent for the court to render judgment without the intervention of a jury; the amount of the note with the interest which has accrued being the amount to be recovered. The court will look to this,

Where Issue Involves Inquiry as to Indebtedness. — In an action on a note, an issue involving the inquiry whether defendants were indebted to plaintiff, and, if so, in what amount, is sufficient to entitle defendants to have the question of plaintiff's ownership of the note passed on by a jury.¹

Where Plaintiff Joins Issue on Plea Controverting Waiver of Exemptions. — In an action on a promissory note containing a waiver of exemptions, where the plaintiff joins issue on defendant's plea, controverting the fact of waiver of exemptions, such issue must be submitted to the jury, where the evidence on the subject is conflicting.²

Where Evidence Conflicting as to Whether Value Was Given for Note After Maturity. — Where, in an action upon a promissory note, there is a conflict of testimony upon the question as to whether plaintiff's assignor had given value for the note, the question is thereby presented for a jury.³

Action on Negotiable Note Against Indorser. — Where, as is the case in some jurisdictions, a negotiable note is not considered to be one for the payment of money as to the indorser, judgment against such indorser, without the intervention of a jury, is improper.⁴

rather than to the amount of damages laid in the conclusion of the declaration. If interest has been miscalculated, it must be regarded as a clerical misprision, and may be here corrected."

1. *Causey v. Snow*, 120 N. Car. 279. In this case the court said: "The court submitted an issue as to whether the defendants were indebted to the plaintiff, and, if so, in what amount, and we are of the opinion that that issue was sufficient for the purpose of enabling the defendants to have the question of the plaintiff's ownership of the note passed upon by the jury. It would have been an easy matter for his honor to have instructed the jury that, if they found from the evidence that the plaintiff was not the owner of the note, then they should find for their verdict that nothing was due to him; and the jury would have had no trouble in understanding the matter committed to them."

2. *Slaughter v. Montgomery First Nat. Bank*, 109 Ala. 157. In this case the court said: "The next plea is, that the defendants did not sign the note which is the foundation of the action, as a waive note or contract. The plaintiff joined issue upon this plea. It is pleaded in bar of the whole action, yet it may be regarded as simply controverting the fact of waiver of exemptions. *Goetter v. Pickett*, 61 Ala.

387. By the issue thus presented, all questions as to the rights of the plaintiff, as a *bona fide* holder of commercial paper, for value and without notice, were eliminated and waived; and the only question for decision under that issue was, whether the defendants signed the note as a waive note or contract. The evidence was in direct conflict upon this question, and the court erred in taking the issue from the jury."

3. *Elisberg v. Marks*, 20 Misc. Rep. (N. Y. Supreme Ct.) 617.

4. *Metcalf v. Bataille*, Gilmer (Va.) 191. In this case the court said: "The court is, at the same time, of opinion, that this writing is not of that character, and that, therefore, neither the interest nor a final judgment for the principal sum could be given upon it, without the intervention of a jury. It is not a writing for the payment of money absolutely, but a collateral contract to pay it under certain circumstances. The opinion of this court discriminating between these two classes of contracts has been heretofore given, and particularly in the cases of *Ruffin v. Call*, 2 Wash. (Va.) 181, and *Henderson v. Hepburn*, 2 Call. (Va.) 232, and by that opinion this writing falls within the latter class of contracts. The court is therefore of opinion, that the judgment of the superior court be affirmed, by which the

Actions on Notes Bearing Interest According to Foreign Law. — In actions on notes made in another state and drawing interest under the laws of such state, final judgment cannot, as a rule, be rendered on such notes for principal and interest, without the intervention of a jury,¹ on the ground that the rate of interest in such other state must be proved as a fact.²

Action on Obligation for Unliquidated Damages. — According to some decisions it is held that, in a suit on a note payable in current bank notes, it is error to give judgment for its nominal amount on default, but there should be a writ of inquiry to ascertain their value, on the ground that such an obligation is for unliquidated damages.³

interest and damages will be hereafter assessed under a writ of inquiry. It is the right of the appellee to reverse this erroneous proceeding altogether, and thus be let into his objections on the merits, instead of being subjected to pay the principal sum, under the consent of the appellant."

1. *Peacock v. Banks, Minor* (Ala.) 387; *Dunn v. Clement*, 2 Ala. 392; *Fretwell v. Dinsmore, Walk.* (Miss.) 484.

In *Mississippi* on a judgment by default, founded on a note made in the District of Columbia, a writ of inquiry was held to be necessary to ascertain the rate and amount of interest. *Fretwell v. Dinsmore, Walk.* (Miss.) 484.

2. *Peacock v. Banks, Minor* (Ala.) 387, in which case the court said: "It appears that the note was made payable at Nashville, in the state of Tennessee. Where a contract is made in reference to another country, it must be governed by the laws of the place where it is to have its effect. And foreign laws must be proved as facts. The court, except in special cases, as defined by statute, is not the tribunal for the determination of facts. The laws of Tennessee regulating the rate of interest, the Circuit Court could not judicially know, unless from the finding of a jury on evidence submitted to them; and the clerk was not authorized by our statute (Laws Ala. 70) to calculate the interest."

Contra. — In *Willard v. Conduit*, 10 Tex. 213, it is held that in an action on a note which draws interest under the laws of another state, if judgment is suffered by default, the intervention of a jury to ascertain the legal rate of interest in such other state is unnecessary. The rate of interest may be determined by the judge, and in the

absence of a statement of facts, proper proof will be presumed to have been given. In this case the court said: "The only question deserving of notice is, whether it was necessary to call in a jury to ascertain the law of the state of New York as to the rate of interest recoverable upon the note. And we are of opinion that it was not. The cause of action was certainly liquidated by the writing as to the principal sum due; the law ascertained the rate of interest; and it was, we think, competent to make proof of what the law was to the court, without the intervention of a jury. 'In regard to foreign laws' (says Professor Greenleaf, in his treatise on Evidence), 'the established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proven as facts. And the better opinion seems to be, that this proof must be made to the court, rather than to the jury.' 'For,' observes Mr. Justice Story, 'all matters of law are properly referable to the court; and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matter in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand.' (1 Greenl. Ev., sec. 486.) In support of the judgment we must presume the proof to have been legally made by competent evidence."

3. *McKiel v. Porter*, 4 Ark. 534.

In *Ellett v. Chilton*, 5 Ark. 181, the court said: "It is necessary to notice but a single point assigned as error; for all the others are wholly immaterial

2. Dismissal, Discontinuance, and Nonsuit — Generally. — In accordance with the rule that a proper case for a nonsuit is presented whenever the plaintiff's case is wholly wanting in the proof of any material fact essential to complete his cause of action,¹ it has been held that a failure to show notice of protest to the drawer of a domestic bill of exchange for non-acceptance or non-payment, or to account for the failure, is good cause for nonsuit.²

or untenable. The writing sued on was payable in current bank notes, and due one year thereafter. This obligation is for unliquidated damages, and so we have expressly adjudged the point on several occasions. Here judgment was given by the court for the full amount of the instrument, without examination of witnesses, showing the value of the bank notes, and without awarding a writ of inquiry to ascertain the unliquidated damages. In this there is manifest error, as has been decided in *Day v. Lafferty*, 4 Ark. 450, and in *Wallace v. Collins*, 5 Ark. 41, and several other cases."

1. See article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, pp. 933-939.

2. *Clarke v. Castleman*, 1 J. J. Marsh. (Ky.) 69.

Taking New Certificate of Deposit While Action Pending on Another. — If the holder of a certificate of deposit, having commenced a suit by foreign attachment, surrenders it and takes new certificates, the action cannot be maintained thereon, and a nonsuit is properly directed. *Manuel v. Mississippi R. Co.*, 2 Pa. St. 198. In this case the court said: "Had the plaintiff in December, 1838, received from the defendants (the Brandon bank) \$12,490 in bank notes, and surrendered to them the certificate for that amount, and then deposited these notes, and received new certificates of deposit; it could not be pretended that they continued liable on account of the prior certificate, in any respect whatsoever. The bank would have performed its engagement, and its liability upon it would have ceased. Instead of doing so, the plaintiff surrenders the large certificate to the bank, and receives in its stead, besides bank notes, twenty new certificates of \$500 each, which express upon their face that he has deposited money to that amount. Except that the one is more circuitous in mode than the other, I perceive no difference between them. The plain-

tiff obtains new certificates of deposit of money, both parties treating the transaction as such. He surrenders the first certificate to the bank to cancel or do what they please with. The bank has fulfilled its engagement, by placing him, at his own request, in exactly the same position as if he had received bank notes and again deposited them, and he has agreed, by the terms of the new certificates, that it has so done. The case does not resemble those that have been cited, where a note or security were taken for a subsisting debt, and the question was, whether they were taken as payment or as collateral security. The true mode of viewing it, in my opinion, is that of an instrument of a special character, binding the bank to the payment of certain money; which money, by the plaintiff's own act and admission, has been paid him, and again deposited under a new engagement by him in relation to it, entered into between the parties. We are therefore of opinion that there was no error in directing a nonsuit, there being no fact or inference from fact in the case, on which the plaintiff could be entitled to recover."

Slight Evidence Sufficient to Prevent Nonsuit. — In a suit on a promissory note slight evidence that the title to the note is in the plaintiff will be sufficient to prevent a nonsuit. *Stamper v. Hayes*, 25 Ga. 546.

Opening Case After Resting to Introduce Evidence of Indorsement. — In *Low v. Warden*, 70 Cal. 19, the action was brought on a promissory note by an indorsee. The complaint alleged the execution of the note, its assignment to the plaintiff by the payee, and that he was the owner and holder thereof. The answer admitted the execution of the note, but denied every other allegation of the complaint. On the trial the plaintiff offered the note in evidence, proved that no part of it had been paid, and rested without any proof of the indorsement. The de-

So also, in an action on a promissory note which was to be paid out of another note when collected, a nonsuit is proper where there is no evidence that such other note had been collected, or might have been collected by the use of due diligence.¹

Nonsuit for Delay or Default in Subsequent Proceedings. — Although a plaintiff may be nonsuited for failure to deliver his declaration within the proper time after the appearance of defendant, or for other delays or defaults in the subsequent proceedings, yet it has been held that where a note has been placed in the hands of a justice for suit and collection it would be error to dismiss the action merely because the plaintiff did not appear. With the note in his possession he should proceed to trial, and produce the same as evidence, subject to such defenses as defendant might present.²

Questions Considered on Motion for Nonsuit. — In an action on a promissory note by an indorsee, neither of the questions, whether plaintiff is a holder as an agent or for value, can be considered on a motion for nonsuit.³

Dismissal or Discontinuance as to Part of Codefendants.⁴

3. Trial — a. IN GENERAL. — On the trial of an action to recover on a negotiable instrument the right to open and close is governed by ordinary considerations and rests with the party holding the affirmative of the issues.⁵ The order in which the proof

pendant then moved for a nonsuit, on the ground that there was no proof of the indorsement. The plaintiff's counsel contended that no such proof was necessary, but, upon an intimation of the court to the contrary, asked leave to open the case and introduce evidence of the indorsement. This the court refused to allow, and granted the motion for nonsuit. The nonsuit, if allowed to stand, would have compelled the plaintiff to bring a new action, to which the statute of limitations would be a bar. It was held that under the circumstances the rulings of the court were erroneous.

1. *Wilson v. Morrison*, 29 Ga. 269.

2. *Hitch v. Lambright*, 66 Ga. 228.

In this case the court said: "It is the duty of magistrates to receive for suit and collection all notes and accounts within their districts when tendered, and to give receipts for the same. Code, § 4147. It is also made their duty to have parties served by summons, and to proceed to the trial of such causes at the proper term of the court. If a note thus placed in the hands of the magistrate is sued, and the defendant appears, we think it would be error in the magistrate to dismiss

such suit merely because the plaintiff did not appear, with the evidence of indebtedness under his control and in his possession. He should proceed to the trial of said cause, and produce the same as evidence, subject to such defenses as the defendant might present against the recovery of a judgment thereon."

3. *Poorman v. Mills*, 35 Cal. 118.

4. See *supra*, various subdivisions under VIII. *Parties Defendant*. See also articles DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 847; JUDGMENTS, vol. 11, p. 847 *et seq.*

5. **Right to Open and Close.** — *Montgomery v. Hunt*, 93 Ga. 438; *Lindsley v. European Petroleum Co.*, 3 Lans. (N. Y.) 176, 10 Abb. Pr. N. S. (N. Y.) 107; *Opper v. Caillon*, 9 Daly (N. Y.) 157; *Stayner v. Joyce*, 120 Ind. 99. And see, in general, article OPEN AND CLOSE.

An admission by the defendants in a proceeding to foreclose a negotiable mortgage note that they executed the paper, and that the plaintiff is the owner thereof, entitles them to open and conclude the argument. *Southern Mut. Bldg., etc., Assoc. v. Perry*, (Ga. 1898) 30 S. E. Rep. 658.

should be introduced is also governed by the well-established general rules.¹ The power of the court to consolidate several suits² or to transfer the case to the equity side of the docket has also been recognized in this class of cases.³ Where the note sued on is held under a blank indorsement, the holder may fill out the indorsement at the trial, but need not do it, as it is mere form.⁴

b. PRODUCTION OF INSTRUMENT. — A note or bill of exchange sued on must in general be produced at the trial before a verdict and judgment can be rendered thereon,⁵ or an excuse shown for

1. In *Crosett v. Whelan*, 44 Cal. 200, the defendants, being guarantors on a note, set up an agreement with the maker which was afterwards violated. On the trial defendants offered evidence in support of this agreement. Plaintiff objected that the testimony was irrelevant until after it had been shown either that the plaintiff took the note with notice or acquired it after maturity. The court, in the exercise of its discretion, decided that the defendants might introduce their evidence in whatever order they preferred, and this was held to be no error. See also *Cashman v. Harrison*, 90 Cal. 297. And see, in general, article ORDER OF PROOF.

2. **Consolidation of Actions.** — Where a plaintiff brought ten actions upon promissory notes against the same defendants in the same court, and but one defense existed as to each of them, which was the same in all the cases, it was in the discretion of the court to order a consolidation at the instance of either party. *Hatcher v. Chambersburg Nat. Bank*, 79 Ga. 542; *Hatcher v. Independence Nat. Bank*, 79 Ga. 547. And see, in general, article CONSOLIDATION OF ACTIONS, vol. 4, p. 673; and see *supra*, XI. *Joinder of Causes of Action*, 1. *In General*.

3. *Hackett v. Schad*, 3 Bush (Ky.) 353. See article CALENDARS AND TRIAL DOCKETS, vol. 3, p. 801.

4. *Trainor v. Adams*, 54 Ill. App. 523; *Kuehne v. Goit*, 54 Ill. App. 596. And see *Weston v. Meyers*, 33 Ill. 428; *Cutting v. Conklin*, 28 Ill. 506.

Striking Out Indorsement. — An indorsement may be stricken out, even at the trial, if it be necessary. *Planters' Bank v. Chewning*, 5 How. (Miss.) 413.

5. *Brandt v. Foster*, 5 Iowa 287; *Armstrong v. Lewis*, 14 Minn. 406; *Fales v. Russell*, 16 Pick. (Mass.) 315; *Matossy v. Frosh*, 9 Tex. 610; *Sebree v. Dorr*, 9 Wheat. (U. S.) 558; *Powell v. Roach*, 6 Esp. N. P. 76. See also *Wil-*

ins v. McGuire, 2 App. Cas. (D. C.) 453. See also *supra*, XII. 2. *Denial of Execution of Instrument — Indorser's Denial*.

An Acknowledgment of the Debt, or even promise of payment, will not dispense with the production of the note nor release the plaintiff from the necessity of accounting for its absence. *Vanauken v. Hornbeck*, 14 N. J. L. 178.

Where the Note in Suit Was Given for Two Other Notes which were not surrendered, it was held that the judge committed no error in allowing a verdict for the plaintiff and withholding judgment thereon until the notes were produced and filed in court. *Raisin v. Thomas*, 88 N. Car. 148.

Admission in Pleadings — Where everything which the production of a note in evidence would prove is admitted by the pleadings, it is not necessary to produce the note in evidence. *Williams v. Norton*, 3 Kan. 295.

Default Judgment. — Where a demurrer to an answer was sustained and the defendants failed to file an amended answer within the time prescribed, it was held to be error to direct the jury to find for the plaintiff on his petition without requiring the note sued on to be produced in evidence. *Brandt v. Foster*, 5 Iowa 289.

Surrender. — But in *U. S. Bank v. Thayer*, 2 W. & S. (Pa.) 443, it was held that the court could give judgment to the plaintiff by default for want of a sufficient affidavit of defense without requiring the plaintiff to surrender his note, as the court could control its execution so as to protect defendant's security by refusing to compel satisfaction of the judgment until the identical note described in the statement was delivered to the maker.

Filing of Note — Presumption. — If it is necessary to file the original note in the trial court before judgment is taken thereon, it will be presumed in the

its nonproduction, as that it is lost or destroyed,¹ or is in the possession or control of the adverse party.²

Action on Coupon — Production of Bond. — Where a coupon is negotiable after it is detached from the bond, it is not necessary to produce the bond to entitle the holder of the coupon to recover in an action upon the coupon.³

Bills Drawn in Sets. — Where the holder of one of a set of exchange which has been protested, and due notice thereof given to the indorser, brings an action thereon against the indorser, and upon the trial produces the bill to which the protest is attached, it is not incumbent upon him to produce or account for the nonproduction of the other parts of the set.⁴

court of last resort, in the absence of a bill of exceptions showing to the contrary, that it was so filed. *Duncan v. Scott County*, 64 Miss. 40.

1. *Armstrong v. Lewis*, 14 Minn. 406; *Powell v. Roach*, 6 Esp. N. P. 76. See also article LOST INSTRUMENTS, vol. 13, p. 349.

Indemnity. — Where a note indorsed in blank is lost before it becomes due, it may be sued on in an action at common law, but a sufficient bond will be required for the indemnity of the defendant. There is no difference, as to the title of the plaintiff, between this case and the case of loss after the maturity of the note, except that where the loss occurs before maturity the defendant is exposed to greater risk, as there is a possibility that it may have been negotiated to a *bona fide* holder in the ordinary and regular course of business before it was due, and therefore a court of law, holding a just regulating power over judgments and proceedings before it, has the authority to prescribe an equivalent security to the defendant by a sufficient and reasonable indemnity. *Fales v. Russell*, 16 Pick. (Mass.) 315; *Burrows v. Goodhue*, 1 Greene (Iowa) 48; *Armstrong v. Lewis*, 14 Minn. 406, holding that the statute in that state (Gen. Stat., c. 73, §§ 68, 69) intended to retain the former practice as to the production and filing of notes before a recovery, or in case of loss or destruction, proof of that fact and the execution of a bond to indemnify the maker.

2. Action on Written Contract of Assignment. — Where a plaintiff declares upon a written contract which assigns a bill single, sets it out *in extenso*, and stipulates to pay it if the means of payment shall not be provided by another source, he will not be re-

quired to produce it at the trial, its production not being necessary to entitle him to recover, and it not appearing to have been in his possession. *Brown v. Isbell*, 11 Ala. 1009.

Allegation of Possession. — It is not necessary to allege that the note sued on is in the defendant's possession in order to admit proof of that fact. *McClusky v. Gerhauser*, 2 Nev. 47.

3. *Welsh v. First Div. of St. Paul, etc.*, R. Co., 25 Minn. 314; *Com. v. State*, 32 Md. 501; *Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402; *Arents v. Com.*, 18 Gratt. (Va.) 766; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Aurora City v. West*, 7 Wall. (U. S.) 82. See also *Copeland v. Philadelphia, etc., Coal, etc., Co.*, 13 Phila. (Pa.) 8, 36 Leg. Int. (Pa.) 202.

4. *Downes v. Church*, 13 Pet. (U. S.) 205, holding that it is not necessary that each part of the set be presented for acceptance before the right of action accrues; that if one of the other parts has been accepted, paid, or presented and dishonored at an earlier time, and due notice not given thereof, or if some other person is the holder and has given notice of his title to the party sued, these are matters of defense which the indorser may establish. *Johnson v. Offutt*, 4 Metc. (Ky.) 21; *Commercial Bank v. Routh*, 7 La. Ann. 129; *Hazzard v. Shelton*, 15 Ala. 62.

Second of a Set. — In *Wells v. Whitehead*, 15 Wend. (N. Y.) 527, it is held that where a second of a set of exchange is protested for nonacceptance an action against the indorser upon the first of the set cannot be maintained without producing the second, inasmuch as the latter may have been accepted *supra protest*.

4. Instructions. — The instructions to the jury in actions upon bills and notes follow the usual course,¹ the court charging or refusing to charge according to the issues made upon the ownership of the paper,² the consideration,³ the good faith of the holder,⁴ the indorsement, transfer, or assignment of the instrument,⁵

The drawer or indorser to be charged on nonacceptance or nonpayment is entitled to call for the protest and the identical bill or number of the set protested before he is bound to pay, and it would be sufficient to produce it at the trial or account for its absence. His rights attach to the bill that has been dishonored, and he is entitled to call for it. He may want it for his own indemnity, and without it he might be exposed to claims from some *bona fide* holder or person who had paid it *supra protest* for his honor. *Hazzard v. Shelton*, 15 Ala. 64, *quoting* from Kent's Com. (1st ed.) 75; *Commercial Bank v. Routh*, 7 La. Ann. 129.

Duplicate Protest. — In an action by the payee's representatives on the first three bills of exchange drawn by defendant's testator, the plaintiff may give in evidence a duplicate protest of the first bill and the third bill of the same tenor and date, if it is shown that the original first bill had been lost after protest and that the same had not been there-after paid. *Usher v. Gaither*, 2 Har. & M. (Md.) 457. See also *Yingling v. Kohlhaas*, 18 Md. 148.

1. See article INSTRUCTIONS, vol. II, p. 47.

2. Ownership. — Where the ownership of the notes in suit is undenied, it is the duty of the court to charge that the owner thereof is entitled to all the rights of the payee named therein. *Keokuk Falls Imp. Co. v. Kingsland, etc.*, Mfg. Co., 5 Okla. 32.

3. Consideration. — In *Cousins v. Partridge*, 79 Cal. 224, it was objected that the jury were charged that the execution of the note "is just about the only question for you to determine" — the argument being that this language took away from the jury the question whether or not there was any consideration for it. But in the next sentence the court said: "The first and principal question for you to determine is, Was this promissory note signed by P. in his lifetime, and, if so, was there any consideration for it?" and afterwards the question of consideration was fully discussed. It was

held that the instructions on the subject of consideration were correct.

In *Galloway v. Hicks*, 26 Neb. 531, the jury were instructed that if they found that the defendant had not proved the failure of consideration as alleged in his answer, they should find for the plaintiff. This was held to be error, as substantially withdrawing from the jury the other issues involved in the case.

In *Smith v. Gillen*, 52 Ark. 442, there was no evidence tending to show that the consideration of the note in suit was illegal, and it was held to be error for the court to instruct the jury that any illegality of consideration as to one of the payees might be pleaded against the other.

4. Bona Fides. — It is proper for the court to refuse to charge that the jury should consider the assignee of a note a *bona fide* purchaser, where there is any evidence to the contrary. Such an instruction in substance directs the jury to return a verdict for the plaintiff, and is an invasion of the right of the jury to pass on a question of fact. *Hamilton v. Henneman*, (Ind. App. 1898) 50 N. E. Rep. 43.

Certain notes were obtained by fraud on the part of the payee. These notes were assigned, before they were due, to the plaintiff, and there was no evidence that he had express notice of the fraud. It was held to be error for the court to charge that "if fraud is shown in the notes the law presumes the holder knew it, the plaintiff must rebut this presumption." *Arnold v. Lane*, 71 Conn. 61.

If the holder of a note, obtained by fraud, shows by uncontradicted evidence his *bona fides* and purchase before due, he is entitled to have a verdict directed for the amount of the note and interest. *Adams County Bank v. Hainline*, 67 Mo. App. 483.

5. Indorsement and Transfer. — Instructions are rightly withheld which would refer to the jury the interpretation of an indorsement and leave them to determine a case, special in its circumstances, on the face of the paper and

and the damages.¹ When there is no question to submit to the jury, as when there is no conflict in the evidence, a verdict should be directed.² Where a special verdict is requested, an instruction on the general law of the case is of course properly refused.³

5. **Verdict.** — See article VERDICT.

6. **Findings of Court — Must Support Judgment.** — In an action on a bill or note, as in other actions, where the trial is by the court without a jury, the usual rule prevails that the *allegata* and *probata* must correspond in order to support a judgment for the plaintiff.⁴

the custom of bankers generally. *Sweeney v. Easter*, 1 Wall. (U. S.) 166. So, in a suit against a bank for negligence, in relation to demand or notice of nonpayment, the court is not bound to declare the law as between the holder and the drawer of the bill. *Washington Bank v. Triplett*, 1 Pet. (U. S.) 25.

An indorsement of a note due to a firm was made by one partner with the consent of his copartner. This was done by writing the firm name across the back of the note with intent to assign the note to himself. The court charged that this was a sufficient assignment and indorsement, and that the partner so acting became the owner and holder of the note. This charge was held to be correct, and not to take from the jury the question as to whether or not the note was in fact assigned and delivered. *Low v. Warden*, 77 Cal. 94.

Where the legality of the indorsement of a check under the facts is at issue, a charge that it is admitted by the pleadings that the check was "duly indorsed" by the payee is misleading. And where there is evidence that plaintiff had reason to suspect that the check was improperly obtained, a charge which limits the jury to the question of plaintiff's actual knowledge of fraud is improper. *Harrington v. Butte*, etc., Min. Co., 19 Mont. 411.

1. **Damages.** — In an action on a non-negotiable note it is error to instruct the jury that in case of a recovery it must be for the full amount claimed, when there is proof of a much smaller consideration. *Closs v. Thiefels*, 79 Mich. 589.

2. **Directing Verdict.** — *Mosher v. Farmers'*, etc., Nat. Bank, 51 Neb. 55; *Scott v. Taul*, 115 Ala. 529; *Lett v. Kunkle*, 178 Pa. St. 273; *Hilbert v. Barry*, 111 Mich. 698. See, in general,

article DIRECTING VERDICT, vol. 6, p. 667.

In *Drovers' Nat. Bank v. Potvin*, (Mich. 1898) 74 N. W. Rep. 724, the only question for determination was whether the testimony offered by the plaintiff showed its purchase of the note to be in good faith. The testimony of *bona fides* was undisputed, and it was held to be proper for the court to direct the verdict.

In *Forgey v. Cambridge City First Nat. Bank*, 66 Ind. 123, the action was on a note, by the payee, against the makers as principals. It was held that an instruction to the jury that the plaintiff had failed to make out a case against certain of the defendants, and directing a verdict for them, though erroneous, yet, if the relation of principal and surety be not shown by the record, was an error which was not available to a codefendant against whom a verdict was found.

In *Limerick Nat. Bank v. Adams*, (Vt. 1898) 40 Atl. Rep. 166, it was held that a motion to direct a verdict for plaintiff is properly denied where the evidence tends to show that plaintiff (suing as assignee) had notice of facts in respect to the note which should have put him upon inquiry respecting its validity.

3. *Stayner v. Joyce*, 120 Ind. 99.

4. See article FINDINGS OF COURT, vol. 8, p. 943.

In *Lewis v. Myers*, 3 Cal. 475, the declaration was upon a note, and there was but one count. The court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold. The finding was held to be against the averments and insufficient to support the judgment.

Consistency in Findings. — Since, under § 3117, Cal. Civ. Code, a person may be an indorser upon a promissory

Must Cover Issues. — The findings of the court in an action on a bill or note must, as in other cases, be responsive to and cover all the material issues made by the pleadings.¹

Must Be Within the Issues. — The findings of the court in an action on a bill or note must be within the issues made by the pleadings.²

7. Judgment — a. FORM — Judgment in Assumpsit in Action of Debt. — In an action of debt on a promissory note, the fact that a judgment is entered informally as in assumpsit is no cause of reversal in error, where the judgment is for the proper amount declared on.³

Absolute Judgment in Favor of Surety. — Where an action is brought against the maker and surety of a note, judgment should not be

note and also a guarantor upon the same note, a finding that the allegation in the complaint that a party was an indorser was true, and a finding that the same party was a guarantor, are not contradictory, and support the judgment. *Loustalot v. Calkins*, 120 Cal. 688.

A finding that a note of another person was surrendered in part consideration of a new note executed by two other makers, and another finding that the making of such note was for and on behalf of and as an accommodation to the maker of the surrendered note, who was a personal friend, are not inconsistent; the one finding merely showing the consideration yielded up by the payee on the making of the note, and the other finding showing the friendly relation which operated as an inducement for making a note in security for the debt of another. *Scribner v. Hanke*, 116 Cal. 613.

1. See article FINDINGS OF COURT, vol. 8, p. 944; *Ward v. Clay*, 82 Cal. 502.

Finding on Issue of Payment of Principal and Interest. — Where issue is raised as to whether or not the principal and interest of a promissory note in controversy had been paid, a finding that a certain sum is due thereon is equivalent to a finding that such sum is owing and unpaid. *Myers v. McDonald*, 68 Cal. 162.

Finding Leaving Amount Paid to Be Computed. — A finding that a certain balance is due and owing from defendant to plaintiff upon the note in suit states merely a conclusion of law, and is not a finding of fact covering the issue of nonpayment. But that is certain which can be made certain, and it is sufficient if the findings show that no part of the note has been paid excepting the principal and interest of a cer-

tain collateral note, which gives the balance found due to plaintiff by computation, after deducting from the amount of the note in suit the whole amount of the collateral note. *Ward v. Clay*, 82 Cal. 502, cited in *Schuttler v. King*, 13 Mont. 228.

Assumption of Sufficiency of Findings.

— In an action upon a promissory note which defendant alleged was signed on a void, illegal, and invalid consideration, the consideration being the payee's promise not to prosecute her brother for crime, and to keep the crime secret, a failure to find specifically upon the illegality of the consideration is not material if counsel on both sides assume or concede that findings to the effect that neither plaintiff nor his indorser had notice of the want of consideration or invalidity of the note are equivalent to a finding that the consideration was illegal. Such assumption or concession of the sufficiency of the findings as to illegality of the consideration must have effect for all purposes of the appeal. *Graham v. Larimer*, 83 Cal. 173, cited in *Jordan v. Grover*, 99 Cal. 195.

2. See article FINDINGS OF COURT, vol. 8, p. 945; *Eames v. Crosier*, 101 Cal. 260.

3. *Carroll v. Meeks*, 3 Port. (Ala.) 226. In this case the court said: "The next assignment questions the sufficiency of the judgment because it is in assumpsit. The judgment, though informal, was for the precise amount of the principal and interest due upon the note, and bound the plaintiff in error to pay no more than an accurate judgment in debt would have done. As the judgment has the same effect that a proper one would have, we could not reverse it upon the ground that it is in assumpsit."

rendered absolutely in favor of the surety as against the maker of the note.¹

Parties in Representative Capacity. — If it appear from the face of the note and from the allegations of the petition that the makers intended to bind themselves in a representative capacity as trustees, and the plaintiff intended to recover against them as such, a judgment that would render them personally or individually liable therefor is erroneous.²

b. PARTIES — (1) Joint Defendants — Common-law Rule. — At common law, in actions on notes, as in other actions *ex contractu* where several defendants are sued jointly, the plaintiff must have judgment against all of the defendants who are before the court, either by service of process or by appearance, or he can have judgment against none.³

1. *Dignowity v. Staacke*, (Tex. Civ. App. 1894) 25 S. W. Rep. 824. And see, in general, article PRINCIPAL AND SURETY.

In an action on a promissory note against two persons who executed the note apparently as joint principals, but who were in fact one a principal, and the other his surety, and where the pleadings show this fact, and the petition asks for a judgment against the surety only as a surety, and no issue is made upon the subject, and the surety does not ask the court to render a judgment against himself only as a surety, and it does not seem that the attention of the court was ever called to the fact that the surety was only a surety, it was held not error for the court to render judgment against the makers of the note as though they were both principals. *Foote v. Sprague*, 13 Kan. 155.

2. *Storey v. Nichols*, 22 Tex. 87.

Personal Judgment on Secured Note. — The court cannot properly render a personal judgment against the makers of a promissory note which is secured by a valid deed of trust, before the security has been legally exhausted. *Powell v. Patison*, 100 Cal. 236.

3. See article JUDGMENTS, vol. 11, p. 847; *Gould v. Sternburg*, 69 Ill. 531; *Lodge v. State Bank*, 6 Blackf. (Ind.) 557; *Bright v. Hand*, 16 N. J. L. 273; *Miller v. M'Cagg*, 4 Hill (N. Y.) 35; *McGuire v. Johnson*, 2 Lans. (N. Y.) 305.

In *Miller v. M'Cagg*, 4 Hill (N. Y.) 35, the court said: "It seems to be supposed that whenever the declaration contains nothing but the money counts, and a copy of the note or bill is added, that it is a statute action.

But this is a mistake. Whether it is a statute action or not depends on the fact whether several parties to the note or bill, as makers and indorsers, drawers and acceptors, are sued together. In this case, both of the defendants are makers, and constitute only one party to the note. Whether sued jointly or severally, the action is at the common law; and neither plaintiff nor defendant is entitled to any privilege which he could not have claimed if the statutes had never been passed. We are referred to the *Genesee Bank v. Field*, 19 Wend. (N. Y.) 643, to prove that this is a statute action. But there the makers and the indorser of a promissory note were sued jointly, while this is an action against the makers only. It is enough that the case is not in point. But I have more than once intimated a doubt whether the case was rightly decided; and on conferring further with my brethren, we are all agreed that the decision cannot be supported. When the joint and several makers of a promissory note are sued together, whether the indorsers are joined or not, the plaintiff has made his election to treat the contract of the makers as joint only, and he must abide by that election. He cannot sever the action as to the makers, and take judgment against one of them without the other. The statute does not reach the case, because it only provides for a severance as to different parties to the note; and all of the makers, though their promise be joint and several, make but one party within the meaning of the statute."

Judgment Against One Joint Maker. —

The fact that judgment has been rendered against one of two joint makers

Exception. — The usual exception to this rule, however, also applies in actions on negotiable instruments.¹ Thus, where, in an action on a promissory note against the two joint makers thereof, one of them establishes a defense on the ground of coverture, judgment may go against the other defendant.²

Under Statute. — In a greater number of the states, however, the rule of the common law has been changed by statute, so that, in actions on promissory notes, as in other actions *ex contractu*, the plaintiff may have judgment against one or more of the defendants, if he shall make out a good cause of action against them, even though he may fail as to the others, and this, too, whether the contract be joint and several or joint only.³

(2) *Maker and Guarantor.* — In an action on a promissory note against its maker and the guarantors thereon, the plaintiff may enter a several judgment on the verdict against the maker and need not await the trial of the issues against the others. A several judgment is proper in such case, the agreements of the maker and guarantor being entirely separate and independent.⁴

c. AMOUNT — Judgment Exceeding the Amount Prayed For. — In an action on a promissory note, if the relief granted is consistent with the case made by the plaintiff, is embraced within the issues presented by the pleadings, and is shown by the evidence to be due the plaintiff, the fact that the judgment in amount exceeds that prayed for is not reversible error.⁵

Abatement of Interest in Judgment on Notes Not Due. — Where, by the terms of certain notes, the plaintiff is entitled to a judgment on them, though all are not due, the interest on such of the notes as are not due should be abated so that on maturity of each note the judgment bearing interest thereon shall not exceed the amount that would have been due on the note.⁶

of a promissory note is good cause for reversal. *Bright v. Hand*, 16 N. J. L. 273.

1. See article JUDGMENTS, vol. II, p. 850.

2. *McGuire v. Johnson*, 2 Lans. (N. Y.) 305.

3. *Erwin v. Scotten*, 40 Ind. 389; *Beals v. Smith*, 91 Mich. 146. See also *Maynard v. Penniman*, 10 Mich. 153.

4. *Bank of Commerce v. Smith*, 57 Minn. 374.

5. *Johnson v. Rider*, 84 Iowa 50. In this case the court said: "Some question is made as to the amount of the judgment, and it is said it is greater than that demanded in the petition. The relief granted was consistent with the case made by the petition, was embraced within the issues presented by the pleadings, and was shown by the evidence to be due the plaintiff. We

do not think the judgment should be disturbed on the ground that it is excessive." See, in general, article JUDGMENTS, vol. II, p. 899 *et seq.*

6. *Barbisch v. Oatman*, (Tex. Civ. App. 1896) 39 S. W. Rep. 191. In this case the court said: "But the interest on the notes not due at that time should have been abated, so that on maturity of each note the judgment thereon, bearing interest, should not exceed the amount that would have been due on the note. *Tinsley v. Boykin*, 46 Tex. 596; *Gillmour v. Ford*, (Tex. 1892) 19 S. W. Rep. 442. The amount to fall due on each note at maturity should be ascertained, and this amount discounted at the contract rate of interest to the date of judgment, so that the judgment on each note should, at maturity, including interest, be the same as the note at maturity,

Inclusion of Interest and Damages for Non-payment. — In an action on a bill of exchange it is no objection that interest and damages for non-payment are included in the same entry of judgment, without specifying the amount of each separately.¹

Judgment for Interest and Damages for Detention. — Where, in an action on a note, the jury assess damages for the detention, judgment may be taken by the plaintiff either for the debt and damages, or for the debt and interest, but not for both.²

Award of Interest from Date of Judgment. — In an action on a note not bearing interest, a judgment decreeing interest from the date of such judgment does not conflict with the terms of the note.³

Correction of Erroneous Calculation of Interest. — Where an error has been made in calculating interest in a judgment on a note on which suit has been brought, the court before whom the suit was brought may correct the error.⁴

d. REQUISITES — Judgment Must Be Supported by the Pleadings. — A judgment, in an action on a bill or note, must, in accordance with the general rule as to judgments,⁵ be supported by, and accord with, the pleadings of the party for whom it is rendered.⁶ A valid judgment cannot be rendered for a party inconsistent with his own allegations, or on facts not alleged in the pleadings.⁷

and no more. This rule must be observed so as not to compound interest, and increase it above the contract rate. A judgment may be taken on undue notes as well as those due, when a foreclosure is sought on property mortgaged to secure the notes; but the contract must not be changed, increasing the obligation."

1. "If a judgment for both interest and damages could be supported in the condition of the record, it would be no objection that the clerk omitted to state in the entry the several amounts of each — if the recovery did not exceed the aggregate of both. The old and strict rule upon this subject has long yielded to the progressive spirit of more enlarged and liberal views of justice." *Dickinson v. Branch Bank*, 12 Ala. 54.

2. *Diggs v. Bolware*, 2 Litt. (Ky.) 248.

3. *Bush v. Wilson*, 23 Tex. 148, in which case it was held that a judgment on a note for interest at eight per cent. from the rendition thereof is not in conflict with the terms of such an instrument admitting an indebtedness without interest.

Allowance of Interest on Judgment at the Rate of the Principal. — In *Corcoran v. Doll*, 32 Cal. 83, it is held that when the judgment is not rendered by default, but upon answer and after trial, the interest may be added to the prin-

cipal, and the judgment may direct the whole sum to draw the same rate of interest which the principal drew by the contract, although the complaint does not pray that the judgment draw interest.

4. *Smith v. Clapp*, 15 Pet. (U. S.) 125.

5. See article JUDGMENTS, vol. II, p. 888.

6. *Stephenson v. Bassett*, 51 Tex. 544. In this case a suit was brought on two of three promissory notes given for land; the third, though not due, was set out in the petition for the purpose of enabling the court to apportion the proceeds of sale under a foreclosure of the vendor's lien, which was sought, and to have retained a sufficient amount for the third note, "when the same shall become due and your petitioner can obtain a judgment thereon." Before trial the third note became due, and judgment was rendered for the amount due in all three of the notes, though the petition asked for judgment only on the two notes first sued on. It was held to be error, since it was a judgment on a case not made by the pleading.

7. *Atwood v. Welton*, 57 Conn. 514. In this case it was held that, in an action by the accommodation maker of a note against the payee, when the only

Determination of Issues. — In an action on a bill or note, the usual rule applies that a judgment without a trial and determination of all the issues properly raised is erroneous.¹

Identification and Relation of Parties. — All judgments against sureties or indorsers on any bill of exchange or promissory note should designate and identify the relation of the parties under the contract or note on which the judgment was rendered.²

Limitation as to Defendants Not Served. — In some jurisdictions it is expressly provided by statute that, in all suits on negotiable instruments where any of the defendants are jointly liable, and all of them have not been served, judgment for the plaintiff must be limited so as not to affect the separate property of defendants not served.³

e. AGAINST CORPORATIONS. — In *New York* it is provided by statute that, in an action against a corporation to recover damages for the non-payment of a promissory note or other evidence of debt, for the absolute payment of money, unless the defendant serves with a copy of his answer or demurrer a copy of an order of a judge directing that the issue presented by the pleadings be

issues are whether the plaintiff paid the note at maturity, and whether he has ever been repaid, and the court finds both the issues for the plaintiff, it is error to render judgment for defendant on the fact, not alleged in the pleadings, that the relation of the parties has so changed that it became the duty of plaintiff to pay the note.

Judgment Must Correspond with Averments. — Where the plaintiff declares specially upon a promissory note, and the defendant shows payment partly in money by the giving of another note, the plaintiff, relying wholly upon the original note, cannot have judgment for the amount of the other. *Trude v. Meyer*, 82 Ill. 535.

1. See article JUDGMENTS, vol. II, p. 865; *Mitchell v. Sheldon*, 2 Blackf. (Ind.) 185. In this case, which was an action of assumpsit on a promissory note, two pleas were pleaded, the first of which was *non assumpsit* and issue, the second was as to part failure as to consideration. There was a replication as to the second plea, demurrer, and judgment for the plaintiff. It was held that the plaintiff could not have final judgment for the amount of the note while the first issue remained undisposed of.

2. *Saffold v. Banks*, 69 Ga. 289. See also *Copass v. Wheelock*, 1 Lea (Tenn.) 381, in which it is held that a judgment by motion in favor of an indorser is void if it fails to show that

he was an accommodation indorser, since the summary proceeding by motion is only allowed in favor of accommodation indorsers.

Statement of Order of Liability. — In a suit on a bill of exchange, payee and indorsers, being joined with the drawer and acceptor, may set up by way of cross-complaint that they are sureties of the latter, for the purpose of having the question tried, and if such be true, judgment should be entered as to the order in which they and the other defendants are liable on execution. *Alley v. Gavin*, 40 Ind. 446; *Lacy v. Lofton*, 26 Ind. 324.

3. *Neal v. Pennington*, 65 Ill. App. 68. In this case the court said: "Section 5 of the act of June 4, 1895, Laws of 1895, p. 262, is as follows: 'In all suits on negotiable instruments where any of the defendants are jointly liable, and only one or more, but not all of them, have been served with summons, if the plaintiff recover, judgment shall be entered in form against all the defendants so jointly liable, but so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served;' which is relied on by appellee as warranting the judgment in this case. If this section can be sustained as a valid enactment it should at least receive a strict construction. A judgment to be warranted by it, should be so limited as

tried, the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney pursuant to his demand therefor, or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.¹

f. SATISFACTION ON PAYMENT OF ONE OF TWO JUDGMENTS. — Where the holder of a note obtains separate judgments against the maker and the guarantor, and the former pays such judgment, the court may, upon motion of the guarantor, and upon payment of costs, order an entry of satisfaction of the judgment against him.²

g. JUDGMENTS BY DEFAULT — In General. — An action upon a promissory note being one upon a liquidated demand, final judgment by default, on defendant's failure to answer, is proper.³

not to affect the separate property of defendants not served. The judgment here is not so limited, but is in the form applicable to cases in which all the defendants are served, and awards execution generally and simply. In our opinion, therefore, it is not within the letter or spirit of the statute, and must be reversed under the general rule declared in *Clafin v. Dunne*, 129 Ill. 241, and cases cited on p. 248."

1. N. Y. Code Civ. Pro., § 1778; *Ford v. Binghamton Hydraulic Power Co.*, 54 Hun (N. Y.) 451; *Hutson v. Morrisania Steamboat Co.*, 64 How. Pr. (N. Y. C. Pl.) 268; *Moran v. Long Island City*, 101 N. Y. 439; *Shorer v. Times Printing, etc., Co.*, 119 N. Y. 483; *Bradley v. Albemarle Fertilizing Co.*, 2 Civ. Pro. Rep. (N. Y. Marine Ct.) 50; *Schlegel v. American Beer, etc., Bottling Co.*, 64 How. Pr. (N. Y. Marine Ct.) 196; *Beaumont v. Diecks Pharmaceutical Extract Co.*, 5 Civ. Pro. Rep. (N. Y. City Ct.) 274; *New York L. Ins. Co. v. Universal L. Ins. Co.*, 88 N. Y. 424; *Tyler v. Aetna F. Ins. Co.*, 2 Wend. (N. Y.) 280.

Provision to Be Strictly Construed. — In *Shorer v. Times Printing, etc., Co.*, 119 N. Y. 483, it was held that the provision under consideration is to be strictly construed, and is to be confined to actions upon instruments which admit on their face an existing debt, payable absolutely. See also *Bradley v. Albemarle Fertilizing Co.*, 2 Civ. Pro. Rep. (N. Y. Marine Ct.) 50.

Applies to Municipal Corporations. — In *Moran v. Long Island City*, 101 N. Y. 439, it was held that this statute applies to a municipal corporation, al-

though by its charter it is authorized to sue and be sued, to complain and defend. Such a provision in the charter of a municipal corporation confers no special right not given to corporations generally.

Applies to Action on Protested Notes by Indorser. — In *Ford v. Binghamton Hydraulic Power Co.*, 54 Hun (N. Y.) 451, it is held that the provision applies to actions upon protested notes of a corporation, brought by an indorser who has been compelled to take up such notes.

Action to Charge Corporation as Indorser. — In *Shorer v. Times Printing, etc., Co.*, 119 N. Y. 483, it is held that the section in question does not apply to an action where it is sought to charge a corporation as indorser of a promissory note.

Service of Order Necessary. — The service of a copy of the order prescribed by the statute is not restricted to cases where the defendant corporation has asked for and obtained an extension of time to answer or demur, but is necessary in all cases. *Hutson v. Morrisania Steamboat Co.*, 64 How. Pr. (N. Y. C. Pl.) 268.

Waiver of Benefit of Provision. — In *Bradley v. Albemarle Fertilizing Co.*, 2 Civ. Pro. Rep. (N. Y. Marine Ct.) 50, it is held that where the plaintiff, in an action against a corporation, united in the same complaint a cause of action upon a promissory note and another for goods sold and delivered, he thereby waived the benefit of this section of the code.

2. *Frankel v. Stern*, 50 Ill. App. 54.

3. *Loungeway v. Hale*, 73 Tex. 495.

Premature Rendition of Default Judgment. — In actions on bills or notes, as in other actions, a judgment rendered by default before the time authorized by law, is irregular.¹

Plaintiff's Pleadings Must Be Sufficient to Sustain the Judgment. — In an action on a promissory note the usual rule prevails that, while a default, regularly taken, admits the cause of action, yet the declaration or complaint must contain such a statement of facts as will, when admitted, authorize a judgment against the defendant.²

Default Judgment Against Part Before Final Disposition as to Others. — The rule that, in a joint action *ex contractu*, a final judgment by default cannot be entered against the defaulting defendants while the cause is undisposed of as to the codefendants answering,³ applies to actions on promissory notes.⁴

Separate Judgment Where Liability Several. — In actions on bills or notes, the usual rule applies that, where the liability of a portion of the codefendants, who are in default, is several, the plaintiff may take a separate judgment by default against them, and have a severance of the action to proceed against the defendant who makes answer.⁵

Amount of Judgment on Withdrawal of Plea. — In an action on a promissory note, if the defendant withdraws his plea after appearing, judgment may be rendered for the amount of the note with

In *Hamilton v. Black*, Dall. (Tex.) 586, it is held that although the usual judgment in overruling dilatory pleas is *respondat oster*, yet where the defendant after service of citation and petition appeared at the first term and filed his answer, and then procured a continuance, and the cause remained on the docket for two years when it was called for trial, and the judge correctly decided that the answer which was in the nature of a demurrer was bad, it was held that the defendant was in default, and that the judge had the power and the right, it being a suit on a note, to render final judgment for the plaintiff by default, especially where it did not appear from the record that the defendant asked leave to plead over or that such leave was refused.

1. See article DEFAULTS, vol. 6, p. 94. And see *Hart v. Walker*, 31 Mo. 26; *Ryburn v. Nail*, 4 Tex. 305.

2. *Smith v. Carley*, 8 Ind. 451, in which case it was held that in assumption on a promissory note, if the declaration does not allege that the defendant is the maker of the note, and that the note is unpaid, a judgment upon default cannot be sustained.

In *Williams v. Knighton*, 1 Oregon

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234, it is held that a complaint upon a promissory note which omits to state that the note was then due, is insufficient to sustain a default judgment.

So, a declaration which does not allege the delivery of a note in a suit on a promissory note, will not authorize a judgment by default. *Lounge-way v. Hale*, 73 Tex. 495.

3. See article DEFAULTS, vol. 6, p. 20.

4. In an action on a promissory note, where one defendant answers setting up a defense to the action, and the other permits a default, judgment cannot be rendered against the latter before the answer of the former is disposed of. *Campbell v. McHarg*, 9 Iowa 355. See also *Chapman v. Arrington*, 3 Stew. (Ala.) 480.

5. See article DEFAULTS, vol. 6, p. 23.

In *Citizens' Nat. Bank v. Weston*, 81 Hun (N. Y.) 84, it is held that where the indorsers of a note are in default in an action brought upon the same against the makers and indorsers thereof, the liability of the indorsers being several as distinguished from that of the makers, the plaintiff in such action is entitled to a judgment against the indorsers and severance of the action to entitle him to proceed against

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interest thereon, without regard to the amount of damages claimed in the declaration.¹

4. JUDGMENT AS AN ENTIRETY.—In accordance with the usual rule, that, upon appeal, a judgment at law is an entirety, and must be reversed as to all or none,² a judgment rendered jointly against the maker and indorser of a promissory note in a suit in which the maker was not served with process, is erroneous as against the indorser, and will be reversed upon writ of error or appeal.³

certain of the makers, the answering defendants.

1. Kennedy v. Young, 25 Ala. 563.

Where Complaint Prays Judgment for Sum Certain.—In *Lamping v. Hyatt*, 27 Cal. 99, it is held that if the complaint on a promissory note prays for judgment on a sum certain, which sum is the principal and interest due when the complaint is filed, judgment by default should not include the interest accruing after the complaint is filed.

Computation of Amount on Withdrawal of Answer.—In a suit on a promissory note, described in the complaint, the clerk, on withdrawal of the answer, may compute the amount due. *Graves v. Cameron*, 77 Tex. 273.

2. See article JUDGMENTS, vol. II, p. 859.

3. *Covenant Mut. L. Ins. Co. v. Clover*, 36 Mo. 392. In this case the court said: "It is insisted that the judgment is good against Clover, and that he cannot take advantage of the defect as to his codefendant, because it does not affect him. But this is a judgment at law—an entirety; it is good as to all, or bad as to all; and an entire judgment against several defendants will be reversed as to all, if it be erroneous as to one. *Coux v. Lowther*, 1 Ld. Ray. 601; *Rush v. Rush*, 19 Mo. 441; *Smith v. Rollins*, 25 Mo. 408; *Pomeroy v. Betts*, 31 Mo. 419."

NEW ASSIGNMENT.

See articles *REPLICATION*; *REPLY*; *TRESPASS*.

NEWLY DISCOVERED EVIDENCE.

See articles *BILLS OF REVIEW*, vol. 3, p. 580; *CONTINUANCE*, vol. 4, p. 863; *NEW TRIAL*.

NEW MATTER.

See article *ANSWERS IN CODE PLEADING*, vol. 1, p. 830; *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 920; *DEPARTURE*, vol. 6, p. 465; *REPLICATION*; *REPLY*. And consult the various titles in this work concerning particular actions or subject matters.

NEWSPAPERS.

See generally article *PUBLICATION*, and references there given. As to *reading newspapers to the jury*, see article *ARGUMENTS OF COUNSEL*, vol. 2, p. 741.

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CROSS-REFERENCES.

See in general the articles *APPEALS*, vol. 2, p. 1; *TRIALS*; *VERDICT*; and consult the General Index to this work.

Definition.

NEW TRIAL.

Definition.

As to *New Trial for Abuse of Argument*, see article *ARGUMENTS OF COUNSEL*, vol. 2, p. 698.

Misconduct of Jurors, see article *JURY*, vol. 12, p. 223.

Bills in Equity for New Trial, see article *JUDGMENTS*, vol. 11, p. 1170 *et seq.*

New Trial Where Special Issues Have Been Submitted to Jury, see article *ISSUES TO THE JURY*, vol. 11, p. 712.

Mandamus to Compel Granting of New Trial, see article *MANDAMUS*, vol. 13, p. 559.

New Trial upon Reversal and Remand by Appellate Court, see article *MANDATE AND PROCEEDINGS THEREON*, vol. 13, p. 853 *et seq.*

New Trial in Particular Actions and Proceedings, see the special titles in this work, and consult the General Index.

I. DEFINITION. — A new trial is a re-examination of an issue of fact by the same court. It is generally a retrial of the issues by another jury, but they may be tried again by the court or referee as on a first trial. The issues in the cause must be the same, but new or additional evidence may be introduced.¹ A motion to set aside a default² or to reopen a case before decision³ or for the rehearing of a question of fact arising upon a motion⁴ is not a motion for a new trial; and a rehearing or trial in such proceedings is not a new trial, because it is not a retrial of an issue of fact arising on the pleadings.

Code Definitions. — The codes of civil procedure define a new trial substantially as follows: "A new trial is a re-examination of an issue of fact, in the same court, after a trial and decision by a jury or court, or by referees."⁵

1. Other Definitions. — A new trial is "a rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose." 2 Bouv. L. Dict.; 4 Chitty's Gen. Prac. 30.

"A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before." 3 Stephen's Com. 626; 3 Black. Com. 391; Gott v. Judge, 42 Mich. 625.

A new trial is "a re-examination of an issue of fact." "The new trial is here, as everywhere, a new trial of the facts, and is in no sense a new trial of the law. The error of law has been tried upon the motion and has been decided by the court in deciding to grant the new trial. The new trial, when granted, is no longer a trial of the law, but solely of the fact." Zaleski v. Clark, 45 Conn. 397.

It "is no more than having the cause more deliberately considered by another jury when there is a reasonable doubt, or perhaps a certainty, that justice has not been done." Bright v. Eynon, 1 Burr. 393.

A new trial is "a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court." Humphreys v. Walton, 2 Bush (Ky.) 580.

2. A Motion to Set Aside a Default is not a motion for a new trial, since there has been no trial of the issue. See *infra*, VII. 2. In *What Proceedings*.

3. A Motion to Reopen a Case after submission but before a decision is rendered is not a motion for a new trial. Nelson v. Betts, 30 Mo. App. 10.

4. See *infra*, VII. 2. In *What Proceedings*.

5. California. — Code Civ. Pro. 1897, § 656.

North Dakota. — Rev. Codes 1895, § 5471.

II. METHODS OF OBTAINING A NEW TRIAL — 1. **Generally.** — There are two methods of obtaining a new trial: (1) by proceedings in an appellate court; (2) by application to the trial court. This article is confined to applications made to the trial court.

2. **By Appeal** — **Trial de Novo.** — The new trial which occurs on appeal from inferior courts, such as probate and surrogate courts and justices' courts, is treated elsewhere.¹

3. **By Writ of Error.** — See article ERROR, WRIT OF, vol. 7, p. 817.

4. **By Motion for Venire de Novo.** — A venire facias de novo is an ancient process of the common law to obtain a new trial for defects in the proceedings appearing of record, such as a defective verdict or irregularities in selecting or impaneling the jury.² This process differs from a motion for a new trial in that the propriety of granting it depends upon fixed rules of law, not permit-

Montana. — Code Civ. Pro. 1895, § 1170.

Nevada. — Code Civ. Pro. 1885, § 194.

South Dakota. — Comp. Laws 1887, § 5087. The definition in the text is also given substantially in *Jenkins v. Frink*, 30 Cal. 596.

Other Code Definitions — *Iowa.* — A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court. Annot. Code 1897, § 3755.

Kansas, Kentucky, Nebraska, and Ohio. — A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee (or master), or a decision by the court. *Bates's Ohio Stat.*, § 5305; Code Neb., § 314; Code Kan., § 316; Code Ky., § 340.

1. **Appeal from Probate Court.** — See article PROBATE AND ADMINISTRATION.

Appeal from Inferior Tribunal in Admiralty. — See article APPEALS, vol. 2, p. 327.

Appeal from Judgments of Justice of the Peace. — See article JUSTICES OF THE PEACE, vol. 12, p. 811.

Review of Evidence on Trial de Novo. — See article APPEALS, vol. 2, p. 327.

2. **Imperfections in Verdict.** — The writ of venire facias de novo will be granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages. *Harden v. Fisher*, 1 Wheat. (U. S.) 300; *U. S. v. Hawkins*, 10 Pet. (U. S.) 125; *Brown v. Hillegas*, 2 Hill L. (S. Car.) 447;

White v. Bailey, 14 Conn. 271; *Hite v. Wilson*, 2 Hen. & M. (Va.) 268; *Brickley v. Weghorn*, 71 Ind. 497; *Bunnell v. Bunnell*, 93 Ind. 595; *Bartley v. Phillips*, 114 Ind. 189; *Parker v. Hubble*, 75 Ind. 580; *Smith v. Goodwin*, 86 Ind. 300. See also article VERDICT.

But in such case the verdict must be so uncertain or ambiguous or defective that no judgment can be rendered thereon. *Carver v. Carver*, 83 Ind. 368; *Peigh v. Huffman*, 6 Ind. App. 658; *Peters v. Banta*, 120 Ind. 416; *State v. Funck*, 17 Iowa 365; *Wiggins v. Chicago*, 68 Ill. 372; *Lincoln v. Hapgood*, 11 Mass. 358.

The writ will issue where there is a failure to assess damages. *Kynaston v. Shrewsbury*, 2 Stra. 1051; *Neal v. Mills*, 5 Blackf. (Ind.) 208; *Miller v. Hower*, 2 Rawle (Pa.) 53; *Hershman v. Hershman*, 63 Ind. 451; *Ridenour v. Miller*, 83 Ind. 208; *Wainright v. Burroughs*, 1 Ind. App. 393. But not where the amount of damages can be ascertained by computation from the amounts stated. *Knight v. Fisher*, 15 Colo. 176; *Buchanan v. Townsend*, 80 Tex. 534; *Gaff v. Hutchinson*, 38 Ind. 341; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309; *Clapp v. Martin*, 33 Ill. App. 438.

Omission of Material Finding. — Where the court fails or neglects to find material facts established by the evidence, the remedy is by motion for a new trial, and not by a motion for a venire de novo. *Heiney v. Loutz*, 147 Ind. 417; *Citizens' Bank v. Bolen*, 121 Ind. 301; *Freedom v. Norris*, 128 Ind. 377; *Blair v. Curry*, (Ind. 1897) 46 N. E. Rep. 672.

ting the exercise of discretion, and it is granted upon defects appearing in the record rather than upon extrinsic irregularities and errors occurring at the trial which do not appear of record.¹

5. By Motion or Petition for New Trial. — The common form of application for a new trial is by motion after the verdict is returned and during the same term of court.² After the judgment has been rendered and the court has lost the power to vacate it by motion, the usual remedy is by a bill of review or by a statutory action or proceeding in the nature of a bill of review.³

6. New Trials at Common Law. — The indications are that at the early common law the verdict of a jury was regarded as conclusive and new trials were not granted. The only remedies of a party injured by an unjust verdict were by writ of venire de novo and by writ of attain against the jury⁴ or by suit in equity. The time when the practice of granting new trials commenced and the causes for which new trials were granted are involved in obscurity, owing to the failure to report decisions relating to motions.⁵ In the first reported case (1655) the practice of granting new trials was said to be frequent.⁶ Such practice probably

1. *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500. See dissenting opinion, p. 517.

The Nature of a Venire Facias de Novo at common law is fully explained in *Witham v. Lewis*, 1 Wils. 48. See also 1 Tidd's Pr. 922; *Witham v. Lewis*, 1 Wils. 56, 4 Minor's Inst. 861; *Hite v. Willson*, 2 Hen. & M. (Va.) 268; *Gould on Pleading* 526.

A venire de novo is not equivalent to a new suit, but to a new trial. *U. S. v. Hawkins*, 10 Pet. (U. S.) 125.

When Motion Made. — A motion for a venire facias de novo should be made before judgment and before a motion for a new trial is made. *McClintock v. Theiss*, 74 Ind. 200; *Sloan v. Lick Creek, etc.*, Gravel Road Co., 6 Ind. App. 584; *Potter v. McCormack*, 127 Ind. 439; *Jenkins v. Parkhill*, 25 Ind. 472.

2. See *infra*, VII. 5. *Time When Motion Must Be Made.*

3. See *infra*, XX. *Proceedings by Petition for New Trial After Term.*

New Trial After Judgment. — In some jurisdictions it appears to be the practice to grant a new trial even after judgment. In such cases the effect is to vacate the judgment. See article OPENING, VACATING, AND AMENDING JUDGMENTS AND DECREES.

4. In *Slade's Case*, Style 138 (1648), a new trial was refused although the judge certified that the verdict passed against his opinion. "Bacon, Justice,

said: 'Judgments have been arrested in the Common Pleas upon such certificates.' Hales, of counsel with defendant, prayed that this judgment might be arrested, and that there might be a new trial, for that it hath been done heretofore in like cases. But Roll, Justice, held it ought not to be stayed though it have been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your attain against the jury, and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial for better satisfaction."

5. In *Reg. v. Ballivos*, 1 P. Wms. 213, Lord Hardwicke explains that "one reason why we do not find this practice more ancient may be that there are no old reports of motions."

6. The first case in which a new trial is reported to have been granted is *Wood v. Gunston*, Style 466, in which a new trial was granted for partiality of the jury and excessive damages for libel. Glynn, C. J., said: "It is in the discretion of the court in some cases to grant a new trial, and this must be a judicial and not an arbitrary discretion; and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and

arose from the difficulty and delay of obtaining relief by suit in equity or after attain of the jury.¹

III. GROUNDS FOR NEW TRIAL — 1. At Common Law. — The general rule at common law was that a new trial would be granted where an injustice had been done.² No particular causes were enumerated, each case being decided by this general rule.³ It was at first purely discretionary, but later it was governed by a few well-defined rules.⁴

2. Statutory Grounds. — In the various codes and practice acts attempts have been made to enumerate and briefly state the grounds for new trial.⁵ Such enumeration does not restrict the inherent power of the courts to relieve a party where justice has not been done, or to grant new trials for any other sufficient cause not enumerated,⁶ unless the restriction is

not to be indifferent betwixt them; but it cannot be so intended of the court."

1. "In the early history of the common law the principal remedy for the reversal of a verdict unduly given was by writ of attain, but the hardships connected therewith seem to have led the courts first to modify verdicts and afterwards to grant new trials." Horn v. Queen, 4 Neb. 108.

Origin of New Trials. — In defining the difference between venire de novo and the motion for a new trial, Willes, C. J., said: "They agree in this, that a venire facias de novo must be awarded in both, and that the court may or may not grant either of them; but they differ, first in this, that a venire facias de novo is the ancient proceeding of the common law; a new trial is only a new invention. The first is as ancient as the law, when attainments were in use; but motions for new trials were introduced in this manner: the judgment in attain was very severe and the punishment excessive hard, and therefore, to avoid that severity, it was thought better to proceed in a milder way, and so motions for new trials were introduced." Witham v. Lewis, 1 Wils. 55. See also explanations in 3 Black. Com. 404; 3 Bouv. Inst. 502, note 6; Sellon's Practice (1st Am. ed.) 494; Kinney v. Beverley, 2 Hen. & M. (Va.) 327; Kearney v. Snodgrass, 12 Oregon 311.

2. In Bright v. Eynon, 1 Burr. 395, Lord Mansfield said: "The rule laid down by Lord Parker, in the case of Reg. v. Helston, H. 12 Ann. B. R. (Lucas's Rep. 202), seems to be the best general rule that can be laid down upon this subject, viz., 'doing justice to the party,' or, in other words, 'at-

taining the justice of the case.' The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."

3. U. S. v. 1363 Bags of Merchandise, 2 Sprague (U. S.) 91.

The common law relating to new trials became a part of our common law. For case decided prior to the Revolution, see Norris v. Freeman, 3 Wils. 38, decided in 1769. No American case is reported prior to the Revolution.

4. Dulaney v. Rankin, 47 Miss. 391.

5. Early acts in Massachusetts provided merely that certain courts might grant a new trial "for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done." This was clearly a statement of the rule at common law. Com. v. McElhaney, 111 Mass. 439.

Object of Code Provisions. — The object of the enumeration of grounds for new trial in the codes adopted in most of the code states was merely to codify the rules of the common law, and not to restrict the inherent power of a court to correct errors in its proceedings. In the dissenting opinion in Valerius v. Richard, 57 Minn. 443, it was said: "It has seldom before been held that the discretionary power of a trial court of general jurisdiction has been cut off by the code. The code is a mere skeleton, and much of it merely declaratory of the common law. Especially is this true as to its provisions regulating practice."

6. Donnelly v. McArdle, 14 N. Y. App. Div. 217; Ladd v. Stevenson, 112

express.¹ The statutory grounds are generally so broad as to include all the errors, accidents, and exigencies which might work injustice at the trial.

3. Irregularity in the Proceedings—*a. STATEMENT AND EXPLANATION OF IRREGULARITIES.*—"Irregularities in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial," is made a ground for a new trial in most of the states. This ground, it seems, does not include errors of law occurring at the trial, such as errors in giving or refusing instructions or in admitting or excluding evidence. Nor does it include misconduct of the jury or prevailing party, which generally constitutes a distinct statutory ground for a new trial.²

b. IRREGULARITY OF THE COURT.—This ground for a new trial was probably intended to include such misconduct or illegal proceedings of the court as do not appear in the rulings or orders, and such as do not constitute errors of law. It is difficult to enumerate the irregularities under this ground which might prevent a party from having a fair trial, but the most frequent are

N. Y. 326; *Vanderbilt v. Schreyer*, 81 N. Y. 646; *Leahey v. Dugdale*, 41 Mo. 517; *Zaleski v. Clark*, 45 Conn. 397.

In *Fine v. Rogers*, 15 Mo. 315, the court, in construing a statute enumerating a few grounds for a new trial, said: "It cannot have been intended that the Circuit Courts should no longer have power to grant new trials on account of the improper admission or rejection of evidence. * * * It is not to be believed that there was any design to limit the necessary control of courts over the verdicts of juries, nor is there any necessity for so construing this part of the statute as to produce that effect. To give it any force, however, it must be taken to have given additional emphasis to the obligation of the courts to grant new trials in the enumerated cases." But see *contra*, *Risse v. Gasch*, 43 Neb. 288.

The enumeration of grounds for a new trial in the statute is not a restriction on the inherent power of a court to grant a new trial on its own motion or for causes not assigned in the motion for a new trial. See *infra*, XV. 2. *Court May Grant on Its Own Motion.*

Minnesota.—The statutory grounds are exclusive, and a court has no power to grant a new trial for error of law unless an exception has been taken. *Valerius v. Richard*, 57 Minn. 443.

1. *Bartling v. Jamison*, 44 Mo. 141. A statute which provides that new

trials may be granted "in the following cases only" clearly excludes all other grounds not enumerated therein. *People v. Fair*, 43 Cal. 137. See also *People v. O'Brien*, 88 Cal. 483. Newly discovered evidence not being enumerated in the statute providing grounds for new trials in criminal cases is not a ground for a new trial. *People v. Bernstein*, 18 Cal. 699.

Under the statute now embodied in Code Crim. Pro. Tex. 1895, art. 817, providing that new trials "shall be granted for the following causes and for no other," a new trial cannot be granted on grounds not enumerated. *McMahon v. State*, 17 Tex. App. 321; *Roseborough v. State*, 43 Tex. 570; *Childs v. State*, 10 Tex. App. 183.

New York.—The right to make a motion for a new trial is one which arises entirely from the statutory provisions, and it can be made only on those grounds upon which the statute permits it to be made. *Swartout v. Willingham*, 31 Abb. N. Cas. (N. Y. Supreme Ct.) 66, 6 Misc. Rep. (N. Y.) 179, citing *Delaney v. Brett*, 51 N. Y. 81, and criticizing *Campanello v. New York Cent., etc., R. Co.*, (Buffalo Super. Ct.) 15 N. Y. Supp. 670.

2. Each subdivision of a statute relating to grounds for new trials is intended to apply to a separate and distinct class of cases. *Brumagim v. Bradshaw*, 39 Cal. 35.

holding court or trying a cause in vacation, or at some place other than the regular or appointed place, acting as judge when disqualified, or refusal of the right to a jury trial;¹ the failure of a referee to file his report;² the failure to find material facts established by the evidence;³ or a trial without substituting lost pleadings.⁴ Misconduct of the judge and other officers of court is treated of elsewhere.⁵

c. **ORDERS OF COURT CONSTITUTING ABUSE OF DISCRETION.**—This ground is broad enough to include errors of the court in orders made before and after the trial, while orders made during the trial are properly assigned as "errors of law occurring at the trial." It includes orders concerning continuance,⁶ amend-

1. See articles CHAMBERS AND VACATION, vol. 4, p. 336; JUDGES, vol. 11, p. 780; TRIAL.

Premature Trial of Cause.—See article TRIAL.

Limitation of Argument.—See article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

2. **Failure to File Report.**—The failure of the referee to file his report within ten days, as required by statute, does not entitle the defendant to a new trial, as such statute is directory only. *Emerson v. Bigler*, (Mont. 1898) 53 Pac. Rep. 621; *Keller v. Sutrick*, 22 Cal. 472; *Broad v. Murray*, 44 Cal. 228; *McQuillan v. Donahue*, 49 Cal. 157.

3. **Failure to Make Findings.**—The failure to make findings of material facts in cases tried without a jury is a ground for a new trial as a "decision against law." See *infra*, VII. 9. d. (8) *Verdict or Decision Contrary to Law*. See also article FINDINGS OF COURT, vol. 8, p. 931.

4. **Trial Without Substituting Lost Pleadings.**—A new trial will be granted where the pleadings were lost prior to the trial and were not substituted until after verdict and motion for a new trial, as the court was unable to give proper instructions as to the issues. *Feder v. Solomon*, 34 Neb. 313. After the case was tried to the court without a jury the pleadings were lost, but the court entered judgment without copies being substituted and against objection of the defendant. It was held that a new trial should be granted, as a party has a right to a complete record on appeal. *Grimison v. Russell*, 11 Neb. 469. See, in general, article LOST INSTRUMENTS AND RECORDS, vol. 13, p. 349.

Loss of Instructions after trial and before the hearing of the motion for a new trial does not render a new trial

necessary, nor would the loss of pleadings or declaration. *Addems v. Suver*, 89 Ill. 482.

Irregularity of Court in Rendering Decision.—The irregularity of the court in rendering a decision without the original pleadings, depositions, and reporters' notes, which had been destroyed by fire after the trial, is not a sufficient ground where copies of the pleadings were substituted before judgment was entered and it was possible from minutes of the court and abstracts of the reporters' notes to prepare a statement of the case. *Golden Terra Min. Co. v. Smith*, 2 Dakota 453.

5. **Judge Communicating with Jury.**—That the judge communicated with the jury in the absence of counsel or parties may be sufficient irregularity for a new trial. See article JURY, vol. 12, p. 619.

Conduct of Judge Tending to Prejudice Jury.—See article TRIAL.

Permitting Exhibits and Evidence in Jury Room.—See article JURY, vol. 12, p. 590.

Coercing Jury to Return Verdict.—See article INSTRUCTIONS, vol. 11, p. 304.

Misconduct of Officers in Charge of Jury.—See article JURY, vol. 12, p. 543.

Expressing an Opinion Concerning Witnesses may constitute such irregularity of the court as to be a ground for a new trial. See article INSTRUCTIONS, vol. 11, p. 91 *et seq.*

Expressing Opinion Concerning Evidence.—See article INSTRUCTIONS, vol. 11, p. 91 *et seq.*

Expressing Opinion Concerning Defense of Alibi.—See article INSTRUCTIONS, vol. 11, p. 358.

6. When error in granting or refusing continuance will constitute a sufficient ground for a new trial, see article CONTINUANCES, vol. 4, p. 822.

ments,¹ and interventions,² and sometimes orders concerning the pleadings. But ordinarily orders concerning the pleadings involve questions of law apparent on the records which are not grounds for a new trial.³

d. IRREGULARITY OF THE JURY. — This provision does not refer to misconduct of the jury, as that is made a separate ground by the statutes, but includes irregularities in the formation and selection of the jury.⁴

e. IRREGULARITY OF PREVAILING PARTY. — Such irregularities as taking a default in the absence of a party, or violation of agreements to notify the adverse party, or the suppression or manufacture of evidence, or fraud and misrepresentation as to the proceedings, are treated hereafter as accident or surprise.⁵

4. Misconduct — *a. STATEMENT AND DEFINITION OF GROUND* — *What Included.* — The second ground for a new trial provided generally by the statute is "misconduct of the jury or prevailing party." This usually includes all misconduct occurring after the jury is impaneled. "Misconduct," as used in this section, denotes any unlawful behavior interfering with the proper administration of justice in such a manner as to prevent a party from having a fair trial. The term does not necessarily imply an evil or corrupt motive.⁶

b. MISCONDUCT OF JURY. — This ground for a new trial is treated in another article.⁷

c. MISCONDUCT OF PREVAILING PARTY. — The misconduct of the prevailing party preventing a fair trial should be assigned

1. *Refusal of Amendment.* — See article AMENDMENTS, vol. I, p. 458.

2. *Intervention.* — See article INTERVENTION, vol. II, p. 494.

3. When errors in orders on motions constitute grounds for a new trial, see *infra*, III. 12. *c. Decisions on Motions Pertaining to Conduct of Trial.*

The abuse of discretion mentioned in Gen. Stat. Minn. 1878, c. 66, § 253, as a ground for a new trial, is an abuse of discretion happening at the trial which prevents a fair trial of the issues as they existed when the trial commenced. It does not include an abuse of discretion in permitting an amendment before trial. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415. See also *infra*, XV. 1. *Discretion of Trial Court.*

4. See article JURY, vol. 12, p. 223.

This is not included as one of the grounds in the *California Criminal Code*, and therefore is not a ground for a new trial in criminal cases in that state. *People v. Fair*, 43 Cal. 146, *overruling People v. Plummer*, 9 Cal. 312.

5. See *infra*, III. 5. *Accident or Surprise.*

6. There is such a slight distinction between this ground and the first ground, viz., "irregularity of the jury or prevailing party," that misconduct could be presented under either head. See *Hayne on New Trial*, § 64.

Misconduct of Attorney, Reinstatement, and Trial Without Notice. — Attorneys agreed to continue and reinstate by consent a cause that had been dismissed, and to try it at the next term. The cause was then reinstated without consent, and the attorney for the defendant was notified by telegraph that the trial would occur on the morning of the date of the telegram. The cause was tried in the absence of the attorney for the defendant, who was unable to be present. It was held that a new trial would be granted for misconduct of the plaintiff's attorney, and that the statutory term "misconduct" does not imply an evil or corrupt motive on the part of the prevailing party. *Chicago, etc., R. Co. v. Deaver*, 45 Neb. 307.

7. See article JURY, vol. 12, p. 223.

under this head. The nature of the misconduct, and whether sufficient to require a new trial, are treated in various other articles.¹

d. MISCONDUCT OF COUNSEL. — Misconduct of counsel is not a separate ground provided by statute, and may be assigned as the misconduct of the prevailing party,² although it is properly an irregularity in the proceedings of the court in failing to suppress it.

e. MISCONDUCT OF COURT OFFICIALS. — Misconduct of sheriffs, bailiffs, clerks, or reporters which deprives a party of a fair trial should be assigned under the first statutory ground as irregularity of the court, as the second ground includes only misconduct of the jury or prevailing party.³

5. Accident or Surprise. — The third statutory ground for new trial is "accident or surprise which ordinary prudence could not have guarded against."

a. DEFINITIONS — **Accident.** — "Accident" as a legal term denotes an unexpected event due to mistake or unavoidable casualty or circumstances which could not have been foreseen and avoided by the exercise of ordinary prudence.⁴ As used in the codes the word is nearly synonymous with "mistake" and means an act or omission due to inadvertence, ignorance, misunderstanding, or unavoidable casualty.⁵

Surprise. — Surprise is an unexpected situation of a party resulting from accident or mistake by which the adverse party acquires some advantages or legal rights not consonant with justice or equity.⁶

1. As to misconduct of a party in communicating with the jury, see article JURY, vol. 12, p. 615.

Misconduct Affording Surprise. — Where the successful party introduces false testimony it is a ground for a new trial as misconduct of the "prevailing party," as provided by the Iowa statute now embodied in Code 1897, § 3755. *Shenandoah First Nat. Bank v. Wabash, etc., R. Co.*, 61 Iowa 700; *Cleslie v. Frerichs*, 95 Iowa 83. And see *infra*, III. 5. *Accident or Surprise*.

2. **As to Abuse of Argument**, see article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

As to Communications with Jury, see article JURY, vol. 12, p. 617.

As to Intoxication at Trial, see article TRIAL.

As to Violation of Agreement to Give Notice, see *infra*, III. 5. *Accident or Surprise*.

3. **As to Misconduct of a Sheriff or Bailiff** in charge of a jury, see article JURY, vol. 12, p. 542.

As to Misconduct of Bystanders, see article TRIAL.

As to Misconduct of Prosecuting Attorney, see article TRIAL.

4. For difficulties of defining "accident," see the title *Accident (in Equity)*, 1 Am. and Eng. Encyc. of Law (2d ed.) 277.

5. See also article MISTAKE, *ante*, p. 32.

There is no such ground as "mistake" or "inadvertence" as distinguished from "accident" or "surprise" as used in the codes. *Fincher v. Malcolmson*, 96 Cal. 38.

6. "Surprise, in its legal acceptance, * * * denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection." *Peers v. Davis*, 29 Mo. 184, *quoted in* *Fretwell v. Laffoon*, 77 Mo. 26.

"That situation in which a party is unexpectedly placed without any default of his own, which will be injurious to his interest." *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392.

Whether These Terms Are Synonymous. — The terms "accident" and "surprise," though not strictly synonymous,¹ have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.²

b. GENERAL PRINCIPLES — (1) *Essential Facts.* — A new trial will not be granted for surprise unless it appears: 1. That the mistake or accident was such that ordinary prudence could not have guarded against it. 2. That the mistake was not due to ignorance of the law. 3. That the result will probably be different if a new trial is granted. 4. That the applicant made prompt complaint of the surprise. 5. That the misfortune could not have been averted by the introduction of other available testimony, by a continuance, or by a dismissal without prejudice. Unless all the above requirements are complied with, the showing will not be sufficient,³ as such applications are regarded with suspicion and granted with caution.⁴

(2) *Accident or Mistake Discovered After Term.* — The codes provide this remedy for surprises which occur during the trial and before the close of the term: if the surprise occurs after the time for moving for a new trial has expired, the proper remedy is by

1. **The Terms Are Not Synonymous**, as accident indicates the cause, and surprise the state of mind and the unexpected and unfortunate position or situation resulting from surprise. The language of the codes as to this ground for a new trial might have been more definite.

2. *McGuire v. Drew*, 83 Cal. 225.

3. **Essential Elements of Showing.** — "In applications for new trials on such ground it is not only necessary that the party should have been surprised, but that it was in a matter material to the issue, and that it produced injury to the party; that it was not the consequence of neglect or inattention on the part of the party surprised; also that he used all reasonable efforts to overcome the evidence which worked the surprise, or that it was not within his power to have done so by the employment of reasonable diligence. We think this affidavit fails to show all of these were complied with by appellants." *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311.

4. *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

Statement of General Rules. — In a leading case the general rules concern-

ing surprise are stated as follows: "To entitle a party to a new trial on the ground of surprise, the same must be conclusively shown by the affidavits; and, moreover, it must appear that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect.

* * * Upon this ground new trials should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and inattention rather than as a meritorious ground for relief. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by nonsuit, or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief." *Schellhous v. Ball*, 29 Cal. 605 [citing *Hartwright v. Badham*, 11 Price 383, followed in *Doyle v. Sturla*, 38 Cal. 456; *Butler v. Vassault*, 40 Cal. 74].

application to open or vacate the judgment for surprise, mistake, inadvertence, misapprehension, misfortune, unavoidable casualty, or excusable neglect.¹ Where there has been no trial of issues of fact, the codes do not contemplate a new trial.²

c. FAILURE TO EXERCISE ORDINARY PRUDENCE AND DILIGENCE — (1) *Generally*. — The codes, in expressing the common law, provide that the accident or surprise must have been such as "ordinary prudence could not have guarded against." The courts cannot, of course, accurately define ordinary prudence,³ so various are circumstances, but determine each case in furtherance of justice.

Discretion of Trial Court. — To pass upon this is peculiarly within the discretion of the trial court, since that court has the better opportunity to arrive at a correct conclusion as to the nature of the surprise and the good faith of the application.⁴ An order refusing a new trial for failure to exercise ordinary prudence will not be reversed unless there is a manifest abuse of discretion.⁵

1. See article DEFAULTS, vol. 6, p. 152. See also article OPENING, AMENDING, AND VACATING JUDGMENTS.

A motion for a new trial on the ground of surprise must be filed in time. After the expiration of such time the remedy is by application to open the judgment on the ground of surprise, as the court loses its jurisdiction to grant a new trial on the close of the term. *Breed v. Ketchum*, 51 Wis. 164.

2. *Foley v. Foley*, 120 Cal. 33.

3. *No Rule as to Ordinary Prudence*. — "As to what constitutes ordinary prudence in such cases, no rule can be laid down as universally applicable, nor is it necessary to lay down any rule upon the subject as applying in this case." *Guy v. Hanly*, 21 Cal. 397.

"It is difficult, if not impracticable, to lay down any precise rule upon the subject of new trials; they must depend so much upon the nature of the controversy and the whole complexion of the cause, that no general rule can be laid down without having so many exceptions that it would rather embarrass than facilitate the administration of justice." *Brevard v. Graham*, 2 Bibb (Ky.) 177.

4. *Decision of Lower Court Usually Sustained*. — A decision of the lower court is usually sustained unless the abuse of discretion is manifest. It is well said that "as a general rule, a trial judge is more capable of correctly deciding whether the surprise alleged is induced by oversight, inattention, or

forgetfulness, than a reviewing court. Many matters transpire in the conduct of a case in the court room which it is almost impossible to present in detail to another tribunal, and of all of which the trial judge is necessarily observant. Further, the trial judge becomes better acquainted with the accustomed acts and habits of the various attorneys in constant practice before him, and therefore can more accurately judge whether a complaint of such surprise as is here charged is of such a character as to demand relief. In some cases the acts of a trial judge which are seemingly harsh and arbitrary are, in view of all the circumstances surrounding them, just and even necessary to enforce dispatch and attention in the trial of cases." *Green v. Bulkley*, 23 Kan. 130.

5. *Failure to Exercise Ordinary Prudence*. — In the following cases the refusal of a new trial on account of the failure to exercise ordinary prudence or diligence was held not an abuse of discretion:

Alabama. — *Shields v. Burns*, 31 Ala. 537; *White v. Ryan*, 31 Ala. 400; *Brock v. South, etc.*, Alabama R. Co., 65 Ala. 79.

Arizona. — *Solomon v. Norton*, (Arizona 1886) 11 Pac. Rep. 108.

Arkansas. — *Ballard v. Noaks*, 2 Ark. 45; *Merrick v. Britton*, 26 Ark. 496.

California. — *Goldstone v. Sperling*, 39 Cal. 447; *Rogers v. Huie*, 1 Cal. 429.

Georgia. — *Ferguson v. Beck, etc.*,

But since such discretion cannot be exercised arbitrarily, but must be according to the usual course of proceedings, the trial courts are to some extent bound by precedents. The apparent confusion and disagreement in the decisions are accounted for by the fact that the reports contain only precedents for the review

Hardware Co., 92 Ga. 531; Rolfe v. Rolfe, 10 Ga. 143; Sheftall v. Clay, R. M. Charlt. (Ga.) 7; Ferrill v. Marks, 76 Ga. 21.

Illinois. — Chicago, etc., R. Co. v. Vosburgh, 45 Ill. 311; Walker v. Kretzinger, 48 Ill. 502; Koon v. Nichols, 85 Ill. 155; Miller v. McGraw, 20 Ill. App. 203; Edwards v. McKay, 73 Ill. 570; Bruson v. Clark, 151 Ill. 495; Rockford, etc., R. Co. v. Rose, 72 Ill. 183.

Indiana. — Lockwood v. Rose, 125 Ind. 588.

Iowa. — State v. Morgan, 80 Iowa 413.

Kansas. — Beachley v. McCormick, 41 Kan. 485.

Kentucky. — Holburn v. Neal, 4 Dana (Ky.) 122; Holmes v. McKinney, 4 T. B. Mon. (Ky.) 6; Patterson v. Matthews, 3 Bibb (Ky.) 80; M'Daniel v. Will, 2 Bibb (Ky.) 551; Calmes v. Ament, 1 A. K. Marsh. (Ky.) 459; Barrow v. Jones, 1 J. J. Marsh. (Ky.) 471.

Maine. — Atkins v. Field, 89 Me. 281.

Minnesota. — Nelson v. Carlson, 54 Minn. 90; Eich v. Taylor, 17 Minn. 172; Feltus v. Balch, 27 Minn. 357.

Mississippi. — Haber v. Lane, 45 Miss. 608; Dorr v. Watson, 28 Miss. 383; Thompson v. Williams, 7 Smed. & M. (Miss.) 270.

Missouri. — Bosbyshell v. Summers, 40 Mo. 172; Smith, etc., Implement Co. v. Wheeler, 27 Mo. App. 16; O'Conner v. Duff, 30 Mo. 595; Schultz v. Hickman, 27 Mo. App. 26; Fretwell v. Laffoon, 77 Mo. 26; Tittman v. Thornton, 107 Mo. 500; Frick Co. v. Caffery, 48 Mo. App. 120.

Nebraska. — Kent v. Green, 43 Neb. 673; Wheeler v. Olson, 37 Neb. 562.

New Hampshire. — Carroll v. McCullough, 63 N. H. 95.

New York. — Jackson v. Warford, 7 Wend. (N. Y.) 62; Dodge v. Strong, 2 Johns. Ch. (N. Y.) 228.

Texas. — Goss v. McClaren, 17 Tex. 107; Taylor Water Co. v. Dillard, 9 Tex. Civ. App. 667; Loonie v. Burt, 80 Tex. 582; Ellis v. Bonner, 7 Tex. Civ. App. 539.

Utah. — Stewart Min. Co. v. Coulter, 3 Utah 178.

Vermont. — Burr v. Palmer, 23 Vt. 244.

Washington. — Pincus v. Puget Sound Brewing Co., 18 Wash. 108.

West Virginia. — Sayre v. King, 17 W. Va. 562.

Instances of Surprise. — The introduction of an unrecorded deed by the adverse party, of which the applicant had no knowledge or notice, and at the close of the evidence when there was no opportunity for rebuttal, is a sufficient surprise to require a new trial. Delmas v. Martin, 39 Cal. 555.

Where through inadvertence of counsel the jury renders a general verdict for the defendant upon a defense which could apply to but one of two causes of action, a new trial will be granted. Brigden v. Osmun, 92 Hun (N. Y.) 578.

Introduction at the Close of a Trial of unexpected evidence, which could not be rebutted by other evidence, owing to the lateness of the hour, was held to be ground for granting a new trial, especially where the plaintiff had succeeded in four out of five cases depending on the same facts. Croner v. Farmers' F. Ins. Co., 18 N. Y. App. Div. 263.

The Resignation as Executor of a person who was trustee for one not made a party, and a consequent misunderstanding as to who should defend the action, constitute a sufficient accident or surprise to entitle the remaining executor to a new trial. Huntress-Brown Lumber Co. v. Wyman, 55 Minn. 262.

Failure to Explain Alteration. — Where the jurors founded their verdict on what they believed to be a suspicious alteration in a bond, which had escaped the attention of the court and counsel for both parties, and which could easily have been explained had attention been called to it, the verdict was set aside and a new trial granted. Libenintz v. Greenland, 2 McCord L. (S. Car.) 313.

Where an alteration in a bond is discovered on the trial too late, under the rules of court, to move for a continu-

of the rulings of the lower courts, the point determined being whether the lower court abused its discretion in granting or refusing a new trial, and not whether the reviewing court would have granted a new trial in the first instance.¹ In practice, however, new trials are granted for accident and surprise more freely than the decisions indicate, as only extreme cases are presented for review, and the ruling of the trial court is usually sustained unless an abuse of discretion is manifest. If the applicant can show that the judgment is unjust and that he has a good cause of action or a good defense, a new trial is usually granted on terms or conditions rather than to deprive a party of the right of trial as a penalty for negligence.² It is more important that justice be done than that progress be made on the calendar.³

(2) *Lack of Notice of Time and Place of Trial* — Generally. — Every litigant and his attorney are bound to take notice of the time and place of holding court, and of the position of the case on the court calendar, and should be present when the case is called for trial.⁴ No notice is required where the cause is reached at a regular term, and in its order on the calendar.⁵

ance, a new trial will be granted. *Kirtley v. Kirtley*, 1 J. J. Marsh. (Ky.) 96.

Failure to Amend before judgment on account of confusion and surprise may be ground for a new trial. *Kennedy v. Waugh*, 23 Wis. 468.

1. **Degree of Negligence.** — In *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81, an order granting a new trial for unavoidable absence of counsel was reversed where the counsel might have reached the place of trial by taking a train at one o'clock in the morning instead of a hack at a later hour. *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81.

Where a party who was his own attorney arose at four o'clock and started at six o'clock for the court house, a distance of twelve miles, but owing to bad roads he reached the court house at ten o'clock, after his case had been tried, a new trial was properly refused, it not appearing that there was any unexpected change in the condition of the roads or that he was not familiar with their condition. *Mehnert v. Thieme*, 15 Kan. 368.

2. *Hinman v. Hamilton Paper Co.*, 53 Wis. 169; *Blain v. Shaffner*, 37 Ill. App. 394; *Hull v. Vining*, 17 Wash. 352; *Chinn v. Taylor*, 64 Tex. 385; *Buford v. Bostick*, 50 Tex. 371.

3. *Blain v. Shaffner*, 37 Ill. App. 394; *Waugh v. Suter*, 3 Ill. App. 275; *Souer-*

bry v. Fisher, 62 Ill. 135; *Mason v. McNamara*, 57 Ill. 274.

4. *Brevard v. Graham*, 2 Bibb (Ky.) 177; *Ross v. Louisville, etc., R. Co.*, 92 Ky. 583; *Chafin v. Fulkerson*, 95 Ky. 277; *Stout v. Calver*, 6 Mo. 254; *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 532; *Kitchen v. Crawford*, 13 Tex. 516; *Chase v. Brown*, 32 N. H. 130; *Holloway v. Holloway*, 97 Mo. 628; *Zweig v. Horicon Iron, etc., Co.*, 14 Wis. 356; *Bingley v. Mallison*, 3 Doug. 402, 26 E. C. L. 163; *Atty.-Gen. v. Stevens*, 3 Price 72.

5. **Notice of Setting Cause for Trial Not Required.** — In the absence of a statute or a rule of court requiring notice by the moving party of the setting of a case for trial, no notice is necessary. It is held that "one having a lawsuit pending must, by himself or his attorney, whether they reside in the county where the case is or elsewhere, watch its progress, and he can only be heard to complain that a proceeding is taken against him in his absence when it is taken through his mistake, inadvertence, surprise, or excusable neglect." *Eltzroth v. Ryan*, 91 Cal. 584.

Changing Date — Lack of Notice. — A new trial should be granted where counsel relied upon the date fixed for trial in the bar docket, but the court called the case one day earlier without notice reaching counsel, it appearing that counsel was in court when the case

Special and Irregular Terms. — If a party is misled by a special term of court or a change in the time, he is entitled to a new trial if he had no notice and was otherwise diligent.¹

Misapprehension as to Time When Case May Be Called. — A party does not exercise ordinary prudence when, knowing that his case is on the calendar and may be reached, he leaves the court room, relying upon surmise or estimate, by himself or others, that his case will not be reached. Ordinarily a new trial will not be granted for surprise caused by a misapprehension as to when a case will be reached on the call,² as it is the duty of every liti-

was called and asked until noon to get witnesses, but the court refused, although the opposing counsel consented. *Leighton v. Dixon*, 42 Kan. 616.

Reinstatement of Dismissed Case. — A defendant is entitled to a new trial on the ground of surprise where a few hours after dismissal of the case for want of prosecution and absence of the plaintiff, the plaintiff has the case reinstated and judgment rendered against the defendant without notice. *Brooks v. Crane*, (Ky. 1897) 42 S. W. Rep. 337.

1. **Where a Judge in Vacation Ordered a Special Term** of court, the regular term having adjourned on account of the death of the clerk, a new trial was granted to a party who had no notice of the special term. *Joslin v. Coffin*, 5 How. (Miss.) 539.

Special Judge Presiding Without Notice. — A new trial will be granted for surprise where a special judge is elected and holds court without notice, and at a time when the applicant knew that it would be impossible for the regular judge to be present. *Simpkins v. White*, 43 W. Va. 200; *Bennett v. Jackson*, 34 W. Va. 62.

2. *Mulholland v. Heyneman*, 19 Cal. 605; *Ekel v. Swift*, 47 Cal. 619; *Haight v. Green*, 19 Cal. 113; *Yater v. Mullen*, 23 Ind. 566; *Desnoyer v. McDonald*, 4 Minn. 519. But see *Storm Lake First Nat. Bank v. Harwick*, 74 Iowa 227.

Although circumstances seemed to indicate that the case could not be reached, or, if reached, could not be tried, the absence of counsel will not afford a good ground for a new trial. *Warren v. Purtell*, 63 Ga. 428.

More Belief that Case Cannot Be Reached. — A party who departs from the court room because he believes the case will not be reached, is not free from negligence. "If a defendant forms such

opinion, not from anything said or done by the plaintiff or the plaintiff's attorney, but from the appearance of the docket, and the opinions of others, including the presiding judge, expressed in conversations out of court, he cannot act upon it except at his own peril." *White v. Ryan*, 31 Ala. 400.

On motion for a new trial it appeared that the cause had been pending for seven years; that a few days before the day set for trial the defendants' attorney consulted the attorney whose cases were prior to his, and was told that his case could not be reached until the day after that for which it was set; that the defendants' attorney notified his clients to appear on that day, but as soon as he learned that the case would be tried prior to the time fixed, owing to the continuance and dismissal of prior cases, he sent a special messenger to notify the defendants, but owing to a change in the time card of the trains and the bad condition of the roads, the defendants were unable to appear in time. It was held that the trial court erred in refusing a new trial. *M'Cormick Harvesting Mach. Co. v. Marchant*, 11 Utah 68.

A case was set at the foot of the September calendar by consent, on account of illness of the defendant's counsel. After the death of the counsel the defendant employed other counsel in February, who, believing the case was set at the foot of the February calendar, informed the defendant that the case could not be called for trial at that term and directed him to wait for notice. While the attorney was trying a case in another county, the case was tried in his absence. It was held that it was not error to refuse a new trial, as the defendant was chargeable with some negligence. *Walsh v. Walsh*, 114 Ill. 655.

Leaving During Trial. — Where a party

gant to attend court and await his turn,¹ unless excused by direction of the court.²

Misunderstanding as to Date and Place. — Absence of a party because of a misunderstanding as to the date and place of the trial is not a ground for a new trial³ unless the party can show that he

left the court room, without asking the court to wait for his return, and went to a hotel three squares distant to procure the presence of a witness, and on his return the evidence was closed, this was held not such surprise as to entitle him to a new trial. *Thompson v. Updegraff*, 3 W. Va. 629.

Where a party left the court room on advice of his counsel that another case on trial would continue during that week, and he was defaulted during that time, a new trial for accident or surprise was refused. *Desnoyer v. McDonald*, 4 Minn. 515.

1. Duty to Attend Court. — "Every one having a matter in litigation before any tribunal, court, or county board, must, in order to protect his rights, be present at every session at which the controversy may be determined, until there is a final disposition. He stays away at his peril; and if, during his absence, the matter is disposed of, he can blame no one but himself. This in many cases is a great hardship. Many a suitor in the courts has felt it to be so. Yet no remedy therefor has as yet been devised." *Masters v. McHolland*, 12 Kan. 17 [quoted in *Green v. Bulkley*, 23 Kan. 130; *Weems v. McDavitt*, 49 Kan. 260]. See also *Missouri, etc., R. Co. v. Crowe*, 9 Kan. 496; *Turner v. Miller*, 28 Kan. 44.

An Irregular Call of the Docket is a surprise which ordinary prudence could not have guarded against, especially where the case could not have been reached on the regular call during the term. *Donallen v. Lennox*, 6 Dana (Ky.) 89, wherein the court said: "Though the law requires diligence on the part of the suitors, it does not require them uselessly to dance attendance upon the courts, to the neglect of all other duties, when their causes cannot be regularly tried." See also *Dorrien v. Howell*, 6 Bing. N. Cas. 245, 37 E. C. L. 364, 8 Scott 508, 8 Dowl. P. C. 277. *Contra, Reg. v. Richardson*, 8 Dowl. P. C. 511; *Cottam v. Banks, Saund. & C.* 302.

2. Statements of Court Excusing Absence. — *Edsall v. Ayres*, 15 Ind. 286; *Clark v. Jarrett*, 2 Baxt. (Tenn.) 467; *Pioneer Mfg. Co. v. Callaway*, 76 Ga. 105.

An order refusing a new trial for absence caused by a misunderstanding between the court and counsel for the defendant as to a postponement of the case will not be reversed as an abuse of discretion. *Wood v. Lake*, 13 Wis. 84.

In *Parks v. Nichols*, 20 Ill. App. 143, the court said: "A court should be particularly careful not to mislead the parties by its own course of action, and when it seems likely that it has done so, it should afford prompt and adequate relief."

3. *Lincoln v. Staley*, 32 Neb. 63; *Stout v. Calver*, 6 Mo. 254; *Bosbyshell v. Summers*, 40 Mo. 172; *Seifert v. Holt*, 82 Ga. 757; *Yater v. Mullen*, 23 Ind. 562; *Brevard v. Graham*, 2 Bibb (Ky.) 177; *Yancey v. Downer*, 5 Litt. (Ky.) 8; *Cotton v. Brashiers*, 2 A. K. Marsh. (Ky.) 153; *Cheney v. Dry Wood Lumber Co.*, 34 Minn. 440; *Brunson v. Clark*, 42 Ill. App. 88.

Mistake as to Date. — A new trial will not be granted for surprise caused by a mistake as to the day when the case was set for trial, where such mistake could have been avoided by examining the docket or calendar. *Stout v. Calver*, 6 Mo. 254; *Cotton v. Brashiers*, 2 A. K. Marsh. (Ky.) 153; *Richardson v. Finney*, 6 Dana (Ky.) 319; *McAuly v. Lockhart*, 4 Humph. (Tenn.) 229.

Mistake as to Identity of Case. — Where a mistake is made as to the identity of a case, there being two or more identical or similar names on the docket, a new trial will usually be granted on the ground of surprise. *McCall v. Hitchcock*, 9 Bush (Ky.) 66; *Burrough v. Hill*, 15 R. I. 190; *Hunter v. Hornblower*, 3 Dowl. P. C. 491.

Omission of the case from the printed calendar is not an excuse for absence if the attorney for adverse party had given notice that the case would be tried when reached in its order on the docket. *Nooney v. Mahoney*, 30 Cal. 226.

Mistake as to Docket. — Where a case was wrongfully placed on the jury docket, the jury fees not having been paid, and the defendant, believing that the case was properly docketed, left the court room relying upon the an-

exercised ordinary prudence.¹

(3) *Absence of Party*—*Necessity of Party's Presence*.—A new trial may be granted on a showing of excusable absence. In such case it should appear that the party was a competent and material witness,² or that his assistance is necessary in the conduct of the case.³

Circumstances Excusing Absence.—A new trial will be granted for absence of a party where the absence is excusable on account of unavoidable circumstances sufficient to defeat ordinary prudence.⁴

nouncement of the judge that no more jury cases would be tried during the week, it was held that the defendant was entitled to a new trial for surprise where the case was tried to the court in his absence. *Lanius v. Shuber*, 77 Tex. 24.

Failure to answer in a case docketed in the name of another defendant is excusable. *Clifford v. Gruelle*, (Ky. 1895) 32 S. W. Rep. 937.

Mistake in Daily Reports of Call.—Where a party claims to be misled by a mistake in daily reports of the call, not authorized by the court, the fact that the correct number of the case was in one issue, associated with the incorrect name of the defendant, is not a sufficient excuse for surprise where the case had been correctly noticed in two prior issues, as the error should have caused inquiry when noticed. *Morrison v. Chicago*, 139 Ill. 210.

A mistake due to negligence of a party in relying upon reports in a daily newspaper of the call on the calendars of various judges is not a ground for a new trial where such report is unauthorized and does not purport to be complete and accurate. Ordinary prudence requires an examination of the calendar of the judge who will try the case. *Miller v. McGraw*, 20 Ill. App. 203.

1. *Mathison v. Stevens*, 12 Ill. App. 474; *Volland v. Wilcox*, 17 Neb. 46; *Goodrich v. Handy*, 91 Ga. 29; *Sayer v. Finck*, 2 Cal. (N. Y.) 336.

By agreement of parties a case was passed when reached in its regular order, and was put on the calendar for trial on the following Monday. A nonresident attorney was notified by two letters that the case would be tried on that day. Subsequently to the mailing of the letters the attorney was notified by wire that the case would be reached on the Saturday before the Monday. By mistake the attorney relied upon the letters, which were re-

ceived later, and when he appeared on Monday ready for trial he found that the case had been tried. It was held that a new trial should have been granted for surprise, without attempting to locate the blame upon either party. *Maddox v. Cleary*, 34 Neb. 586.

Mistake as to Venue.—Mistake of counsel as to the county to which the venue has been changed may be excusable. *Hannah v. Indiana Cent. R. Co.*, 18 Ind. 431.

2. *Poznanski v. Szczech*, 71 Ill. App. 670; *Ricker v. Horn*, 74 Me. 289.

3. *Seiberling v. Schuster*, 83 Iowa 747; *Griffin v. Towns*, (Tex. Civ. App. 1894) 25 S. W. Rep. 968; *Stetham v. Shoultz*, 17 Ill. 99; *Ferrill v. Marks*, 76 Ga. 21.

As to Continuance for Absence of a Party, see article CONTINUANCES, vol. 4, p. 843.

4. *Honore v. Murray*, 3 Dana (Ky.) 31; *Rigney v. Hutchins*, 9 N. H. 257.

Intoxication of a Party, preventing presence at the trial, is not such accident as to constitute a ground for a new trial. *Falkenberg v. Gorman*, 71 Wis. 8; *Branch v. State*, 35 Tex. Crim. Rep. 304. Nor is sickness produced by drunkenness a sufficient excuse for absence of a party. *Turner v. Booker*, 2 Dana (Ky.) 334.

Arrest of a Party.—In *McGloin v. McGloin*, 70 Tex. 634, the arrest of a party during the trial and his detention from the court room were held to excuse his absence and failure to present all his evidence.

Imprisonment for Contempt in another case is good ground for a new trial where a party had prepared for trial. *Truax v. Roberts*, 4 N. J. L. 327.

Imprisonment Not an Excuse.—In *Yanez v. State*, 20 Tex. 656, the court refused to consider imprisonment as an excuse for failure to guard against surprise. "That the defendant was confined in jail, in default of giving bail for his appearance to answer the charge, cannot be recognized as a legal excuse for the

On Account of Sickness. — The absence of a party or his lack of preparation is not excused by sickness of himself¹ or of near relatives,² unless it appears that the sickness was such as to prevent him from communicating with his attorney.³

want of the requisite diligence in preparing for trial. His inability to give bail may have been his misfortune; but it is not a fault of the law or its officers."

A Party Summoned as a Witness in another case has been held to have reasonable excuse for his absence. *South v. Thomas*, 7 T. B. Mon. (Ky.) 59.

A Professional Engagement is a sufficient excuse by a physician for absence until after the trial of a suit to which he was a party. *Griffin v. Towns*, (Tex. Civ. App. 1894) 25 S. W. Rep. 968; *Powell v. Westmoreland*, 49 Ga. 341.

Military Duty. — In *Sturgeon v. Hitchens*, 22 Ind. 107, the fact that the attorney of a party had gone to war was held to be sufficient reason for granting a new trial, where it was also shown that the party had good reason to believe that his own presence at the trial was not necessary and did not discover until after the close of the term that the cause had been tried in the absence of the attorney.

The refusal of a court to grant a new trial on the grounds of absence of the defendant on account of sickness, and inability of counsel to conduct the defendant's case because his former attorneys had enlisted in a hostile army and had all the documentary evidence, is not an abuse of discretion. *Tefft v. Marsh*, 1 W. Va. 38.

Error in Advice of Counsel. — It is discretionary with the trial court whether a new trial should be granted for absence of a party in reliance upon an error in the advice of counsel, coupled with absence of the counsel on account of conflicting professional engagements. *Brock v. South, etc.*, Alabama R. Co., 65 Ala. 79.

Absence Due to Mistake of Law. — A party does not exercise ordinary prudence in failing to prepare for trial because he knew that the judge had been counsel for the plaintiff, and therefore supposed that he would not sit. *Owings v. Gibson*, 2 A. K. Marsh. (Ky.) 515.

In *Broas v. Mersereau*, 18 Wend. (N. Y.) 653, the erroneous supposition of a party that the suit abated on the death

of the plaintiff was held to be a mistake excusing absence at the trial.

Error of a garnishee in believing that the mere filing of his answer operated as a discharge is not a sufficient excuse for absence. *O'Brien v. Liddell*, 10 Smed. & M. (Miss.) 371.

The Failure of the Clerk to Send a Promised Notice is sometimes an excuse for absence. *Thompson v. Sharp*, 17 Neb. 69; *Seymour v. Miller*, 32 Conn. 402. See *contra*, *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46.

The Failure of an Attorney to give notice to his client is sometimes regarded as excusable neglect. *Chesapeake, etc., R. Co. v. Hickey*, (Ky. 1893) 22 S. W. Rep. 441, 15 Ky. L. Rep. 112; *Holburn v. Neal & Dana* (Ky.) 120; *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524.

1. On an application for a new trial on the ground of absence caused by sudden illness of a party claiming to be a material witness it must appear that neither the party nor his attorney was negligent. *Whilworth v. Murphy*, 29 Iowa 470; *Mussin v. Collins*, 1 A. K. Marsh. (Ky.) 350.

2. **Sickness of Relatives** is an excuse where it prevents a party from attendance. *Cleveland Nat. Bank v. Reynolds*, 76 Ga. 834; *Peebles v. Ralls*, 1 Litt. (Ky.) 24; *Steele v. Seale*, 4 Ky. L. Rep. 42; *Den v. Ball*, 3 N. J. L. 528. *Contra*, *Lehde v. Lehde*, (Tex. Civ. App. 1897) 42 S. W. Rep. 585; *Mussin v. Collins*, 1 A. K. Marsh. (Ky.) 350.

3. *Nolan v. Grant*, 53 Iowa 392; *Whilworth v. Murphy*, 29 Iowa 470; *Stetham v. Shoultz*, 17 Ill. 9; *Bruson v. Clark*, 151 Ill. 495; *Edwards v. McKay*, 73 Ill. 570; *Schlesinger v. Nunan*, 26 Ill. App. 525; *White v. Martin*, 63 Ga. 659; *Frick Co. v. Caffery*, 48 Mo. App. 120; *Stewart v. Durrett*, 3 T. B. Mon. (Ky.) 113; *Triplett v. Scott*, 5 Bush (Ky.) 81; *French v. Eversole*, (Ky. 1895) 32 S. W. Rep. 211, 17 Ky. L. Rep. 617; *Sherrard v. Olden*, 6 N. J. L. 344; *Horner v. Conover*, 26 N. J. L. 138.

Sickness of a party does not constitute an "unavoidable accident which ordinary prudence could not have guarded against," where one continu-

Delays in Travel. — The excuse that a party or his attorney was absent on account of accidents or delays in travel will be sufficient if ordinary prudence was exercised by starting in time or by making necessary inquiries.¹

(4) **Absence of Counsel.** — The absence of counsel from the trial is not a ground for a new trial,² unless such absence was excusable,³ as where the counsel could not by reasonable diligence ascertain the time for trial and prepare his evidence in time.⁴ A party complaining of the absence of his attorney must show that he employed an attorney⁵ and used ordinary

ance was obtained for this cause and other delays and no reason is given why his attorneys could not be consulted in time to prepare for trial or at least move for a continuance. *Elmore v. McCrary*, 80 Ind. 544.

In *Chicago, etc., R. Co. v. Newton*, 89 Mich. 549, sickness of the plaintiff prevented his cross-examination, and material testimony in chief given by him was thereupon stricken out. Counsel elected to proceed with the trial, having no assurance that the plaintiff would ever be able to return and give his testimony. It was held not an abuse of discretion to grant a new trial on the affidavits of the plaintiff's physicians that he would be able to give his testimony on a second trial.

1. *Smith v. Rawlings*, 83 Va. 674; *Brooks v. Whitson*, 7 Smed. & M. (Miss.) 513; *Vannerson v. Pendleton*, 8 Smed. & M. (Miss.) 452; *Mehnert v. Thieme*, 15 Kan. 368; *Storm Lake First Nat. Bank v. Harwick*, 74 Iowa 227.

Delays in Trials—Failure to Make Connections. — *Smith v. Rawlings*, 83 Va. 674; *Lehde v. Lehde*, (Tex. Civ. App. 1897) 42 S. W. Rep. 585; *M'Cormick Harvesting Mach. Co. v. Marchant*, 11 Utah 68.

2. **Inexcusable Absence of Counsel.** — *Alabama.* — *Shields v. Burns*, 31 Ala. 535.

California. — *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, 19 Cal. 605; *Francis v. Cox*, 33 Cal. 323.

Georgia. — *Warren v. Purtell*, 63 Ga. 428.

Indiana. — *Blacketer v. House*, 67 Ind. 414.

Kansas. — *Beal v. Coddling*, 32 Kan. 107; *Green v. Bulkley*, 23 Kan. 130.

Kentucky. — *Alexander v. Lewis*, 1 Metc. (Ky.) 407.

Missouri. — *Holloway v. Holloway*, 97 Mo. 628; *Greer v. Parker*, 85 Mo. 107.

Nebraska. — *Kyle v. Chase*, 14 Neb. 531.

New Jersey. — *Starr v. Torrey*, 22 N. J. L. 190.

Texas. — *International, etc., R. Co. v. Miller*, 9 Tex. Civ. App. 104.

See also comment on some of above cases in 33 Cent. L. J. 23.

Inexcusable and unexpected absence of counsel, owing to inadvertence, carelessness, or collusion, may constitute such surprise as will be relieved by a new trial. *Ivor v. Sullivan*, 2 La. Ann. 292.

3. **Excusable Absence.** — *Anderson v. Scotland*, 17 Fed. Rep. 667; *Sturgeon v. Hitchens*, 22 Ind. 107; *Frazier v. Williams*, 18 Ind. 416; *Hinman v. Hamilton Paper Co.*, 53 Wis. 169; *Storm Lake First Nat. Bank v. Harwick*, 74 Iowa 227; *Ordway v. Suchard*, 31 Iowa 481; *Dodge v. Ridenour*, 62 Cal. 263; *Symons v. Bunnell*, 80 Cal. 330; *Dougherty v. Winter*, 57 Ill. App. 128.

4. *Riley v. Louisville*, 2 La. Ann. 965; *Lockett v. Toby*, 10 La. Ann. 713.

Absence of Leading Counsel is not a sufficient ground for a new trial where a party is represented by other counsel. *Alamo F. Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677; *Yeizer v. Burke*, 3 Smed. & M. (Miss.) 439; *Gaines v. White*, 1 S. Dak. 434; *Greer v. Parker*, 85 Mo. 107; *Starr v. Torrey*, 22 N. J. L. 190.

The Excusable Absence of One of a Firm of attorneys is a ground for a new trial where the partner present is not sufficiently acquainted with the facts to try the case. *Stoppelfeldt v. Milwaukee, etc., R. Co.*, 29 Wis. 688.

5. *Mussin v. Collins*, 1 A. K. Marsh. (Ky.) 350; *Goldstone v. Sperling*, 39 Cal. 448; *Singer Mfg. Co. v. May*, 86 Ill. 398.

A mutual and honest mistake between attorney and client as to employment may sometimes be ground

diligence.¹

(5) *Negligence and Incompetence of Counsel — Negligence.* — The prevailing rule in this and in similar applications² is that the negligence of an attorney³ or of his clerk or agents⁴ is considered as the negligence of the applicant and is not available as an excuse for lack of prudence unless it would excuse the applicant under like circumstances.⁵

for relief. *McKinlay v. Tuttle*, 34 Cal. 236; *Panesi v. Boswell*, 12 Heisk. (Tenn.) 323. *Contra*, *Kite v. Lumpkin*, 40 Ga. 506.

A new trial will be refused where it appears that counsel was absent because he had not received his fees. *Cobb v. State*, 78 Ga. 801; *State v. Walker*, 39 La. Ann. 19; *Mullens v. State*, 35 Tex. Crim. Rep. 149.

Failure to Retain Other Counsel discloses negligence where local counsel withdrew from the case six or seven days after notice of the time fixed for trial was given, and the defendant failed during such time to retain other counsel. *Bridgeport, etc., Coal Min. Co. v. Wise County Coal Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 965.

1. The absence of counsel must be free from the negligence of the party in order to constitute surprise. *Keeley v. O'Brien*, 66 Ill. 358; *Walsh v. Walsh*, 114 Ill. 655; *Renfro v. Merryman*, 71 Ala. 195.

Neglect of Codefendant. — A new trial will not be granted to permit a defendant to defend where the default was due to the failure of a codefendant to retain an attorney for both parties, as the negligence of the codefendant is chargeable to the defendant as the act of his agent. *Bennett v. Carey*, 72 Iowa 476.

2. The reason of the rule appears to be that a party is bound by the acts of his attorney as agent and can recover damages suffered from his attorney's negligence. Consequently the rule is relaxed where no damages can be recovered. See article DEFAULTS, vol. 6, pp. 168-170.

In such proceedings the attorney is regarded as the agent of his client. *Gehrke v. Jod*, 59 Mo. 522; *Field v. Matson*, 8 Mo. 686; *Kerby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Ridgley v. Steamboat Reindeer*, 27 Mo. 442; *Biebinger v. Taylor*, 64 Mo. 63; *Bradford v. Coit*, 77 N. Car. 72.

3. **Negligence of Attorney Is Negligence of Client.** — *Hoskins v. Hight*, 95 Ala.

284; *Yates v. Monroe*, 13 Ill. 212; *Newman v. Schueck*, 58 Ill. App. 328; *Griffin v. O'Neil*, 47 Kan. 116; *Holderman v. Jones*, 52 Kan. 743; *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655; *Desnoyer v. McDonald*, 4 Minn. 515; *Patterson v. Matthews*, 3 Bibb (Ky.) 80; *Field v. Matson*, 8 Mo. 686.

Reason for Rule. — "The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusions and would lead to endless confusion in the administration of justice. The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and, in the absence of fraud, leaving the client to his remedy against the attorney for his negligence." *State v. Dreher*, 137 Mo. 11.

4. **Negligence of Clerks and Agents of Attorneys.** — A party is chargeable with the negligence not only of his attorney but also of those employed or intrusted by his attorney to watch the progress of the case and give notice. *Kyle v. Chase*, 14 Neb. 528; *Mulholland v. Heyneman*, 19 Cal. 605; *Webster v. McMahan*, 13 Mo. 582; *Davison v. Heffron*, 31 Vt. 687; *Hinman v. Hamilton Paper Co.*, 53 Wis. 169.

The failure of the clerk of the court to notify attorneys of the proceedings is not a sufficient excuse, as it is the duty of attorneys to be present. *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46.

5. **Negligence of Counsel in Preparing the Case** is not an accident which ordinary prudence could not have guarded against. *Moody v. Dick*, 4 N. & M. 348, 30 E. C. L. 379; *Gwilt v. Crawley*, 8 Bing. 144, 21 E. C. L. 252; *Handy v. Davis*, 38 N. H. 411; *Jackson v. Roe*, 9 Johns. (N. Y.) 77; *Com. v. Beresh*, Thatch. Crim. Cas. (Mass.) 684; *Westheimer v. Cooper*, 40 Kan. 370; *Shields*

Ignorance and incompetence of counsel is not a ground for a new trial, although a party is thereby deprived of substantial rights,¹ even in criminal cases.² A party is bound by the legal blunders and mistakes of his attorney,³ unless it be as to a mistake of fact.⁴

d. SURPRISE IN EVIDENCE — (1) *False but Relevant Testimony*. — Since a party is bound to come prepared to meet the case made by his adversary, he cannot plead surprise at material and relevant testimony,⁵ even though such testimony is

v. Burns, 31 Ala. 537; *Yates v. Monroe*, 13 Ill. 219; *U. S. v. Humason*, 7 Sawy. (U. S.) 252.

It is no excuse that counsel relied upon statements of opposing counsel as to the issues. *Smith, etc., Implement Co. v. Wheeler*, 27 Mo. App. 16; *Jackson v. Van Antwerp*, 8 Cow. (N. Y.) 273. Unless there was a fraudulent attempt to mislead. *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231; *Symons v. Bunnell*, 80 Cal. 330.

Failure of Attorney to Notify Client. — Where a party relies upon his attorney to notify him of the time and place of trial he is chargeable with the negligence of his attorney. *Holburn v. Neal*, 4 Dana (Ky.) 120; *Halton v. Salmons*, (Tex. 1886) 2 S. W. Rep. 753.

Surprise at a trial without the defendant and his witness, who were in the city awaiting trial, is not excusable when a partner of the attorney for the defendant tried the case and failed to give notice. *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524.

1. *Ignorance and Incompetence of Counsel*. — *State v. Dreher*, 137 Mo. 11; *Field v. Matson*, 8 Mo. 686; *Gehrke v. Jod*, 59 Mo. 522; *State v. Bengel*, 61 Iowa 658; *Burton v. Hynson*, 14 Ark. 32; *Holderman v. Jones*, 52 Kan. 743; *Boston v. Haynes*, 33 Cal. 31; *Farmers' L. & T. Co. v. Walworth County Bank*, 23 Wis. 249.

2. *Incompetence — Defense of Charge of Murder*. — Where an attorney for one accused of murder in the first degree, through gross ignorance, incompetence, and imbecility advised his client that one charged with murder was not a competent witness in his own defense, and thereby prevented his client from testifying as to the fact of self-defense, a new trial was granted, notwithstanding the rigid rule in civil cases. *State v. Jones*, 12 Mo. App. 93.

But in *State v. Dreher*, 137 Mo. 11, the court in such a case refused to grant a new trial for failure of counsel,

through inefficiency, to establish the defense of insanity. The case of *State v. Jones*, 12 Mo. App. 93, was criticised as being without precedent and not followed in any state: "We doubt not that in that individual instance their judgment wrought justice, but we cannot give it our sanction as a rule of practice or procedure, and it is accordingly disapproved."

3. *Blunders and Mistakes of Counsel*. — *Witters v. Sowles*, 31 Fed. Rep. 5; *Prevost v. Gratz*, 1 Pet. (C. C.) 364; *Rugles v. Eddy*, 11 Blatchf. (U. S.) 524; *Webster Loom Co. v. Higgins*, 13 Blatchf. (U. S.) 349; *India Rubber Comb Co. v. Phelps*, 8 Blatchf. (U. S.) 85; *Hitchcock v. Tremaine*, 9 Blatchf. (U. S.) 550; *Dame v. Dame*, 38 N. H. 429; *Legrand v. Baker*, 6 T. B. Mon. (Ky.) 236; *Phillips v. Skinner*, 6 Bush (Ky.) 663; *Southwestern R. Co. v. Craig*, 62 Ga. 361; *Endress v. Nelp*, 1 Disney (Ohio) 411; *Matter of Quin*, 1 Connolly (N. Y.) 381; *State v. Currens*, 46 Kan. 750.

Inexperience and Incompetence. — "If such grounds were to be admitted as reasons for opening cases, there would never be an end of a suit so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent, or experienced, or learned." *De Florez v. Raynolds*, 16 Blatchf. (U. S.) 397.

4. *Mistake of Counsel as to Facts*. — The failure of counsel to recite an important and controlling fact in a stipulation of facts as requested by his client is a ground for a new trial where the client was free from negligence and relied upon her attorney until the omission was discovered on the decision of the court. *Kimball Co. v. Huntington*, 80 Wis. 270.

5. *Evidence Not Irrelevant — No Surprise*. — *California*. — *Armstrong v. Davis*, 41 Cal. 494.

Illinois. — *Chicago Exhaust, etc., Co. v. Johnson*, 44 Ill. App. 224.

Kentucky. — *Smith v. Morrison*, 3 A.

false.¹ The fact that the adversary's evidence is different from

K. Marsh. (Ky.) 81; Harrison v. Wilson, 2 A. K. Marsh. (Ky.) 547.

Louisiana. — Donnell v. Parrott, 12 La. Ann. 690.

Missouri. — Bragg v. Moberly, 17 Mo. App. 221; Lindauer v. Meyberg, 27 Mo. App. 181; Shotwell v. McElhinney, 101 Mo. 677; Harrison v. White, 56 Mo. App. 175; Gidionsen v. Union Dept. R. Co., 129 Mo. 392.

Montana. — Francisco v. Benepe, 6 Mont. 243.

New York. — People v. Marks, 10 How. Pr. (N. Y. Supreme Ct.) 261; People v. Mack, 2 Park. Cr. Rep. (Dutchess Special Term) 673; Cole v. Fall Brook Coal Co., (Supreme Ct.) 10 N. Y. Supp. 417; Dillingham v. Flack, (Supreme Ct.) 17 N. Y. Supp. 867; Hartman v. Morning Journal Assoc., (C. Pl.) 46 N. Y. St. Rep. 403.

Pennsylvania. — Bitting v. Mowry, 1 Miles (Pa.) 216.

Texas. — Anderson v. Duffield, 8 Tex. 237; McNeally v. Stroud, 22 Tex. 229; Gulf, etc., R. Co. v. Shearer, 1 Tex. Civ. App. 343; Conwill v. Gulf, etc., R. Co., 85 Tex. 96.

Vermont. — Knapp v. Fisher, 49 Vt. 94; Dodge v. Kendall, 4 Vt. 31.

Washington. — Wilson v. Waldron, 12 Wash. 149.

Wisconsin. — Delaney v. Brunette, 62 Wis. 615; Davis v. Ruggles, 2 Chand. (Wis.) 152.

Surprise by Irrelevant Testimony is sufficient ground for a new trial. Kenezleber v. Wahl, 92 Cal. 202; James v. Hicks, 58 Mo. App. 521; Barrackman v. Girard, 26 Kan. 284.

Want of diligence cannot be charged against a party who fails to procure existing testimony to disprove a statement of which he is not advised by the pleadings. German v. Maquoketa Sav. Bank, 38 Iowa 368; Menk v. Commercial Ins. Co., 70 Cal. 585; Dunham v. State, 3 Tex. App. 465.

Where the court, in denying a motion for a continuance, before trial, ruled that the plaintiff should be restricted to one element of damages, and on the trial admitted evidence to prove other damages, a new trial should be granted, it appearing that the defendant relied upon such order and was surprised by the unexpected evidence. Colorado Midland R. Co. v. Bowles, 14 Colo. 85.

No Written Pleadings. — In cases where there are no written pleadings

and the issues are very indefinite, the court will grant a new trial where it appears that either party was surprised by the evidence. Davis, etc., Bldg., etc., Co. v. Moberly, 65 Ill. App. 228; Goldstein v. Lowther, 81 Ill. 399.

Defective Bill of Particulars in Justice's Court. — Under a bill of particulars framed to recover statutory damages, but too defective for that purpose, the plaintiff introduced evidence for damages on another theory, which the defendant was not prepared to meet. The findings of fact by the jury were not sufficient to cure the defect. It was held that a new trial should be granted. Barrackman v. Girard, 26 Kan. 284.

1. False Testimony. — Workman v. Taylor, 24 Mo. App. 550; Bragg v. Moberly, 17 Mo. App. 221; Wilson v. Waldron, 12 Wash. 149.

False evidence may constitute sufficient surprise where a party is absent on account of sickness, and therefore is unable to contradict and explain the defendant's testimony. Ricker v. Horn, 74 Me. 289.

Failure to have evidence to rebut false testimony is evidence of lack of ordinary prudence. Befay v. Wheeler, 84 Wis. 135.

False testimony is a ground for a new trial if the testimony was inadmissible and irrelevant, as where a party alleges performance and proves a waiver of the conditions of contract of insurance. Nudd v. Home Ins., etc., Co., 25 Minn. 100.

A party does not exercise ordinary prudence when he relies upon an oral agreement of counsel as to the issues to be litigated. Smith, etc., Implement Co. v. Wheeler, 27 Mo. App. 16.

The fact that the surprised party was misled by the opposite party, and believed that certain facts would be admitted or not seriously disputed at the trial, and therefore failed to introduce evidence as to such facts, is not, in the absence of fraud, such surprise as calls for a new trial. Taylor v. Harlow, 11 How. Pr. (N. Y. Supreme Ct.) 285.

The filing of a new account on an appeal and the introduction of testimony in support thereof constitute a surprise to the opposite party entitling him to a new trial or a continuance. Webb v. Lasater, 5 Ill. 543; Newhall v. Appleton, 47 N. Y. Super. Ct. 38.

Where a bill of particulars is filed, a

what it was supposed it would be is not sufficient.¹ A party must come prepared to meet any material evidence, and has no right to assume that false or contradictory evidence will not be introduced.²

(2) *Exclusion of Evidence.* — The exclusion of incompetent or irrelevant testimony is not a ground for a new trial³ unless a

party cannot be surprised at any evidence offered by his adversary to establish the items, even if such evidence was not offered at a former trial. *Rockford, etc., R. Co. v. Rose*, 72 Ill. 183.

1. *California.* — *Taylor v. California Stage Co.*, 6 Cal. 228.

Illinois. — *Bell v. Gardner*, 77 Ill. 319.

Indiana. — *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165; *Travis v. Parkhurst*, 4 Ind. 171; *Cummins v. Walden*, 4 Blackf. (Ind.) 307; *Working v. Garn*, 148 Ind. 546.

Missouri. — *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462; *Shotwell v. McElhinney*, 101 Mo. 677.

Montana. — *O'Donnell v. Bennett*, 12 Mont. 242.

Rhode Island. — *Johnson v. Blanchard*, 5 R. I. 24.

Texas. — *Fears v. Albea*, 69 Tex. 437.

United States. — *Martin v. Clark*, Hempst. (U. S.) 259.

Mistake as to Crime. — A new trial will not be granted for surprise in a trial of an indictment for obstructing the public road where the defendant was merely mistaken as to the point where the obstruction was charged to be and so was not prepared to defend himself. *Wholford v. Com.*, 4 Gratt. (Va.) 553.

2. *Gardner v. State*, 94 Ind. 489; *Pauley v. Short*, 41 Ind. 180; *Hill v. Sutton*, 47 Ind. 592; *Chamberlain v. Reid*, 49 Ind. 332; *Armstrong v. Davis*, 41 Cal. 499; *Foster v. Easton*, (Supreme Ct.) 2 N. Y. Supp. 772; *Bragg v. Moberly*, 17 Mo. App. 221.

It is not ordinary prudence to rely upon the unsworn statement of a witness for the opposite party as to what will be his testimony, and surprise resulting from such reliance, whereby a party goes to trial without witnesses to prove the real truth, is not cause for a new trial. *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165.

A Party Should Be Prepared to Prove the Real Truth, and if he depends upon what the witnesses of his adversary say they will testify to, he cannot complain

if he is surprised at their testimony. *Armstrong v. Davis*, 41 Cal. 499; *Klockenbaum v. Pierson*, 22 Cal. 160; *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165; *Fagan v. State*, 3 Tex. App. 400.

3. **Surprise at Exclusion of Evidence — Mistake of Law.** — *Dorsey v. Maury*, 10 Smed. & M. (Miss.) 298; *Curry v. Kurtz*, 33 Miss. 24; *Hite v. Lenhart*, 7 Mo. 22; *Morgan v. Marshall*, 7 J. J. Marsh. (Ky.) 316; *Holmes v. M'Kinney*, 4 T. B. Mon. (Ky.) 5; *Lawrence v. Fulton*, 19 Cal. 683; *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441; *Turnley v. Evans*, 3 Humph. (Tenn.) 222; *Morgan v. Winston*, 2 Swan (Tenn.) 472; *Nane v. Simpson*, 5 Sneed (Tenn.) 612; *Dunahoe v. Williams*, 24 Ark. 264.

The rejection of secondary evidence material to the defense which had been considered sufficient on a former trial is such mistake and surprise as to warrant a new trial, especially where such evidence was excluded on a point of practice not entirely clear. *Keeter v. Case*, (Tex. Civ. App. 1897) 41 S. W. Rep. 528.

Exclusion of Depositions. — Ruling out a deposition on the ground of irregularity cannot be a surprise which will entitle the defeated party to a new trial. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Dorsey v. Maury*, 10 Smed. & M. (Miss.) 298; *Lawrence v. Fulton*, 19 Cal. 683; *Lee v. Banks*, 4 Litt. (Ky.) 11; *Gentry v. McKeen*, 5 Dana (Ky.) 34; *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *Peers v. Davis*, 29 Mo. 190; *Hirsch v. Patterson*, 23 Ark. 112.

But where objection is first made when it is too late to apply for a continuance, there may be sufficient ground for granting a new trial for surprise. *Thompson v. Porter*, 4 Bibb (Ky.) 71.

Where the irregularity consisted in lack of authority of the attorney who attended the taking of the deposition in behalf of the defendant, a new trial was granted to allow such deposition to be regularly taken. *State Bank v. Cowan*, 7 Humph. (Tenn.) 70.

party is surprised by a change in the rulings of the court.¹

(3) *Mistake in Omitting Testimony*. — Overlooking material testimony² or neglecting to secure valuable and accessible evidence³ does not warrant a new trial.

(4) *Accident Destroying Evidence*. — The fact that evidence was destroyed by fire may be ground for a new trial if such evidence cannot be restored.⁴

(5) *Accident Preventing Bill of Exceptions* — *Death of Judge or Reporter*. — A new trial will be granted where a party is prevented from obtaining a bill of exceptions by the death of a judge⁵ or reporter,⁶ or by the inability of the reporter to transcribe his

So the suppression of a deposition that would be of no benefit to the complaining party will not entitle him to a new trial. *Hirsch v. Patterson*, 23 Ark. 112.

When the court, after granting a motion for the suppression of a deposition as containing matter irrelevant to the issue, permits the matter to go to the jury without a reasonable notice to the party making the motion, the latter is entitled to a new trial. *The Steamboat Violet v. McKay*, 23 Ark. 543.

Erroneous Exclusion of Evidence. — Surprise caused by the exclusion of material and relevant testimony which cannot be supplied is sufficient ground for a new trial. *Keeter v. Case*, (Tex. Civ. App. 1897) 41 S. W. Rep. 528; *Buford v. Bostick*, 50 Tex. 371; *Chinn v. Taylor*, 64 Tex. 385.

1. **Surprise by Change of Rulings.** — *Morrow v. Hatfield*, 6 Humph. (Tenn.) 108; *Helm v. Jones*, 9 Dana (Ky.) 27; *Boyce v. Yoder*, 2 J. J. Marsh. (Ky.) 515; *Starkweather v. Loomis*, 2 Vt. 573.

The Rejection of Depositions which had been received on a former trial of the same suit is such a surprise as requires the granting of a new trial. *Kincaid v. Kincaid*, 1 J. J. Marsh. (Ky.) 100.

Admitting a Suppressed Deposition is a cause for surprise. *The Steamboat Violet v. McKay*, 23 Ark. 543.

2. **Omission of Material Evidence.** — *Yell v. Lane*, 41 Ark. 53; *Crowell v. Harvey*, 30 Neb. 570; *The Steamship Francis Wright*, 7 Ben. (U. S.) 88; *Feiber v. Manhattan Dist. Tel. Co.*, 15 Daly (N. Y.) 62.

Where through inadvertence counsel overlooks material evidence at the trial and fails to introduce it, although at hand, a new trial should be granted on the ground of accident or surprise. *Rolfe v. Rolfe*, 10 Ga. 143. But see

contra, *Jinks v. Lewis*, 89 Ga. 787. But it is a matter resting within the discretion of the court, and an order granting a new trial for omitted testimony will not be reversed. *Greene v. Farlow*, 138 Mass. 146.

3. *Linard v. Crossland*, 10 Tex. 462.

One who, having reason to believe that his adversary will dispute a certain point in the case, summons only one witness to support it, will not be granted a new trial to enable him to reinforce the testimony of his single witness. *Test v. Larsh*, 160 Ind. 563.

4. **Reporters' Notes Destroyed by Fire.**

— The fact that the pleadings, depositions, and reporters' notes were destroyed by fire does not constitute a sufficient "accident" to require a new trial, where copies of the pleadings were substituted and sufficient minutes and memoranda were preserved to enable the applicant to prepare and serve a statement of the case. *Golden Terra Min. Co. v. Smith*, 2 Dakota 453.

5. **Death of Judge.** — Where a party is prevented by the death of the judge from obtaining the settlement of his bill of exceptions, a new trial will be granted if the successor is not authorized to settle it. *Newton v. Boodle*, 3 C. B. 795, 54 E. C. L. 795; *Wright v. Judge*, 41 Mich. 726; *Campau v. Judge*, 40 Mich. 630; *Stebbins v. Field*, 41 Mich. 373.

6. **Death of Stenographer.** — A new trial will not be granted because the official stenographer died before transcribing his notes, in a case where numerous witnesses were examined and the applicant avers that he is unable to prepare a statement of the case, but it does not appear that such statement could not have been prepared by suggestions for amendment by the adverse party and the court. *Lidgerwood Mfg. Co. v. Rogers*, 56 N. Y. Super. Ct. 350.

notes.¹

2. SURPRISE BY AMENDMENT OF PLEADING. — Amendments which require proof of new facts and time for further preparation will constitute good ground for a continuance, and if a continuance is refused and a party is unable to meet the issues during trial a new trial should be granted.²

f. SURPRISE OCCASIONED BY WITNESS — (1) *Generally* — *Necessity of Inquiry Before Trial.* — Surprise arising from the witness of the adverse party³ or the party's own witness⁴ testifying differently from what was expected is not a ground for a new trial unless the applicant had exercised ordinary diligence to ascertain what such testimony would be,⁵ and had been misled by the

1. *Failure to Obtain Bill of Exceptions.* — A new trial will be granted where a party fails to obtain a bill of exceptions without laches on his part and through the inability of the court reporter to transcribe his notes. *Matthews v. Mulford*, (Neb. 1898) 73 N. W. Rep. 661; *Holland v. Chicago, etc., R. Co.*, (Neb. 1897) 71 N. W. Rep. 989.

By a rule of court in the District of Columbia, "in case the justice is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted." *Evans v. Humphreys*, 9 App. Cas. (D. C.) 392, 24 Wash. L. Rep. 782.

A new trial was granted where the judge was too ill to settle before his term expired by promotion. *Benett v. Peninsular, etc., Steam Boat Co.*, 16 C. B. 29, 81 E. C. L. 29.

A new trial is properly granted where the trial judge has failed to settle a bill of exceptions before his death and the successor refuses to settle it because of his ignorance of the facts. *Henrichsen v. Smith*, 29 Oregon 475.

But a new trial will be refused if the applicant failed to serve the bill in time. *Benedix v. German Ins. Co.*, 80 Wis. 148; *Davis v. Menasha*, 21 Wis. 491.

2. See article CONTINUANCES, vol. 4, pp. 836, 837.

3. *Adverse Witness.* — *Moore v. Los Angeles Infirmary*, 49 Cal. 670; *Taylor v. California Stage Co.*, 6 Cal. 228; *Jones v. Parish*, 1 Pin. (Wis.) 494; *Bingham v. Walk*, 128 Ind. 164; *Taylor Water Co. v. Dillard*, 9 Tex. Civ. App. 667; *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

A party must not expect that his views or theory of the case will be adopted or sustained by the witnesses of his opponent, and that such wit-

nesses do not support his theory of the facts will not justify the granting of a new trial on the ground of surprise. *Harrison v. White*, 56 Mo. App. 175.

Testimony of Adverse Party. — A party surprised at the testimony of his adversary will not be granted a new trial to enable him to give oral testimony in rebuttal, where the party has relied upon his deposition and no satisfactory excuse for his absence is shown. *Thompson v. Anthony*, 48 Ill. 468.

Where a plaintiff testifies differently on the second trial the defendant is entitled to a new trial. *Levy v. Brown*, 11 Ark. 16.

A defendant has no right to go to trial relying upon the chance of extracting from the plaintiff, upon cross-examination, admissions which would dispense with proper proofs. But if he did so, and the adverse party, instead of admitting the fact sought to be proved, denied it, it would not afford ground for a new trial. *Randall v. Packard*, 1 Misc. Rep. (N. Y. C. Pl.) 347.

4. *Applicant's Own Witnesses.* — *Hewlett v. Cruchley*, 5 Taunt. 277, 1 E. C. L. 107; *Guard v. Risk*, 11 Ind. 156; *Graeter v. Fowler*, 7 Blackf. (Ind.) 554; *Van Tassell v. New York, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 312; *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285; *Sprout v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Shotwell v. McElhinney*, 101 Mo. 677.

A new trial will not be granted for surprise occasioned by a change of the testimony of a party's witness as to certain dates, where the legal effect of the testimony was the same. *Wolf v. Brass*, 72 Tex. 133.

5. *Ruger v. Bungan*, 10 Ind. 451; *Todd v. State*, 25 Ind. 212.

Where the attorney had examined a

witness,¹ or unless the witness has contradicted his former testimony.² It must be shown that the testimony of the witness is not true³ or that the missing testimony can be supplied if a new trial is granted.⁴

(2) *Impeachment of Witness.* — A new trial will not be granted merely to enable a party to impeach his opponent's witness⁵ or for surprise occasioned by the unexpected impeachment of his own witnesses.⁶

witness, and relied upon his testimony as then stated by him, it was held an abuse of discretion to refuse a new trial for surprise caused by the witness's testifying differently upon the trial. *Delmas v. Margo*, 25 Tex. 1.

Surprise occasioned by a witness's testifying contrary to what another person had promised he would testify is not a ground for a new trial where the witness was summoned by the adverse party and had made no statement as to what his testimony would be. By the exercise of proper diligence the purport of his testimony could have been ascertained before trial. *Taylor Water Co. v. Dillard*, 9 Tex. Civ. App. 667.

1. *Misled by Former Statements.* — *McFarland v. Clark*, 9 Dana (Ky.) 134; *Rodriguez v. Comstock*, 24 Cal. 85; *Cartery's Estate*, 56 Cal. 470; *Gotzian v. McCollum*, 8 S. Dak. 186.

Such surprise is not available where the attention of the witness was not called to the discrepancy and impeaching testimony offered. *Underwood v. Ainsworth*, 72 Miss. 328.

If a party was misled by former statements of a witness he must indicate his surprise at the trial by proving the former statements. *Adamant Mfg. Co. v. Pete*, 61 Minn. 464; *Halsey v. Stillman*, 48 Ill. App. 413.

The court may refuse to grant a new trial on the affidavit of a party that a witness swore differently at a former trial, and that the affiant had discovered only since the last trial that he could prove that the witness swore differently. *Judge v. Moore*, 9 Fla. 269.

Where a defendant has been misled by the statements of persons who were present at an alleged assault with intent to murder, and after conviction learns that they were willing to swear to his innocence, he will be entitled to a new trial. *Thomas v. State*, 52 Ga. 509.

2. *Phenix v. Baldwin*, 14 Wend. (N. Y.) 62; *Levy v. Brown*, 11 Ark. 16.

Where a witness testified differently on a former trial and a continuance was denied, a new trial should be granted. *Withers v. State*, 23 Tex. App. 396.

3. Surprise at the testimony of a witness is not a ground for a new trial in a criminal or civil case unless it can be shown that such testimony was not true. *People v. Jocelyn*, 29 Cal. 562; *Cartery's Estate*, 56 Cal. 470; *Delmas v. Martin*, 39 Cal. 555; *Mehan v. Chicago, etc., R. Co.*, 55 Iowa 305; *Mayfield v. State*, 44 Tex. 59; *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

4. When a motion for a new trial on the ground of surprise is made because witnesses have failed to testify as they represented before the trial they would testify, the question is whether the evidence to be produced on another trial is such as will probably secure a different result. *Stellwagen v. Life Assoc. of America*, 14 Blatchf. (U. S.) 349.

5. *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285; *Starin v. Kelly*, 47 N. Y. Super. Ct. 288; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Com. v. Waite*, 5 Mass. 261; *Hammond v. Wadhams*, 5 Mass. 353; *Com. v. Drew*, 4 Mass. 391; *Com. v. Green*, 17 Mass. 515; *Lloyd v. Monpoey*, 2 Nott & M. (S. Car.) 446; *Riley v. State*, 9 Humph. Tenn. 646; *Sells v. Hoare*, 3 Brod. & B. 232, 7 E. C. L. 425.

The testimony must be not only impeaching but sufficient to change the result. *Allen v. Young*, 6 T. B. Mon. (Ky.) 136.

6. Unexpected evidence impeaching the character of the complainant's witnesses is not a surprise for which a new trial will be granted. *Bell v. Howard*, 4 Litt. (Ky.) 117.

Although a party has the right to impeach witnesses of the adverse party without notice, ordinary prudence does not require the adverse party to come with a host of witnesses to prove his case and an additional host to uphold their character for truth and veracity.

(3) *Perjury of Witness*. — Perjury by a witness is not a ground for a new trial¹ unless a party is surprised by the false testimony² or unless perjury is made a separate ground by the statute.³

(4) *Mistake of Witness*. — A new trial is rarely granted to enable a witness to correct his testimony.⁴ To accomplish this the mistake must be such as could not have been prevented by consulting the witness before trial⁵ or in conducting his examination.⁶ But where it clearly appears that the mistake related to a

Where a party is surprised by the impeachment of his witnesses in such case a new trial should be granted if the party makes complaint when surprised. *Lee-Clark-Andreesen Hardware Co. v. Yankee*, 9 Colo. App. 443.

1. *Workman v. Taylor*, 24 Mo. App. 550; *Bragg v. Moberly*, 17 Mo. App. 221; *Wilson v. Waldron*, 12 Wash. 149; *Befay v. Wheeler*, 84 Wis. 135; *Benfield v. Petria*, 3 Doug. 24, 26 E. C. L. 20.

An application for a new trial cannot be delayed pending an indictment against a witness for perjury at the trial. *Warwicke v. Bunce*, 4 M. & S. 140; *Pott v. Parker*, 2 Chit. Rep. 269, 18 E. C. L. 332.

False evidence creating surprise is not sufficient where it was immaterial and could have had no influence on the judgment. *Guy v. Hanley*, 21 Cal. 397.

2. *Ricker v. Horn*, 74 Me. 289; *Nudd v. Home F. Ins., etc., Co.*, 25 Minn. 100; *Proctor v. Simmons*, 9 Moo. 581, 17 E. C. L. 127.

A new trial will not be granted on the affidavit of the petitioner that the witnesses of the prevailing party swore falsely, where no affidavits of the witnesses to that effect are produced, no steps to prosecute them for perjury have been taken, and an affidavit of one of the witnesses denying the perjury charged is filed. *Dexter v. Handy*, 13 R. I. 474.

Newly Discovered Evidence. — If sufficient evidence of perjury is obtained after trial to impeach and contradict a witness and probably change the result, a new trial may be granted for newly discovered evidence. See *infra*, III. 11. *Newly Discovered Evidence*.

3. *Missouri*. — Under section 2240 Missouri Stat. 1889, a new trial may be granted where "the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of

action or of defense." This is an independent ground and not coupled with surprise, and a party need not make prompt complaint by applying for a continuance as in case of surprise. *Rickroad v. Martin*, 43 Mo. App. 597.

Iowa. — Where the successful party introduces false testimony a new trial may be granted on the ground of "misconduct of the prevailing party." *Shenandoah First Nat. Bank v. Wabash, etc., R. Co.*, 61 Iowa 700; *Cleslie v. Frerichs*, 95 Iowa 83.

4. *Howe v. Briggs*, 17 Cal. 385; *Hause v. Sloyer*, 3 Pa. Dist. Rep. 320.

An affidavit by a witness in the former trial that he was surprised on his examination, and explaining and correcting a mistake in his testimony, is not sufficient to warrant the granting of a new trial. *Steinbach v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 129.

A new trial should not be granted because a witness did not use language to convey the meaning he intended. *Sheffield v. Mullin*, 28 Minn. 251. See also *State v. Viers*, 82 Iowa 397.

Relief for this cause should be granted only in extreme cases. As said in *O'Kelly v. Felker*, 71 Ga. 775: "It will not do, except in extraordinary cases, to make such mistake a rule for granting a new trial. It is too tempting to parties to get affidavits of mistake from witnesses, and the temptation and tendency would be too great to bribery and perjury." See also *Tarver v. McKay*, 15 Ga. 550; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635.

Newly Discovered Evidence. — Mistakes discovered after trial and evidence correcting mistakes may constitute newly discovered evidence. *Scofield Rolling Mill Co. v. State*, 54 Ga. 636.

5. *Crawford v. Georgia Pac. R. Co.*, 86 Ga. 5.

6. *Nelson v. Carlson*, 54 Minn. 90; *Valentino v. Weil*, 67 Ga. 15.

material fact ¹ and probably affected the verdict,² a new trial will ordinarily be granted.³

(5) *Intoxication or Insanity of Witness.* — Intoxication or insanity of a witness may sometimes be sufficient surprise to be a ground for a new trial.⁴ But where the witness was examined, and the trial court had an opportunity to ascertain his condition and whether the applicant was injured by the lack of such testimony, its decision will not be disturbed.⁵

(6) *Absence of Witnesses.* — A new trial may be granted if a witness was absent under circumstances which were not due to any negligence of the applicant.⁶ But it must appear that the

If a party failed by proper cross-examination to make a witness recall and correct a former contradictory statement he will not be allowed a new trial. *Webb v. Barnard*, 36 Minn. 336; *Howell v. Howell*, 37 Mo. 124.

Embarrassment and Excitement — Forgetting Material Facts. — One is not entitled to a new trial because, when testifying, he was so nervous, excited, and embarrassed that he forgot many important facts, and answered in such a manner as to prejudice his case. *Korte v. Hoffman*, 97 Mo. 284. But see *Ainsworth v. Sessions*, 1 Root (Conn.) 175.

Where the Testimony of a Material Witness Is Incoherent on account of his being disconcerted and embarrassed at the trial, so that it is unintelligible, a new trial may be granted. *Ainsworth v. Sessions*, 1 Root (Conn.) 175.

1. A mistake relating to an immaterial matter is not sufficient. *Magnay v. Knight*, 1 M. & G. 944, 39 E. C. L. 721; *Brinson v. Faircloth*, 82 Ga. 185.

2. A new trial will not be granted where it clearly appears that the verdict could not have been based upon the evidence claimed to be given by mistake. *State v. Viers*, 82 Iowa 397.

3. *Coddington v. Hunt*, 6 Hill (N. Y.) 595; *Mersereau v. Pearsall*, 6 How. Pr. (N. Y. Supreme Ct.) 293; *Wilson v. Brandon*, 8 Ga. 136; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Hewey v. Nourse*, 54 Me. 256; *Richardson v. Fisher*, 7 Moo. 546, 1 Bing. 145, 8 E. C. L. 444.

4. **Intoxication of Witness.** — Where a witness is excluded from testifying because of drunkenness, application for a continuance should be made before a new trial will be granted, and materiality of the witness's testimony must be shown. *Mann v. Clifton*, 3 Blackf.

(Ind.) 304; *Fox v. Territory*, 2 Wash. Ter. 297; *Shipp v. Suggett*, 9 B. Mon. (Ky.) 5; *Land v. Miller*, 7 Tex. 463.

In *Iseley v. Lovejoy*, 8 Blackf. (Ind.) 462, a party moved for a new trial on the ground that a material witness for him was incapacitated by intoxication to give evidence on the trial. For aught shown by the affidavits in support of the motion, the party might have previously known of the intoxication and have been instrumental in occasioning it. It was held that the motion was rightly overruled.

A refusal of the right to cross-examine a witness because of his intoxication is a sufficient ground for a new trial. *State v. McNinch*, 12 S. Car. 89.

Insanity of a Witness for the defendant, creating surprise by variance in his testimony, was held sufficient to justify a new trial, where the witness's manner while testifying was such that the jury might have imputed it to a guilty conscience and rendered a verdict against the defendant in indignation at an apparent attempt to defeat justice by perjury of an employee, and where the defendant did not discover the mental condition of the witness until he was declared insane a few days after the trial. *Helwig v. Second Ave R. Co.*, 9 Misc. Rep. (N. Y. C. Pl.) 61.

5. *Shipp v. Suggett*, 9 B. Mon. (Ky.) 5.

6. *McLane v. Harris*, 1 Mo. 700; *Smith v. Chapel*, 36 Minn. 180; *Black v. State*, 27 Tex. App. 495; *Sherrard v. Olden*, 6 N. J. L. 344; *Smith v. State Ins. Co.*, 58 Iowa 487; *Gallaudet v. Steinmetz*, 45 N. Y. Super. Ct. 239; *Cahill v. Hilton*, 31 Hun (N. Y.) 114.

Negligence of Applicant. — *Allington v. Tucker*, 38 Ala. 655; *Carey v. King*, 5 Ga. 75; *Washer v. White*, 16 Ind.

testimony of the absent witness will probably affect the result;¹ that the witness was served with a subpoena² or promised to be present and testify;³ and that the applicant was free from negligence in not taking a deposition.⁴ The general rule that a surprised party must make prompt complaint⁵ of his surprise by moving for a continuance is applied with strictness where a party

136; *McAuly v. Lockhart*, 4 Humph. (Tenn.) 229.

A new trial will not be granted for absence through physical inability where there is no showing that the witness had been subpoenaed or that counsel was ignorant of the facts to which he would have testified, or made an application for a continuance. *Eich v. Taylor*, 17 Minn. 172.

Witness Absent During Trial.—A witness attended the trial as promised, but left during the trial, whereupon a subpoena was issued for him, but could not be served because he could not be found. It was held that a new trial was properly refused, as due diligence had not been exercised. *Roach v. Colbern*, 76 Mo. 653.

1. *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 345.

A new trial will not be granted for absence of a witness whose testimony is merely cumulative. *Miller v. Manhattan R. Co.*, 73 Hun (N. Y.) 514; *Young v. Com.*, 4 Gratt. (Va.) 550.

2. Failure to Subpoena Witnesses.—*Rogers v. Huie*, 1 Cal. 429; *Kuhland v. Sedgwick*, 17 Cal. 123; *Eich v. Taylor*, 17 Minn. 172; *Brady v. Valentine*, 3 N. Y. Misc. Rep. (Brooklyn City Ct.) 19; *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663; *Gawthrop v. Leary*, 9 Daly (N. Y.) 353; *Love v. Breedlove*, 75 Tex. 649; *Henderson v. Albright*, 12 Tex. Civ. App. 368; *Shockley v. Morgan*, (Ga. 1897) 29 S. E. Rep. 694; *Harrison v. Langston*, 100 Ga. 394.

If witnesses whose testimony is material fail to appear although duly subpoenaed, their absence will entitle the injured party to a new trial. *Hyburn v. State*, 26 Tex. App. 668; *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663; *Rugles v. Hall*, 14 Johns. (N. Y.) 112.

Failure to Subpoena Adverse Witnesses.—On the second trial of a cause, the plaintiff shifted his position and proved facts tending to support another theory of the origin of a fire from that adduced on the first trial, and did not subpoena his witnesses at the first trial as he was dissatisfied with their testimony. It was held that the defendant

was not entitled to a new trial for surprise and absence of such witnesses, as by exercise of due diligence they could have been subpoenaed by him. *Toledo, etc., R. Co. v. Endres*, 57 Ill. App. 69.

A party cannot complain of the absence of the adverse party when no efforts were made to subpoena him as a witness. *Kellogg v. Ballard*, 10 Wis. 440.

3. The promises of witnesses to be present and testify have been held sufficient excuse for failure to subpoena them. *Cahill v. Hilton*, 31 Hun (N. Y.) 114; *Tigue v. Annowski*, (Buffalo Super. Ct.) 24 N. Y. St. Rep. 931; *People v. Brown*, 46 Cal. 103. But see *People v. Baker*, 1 Cal. 404; *Frank v. Brady*, 8 Cal. 48; *Lightner v. Menzel*, 35 Cal. 452.

Where the defendant's attorney wrote to his principal witness to hold himself in readiness to attend the trial on notice by telegraph, which notice failed to reach him, a new trial was refused. *Gawthrop v. Leary*, 9 Daly (N. Y.) 353.

4. Failure to Take Deposition.—A new trial should be refused for absence of a witness although he was notified that the case was set for trial on a certain day and was notified by telegraph in time to be present. Due diligence in such case would require a party to subpoena the witness or procure his deposition. The same is true as to the absence of a codefendant. *Mayer v. Duke*, 72 Tex. 445.

If the testimony of the absent witness could have been procured previous to the trial, his absence will not afford a ground for a new trial. *Servis v. Cooper*, 33 N. J. L. 68.

5. Where a party during the trial went in search of witnesses, and returned with them while his adversary's counsel was addressing the jury, he should then have offered them as witnesses, and his failure to do so prevented him from having a new trial on account of their absence. *Dettman v. Zimmerman*, 53 Iowa 709; *Ketchum v. Breed*, 66 Wis. 85.

is surprised by the absence of witnesses.¹

g. SURPRISE OCCASIONED BY PREVAILING PARTY. — A new trial will be readily granted where the surprise is due to some conduct of the prevailing party² by which he has obtained some advantage,³ as by concealing a witness,⁴ inducing a witness to abscond to avoid subpoena,⁵ suppressing or concealing evidence in his possession,⁶ misleading counsel as to the nature of evidence to be introduced,⁷ or by a variance from his former testimony.⁸

Trial in Violation of Agreement. — Agreements of parties as to the continuance of a case⁹ or the time and place of the trial¹⁰ do not operate to put off the trial without the sanction of the court,¹¹ and will not ordinarily be regarded unless reduced to writing.¹² Yet surprise occasioned by violations of such agreements of counsel is a ground for a new trial in some instances.¹³ See in general article STIPULATIONS.

1. *Failure to Ask Continuance.* — *Gee v. Moss*, 68 Iowa 318; *Lincoln v. Staley*, 32 Neb. 63; *Cassiano v. Strano*, 4 Misc. Rep. (N. Y. City Ct.) 282; *Leonard v. Germania F. Ins. Co.*, 23 Civ. Pro. Rep. (N. Y. C. Pl.) 155, 2 Misc. Rep. (N. Y.) 548; *Watterson v. Watterson*, 1 Head (Tenn.) 1.

2. *Carey v. King*, 5 Ga. 75.

3. *Lyons v. Lawrence*, 12 Ill. App. 531; *Chicago City R. Co. v. McMahon*, 103 Ill. 485.

4. *Montpesson v. Randle*, Buller's N. P. 328.

5. *Carey v. King*, 5 Ga. 75; *Barron v. Jackson*, 40 N. H. 365.

Positive evidence must be shown that the adverse party has been implicated in keeping the witness away from the trial. *Marsh v. Monckton*, 1 Tyr. & G. 34.

An interference by one party to defeat the service of a subpoena on behalf of the other by inducing the witnesses to avoid service of the subpoena will ordinarily be good cause for a new trial. *Barron v. Jackson*, 40 N. H. 365.

6. *Suppressing Evidence.* — *Anderson v. George*, 1 Burr. 352; *Taylor v. Chicago, etc., R. Co.*, 80 Iowa 431.

Where the defendant's attorney admitted after the suit was commenced that he had a certain deed in his possession, but on the trial testified as a witness that he had sent the deed to a distant part of the country before he was subpoenaed by the plaintiff, it was held that a new trial must be granted. *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

A new trial will be granted for misconduct of the attorney of the adverse party in abstracting from a group of

documentary evidence certain material papers which were by agreement to be given to the jury, the moving party having been deceived and misled thereby. *Hastings v. McKinley*, 2 E. D. Smith (N. Y.) 45.

But where a prosecuting attorney by accident retained a paper of little importance in a criminal case, a new trial was refused, it appearing that the jury had remembered its contents. *State v. Pike*, 20 N. H. 344.

7. *Surprise by Misrepresentations.* — As to surprise by misrepresentations as to proof which a party would introduce, see *Tyler v. Hoornbeck*, 48 Barb. (N. Y.) 197.

8. *Variance from Former Testimony.* — *Phenix v. Baldwin*, 14 Wend. (N. Y.) 62; *Levy v. Brown*, 11 Ark. 16; *Lockwood v. Rose*, 125 Ind. 588.

9. See article CONTINUANCES, vol. 4, p. 831.

10. A new trial on the ground of surprise will be refused where the defendant relied upon an agreement to meet the plaintiff at court and set the cause for trial, but failed to reach an agreement before the cause was called. *Moody v. Harper*, 33 Miss. 465.

11. See article DEFAULTS, vol. 6, p. 173; *Falkenberg v. Gorman*, 71 Wis. 8; *Morse v. Budlong*, 5 Colo. App. 147.

12. See article DEFAULTS, vol. 6, p. 174, and article CONTINUANCES, vol. 4, p. 831; *Davis v. Ransom*, 57 Tex. 333; *Felton v. Moffett*, 29 Neb. 582.

A new trial should be granted for a violation of a written agreement to continue a case. *McBride v. Settles*, (Tex. App. 1890) 16 S. W. Rep. 422.

13. *Simpkins v. White*, 43 W. Va. 200; *Robertson v. Williams*, 81 Cal. 268;

h. SURPRISE DUE TO MISTAKES — (1) *Mistake of Law and Fact — Distinction.* — The prevailing rule is that a new trial will not be granted for surprise caused by a mistake of law. The mistake contemplated at the common law was a mistake of fact.¹ Statutes, however, make no distinction between mistakes of law and mistakes of fact,² and the tendency of later legislation is to create exceptions to the harsh rule of the common law³ and to grant new trials for mistakes of law where the application is made in good faith and it is apparent that the party will suffer injustice and that he was diligent in preparing his case.⁴

(2) *Mistakes of Attorneys.* — Mistakes of attorneys as to the competency of a witness,⁵ the sufficiency, relevancy, or materiality of certain evidence,⁶ the effect of a certain law upon the case at bar,⁷ the law of the case,⁸ the proper

Symon v. Bunnell, 80 Cal. 330; *Bennett v. Carey*, 72 Iowa 476; *Chicago, etc., R. Co. v. Gillett*, 38 Iowa 434; *Mordhorst v. Reynolds*, 23 Neb. 485.

Violating Agreement to Notify Opposing Counsel. — *Harbers v. Tribby*, 5 Ill. App. 411; *Keeley v. O'Brien*, 66 Ill. 358.

Agreement Denied — Mistake as to Agreement. — A defendant in a foreclosure suit, relying upon a promise of the plaintiff's attorney not to take a personal judgment for any deficiency that might remain after foreclosure of the mortgage, made no defense and permitted a default against him. After sale a personal judgment was entered against the defendant, and on motion for a new trial the promise was denied. It was apparent that the defendant was misled by his conversations with the plaintiff's attorney, yet there was no intention to deceive. It was held that the defendant was entitled to a new trial on the ground of mistake and surprise. *Hull v. Vining*, 17 Wash. 352.

1. *Fuller v. Hutchings*, 10 Cal. 526; *Morgan v. Houston*, 25 Vt. 570; *Handy v. Davis*, 38 N. H. 414; *Hite v. Lenhart*, 7 Mo. 22; *Craig v. Fanning*, 6 How. Pr. (N. Y. Supreme Ct.) 336; *Beals v. Beals*, 27 Ind. 77; *Phillips v. Wheeler*, 10 Tex. 536; *Carey v. King*, 5 Ga. 75; *Allen v. Chambers*, 18 Wash. 341. See also article *DEFAULTS*, vol. 6, p. 167.

2. *Douglass v. Todd*, 96 Cal. 655.

3. See article *DEFAULTS*, vol. 6, p. 170.

It is said that the rule refusing relief from mistakes of law "is justified by considerations of public policy; and yet so harsh a rule, founded upon a presumption so arbitrary, ought to be modified by every exception which can be admitted without defeating its pol-

icy." *Marx v. Epstein*, 1 Tex. App. Civ. Cas., § 1317, quoting *Moreland v. Atchison*, 19 Tex. 309.

4. *Necessity of Revenue Stamp.* — Where a party failed to make a case because of the failure to affix a revenue stamp to a mortgage, through an honest mistake as to the character of the contract, a new trial was granted to allow the party to pay the penalties and affix the stamp. *Hoppock v. Stone*, 49 Barb. (N. Y.) 524.

Surprise at Correct Rulings of the court may sometimes justify a new trial where the law is unsettled or in doubt and a refusal would impose injustice. *Chinn v. Taylor*, 64 Tex. 385; *State v. Williams*, 27 Vt. 724.

5. *Mistake as to Competency of Witness.* — *Klockenbaum v. Pierson*, 22 Cal. 160; *Packer v. Heaton*, 9 Cal. 568; *Fuller v. Hutchings*, 10 Cal. 523; *Bag-nall v. Roach*, 76 Cal. 106; *Haskins v. Smith*, 17 Vt. 263; *Morrison v. Murphy*, 36 Mo. App. 36.

Such ground is discretionary. *Johnson v. Watson*, 157 Pa. St. 454.

6. *Mistake as to Relevancy or Materiality of Evidence.* — *De Florez v. Reynolds*, 16 Blatchf. (U. S.) 397; *Northampton Nat. Bank v. Kidder*, 50 N. Y. Super. Ct. 246; *Dillingham v. Flack*, (Supreme Ct.) 17 N. Y. Supp. 867; *Emmerich v. Hefferan*, 53 N. Y. Super. Ct. 98; *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286; *Lyon v. Bolling*, 14 Ala. 753; *Morgan v. Marshall*, 7 J. J. Marsh. (Ky.) 316.

7. *Mistake as to Effect of the Law.* — *Webster Loom Co. v. Higgins*, 13 Blatchf. (U. S.) 349.

8. *Mistake as to Law of the Case.* — *Bates v. Bates*, 71 Cal. 307; *Dame v. Dame*, 38 N. H. 429; *Anderson v.*

defense,¹ or the burden of proof² are not grounds for a new trial.

(3) *Surprise by Rulings of Court.* — Surprise occasioned by the rulings of the court on points of law during the trial is rarely a ground for a new trial.³ If the attorney was mistaken, the client is bound by his mistake,⁴ and if the court is mistaken the remedy is to apply for a new trial on the ground of errors of law occurring at the trial.⁵ But in some instances, where the surprise is caused by rulings which the court is subsequently convinced are errone-

Market Nat. Bank, 66 How. Pr. (N. Y. Supreme Ct.) 8.

1. *Mistake as to Proper Defense.* — Winchester v. Grosvenor, 48 Ill. 517; Newman v. Schueck, 58 Ill. App. 328; Barrows v. Fox, 39 Minn. 61; Root v. Catskill Mt. R. Co., 33 Fed. Rep. 858.

A *Mistake in Withdrawing a Cross-complaint*, with a view to a separate action for damages, is not a ground for a new trial where the party consented to follow the advice of his attorneys and makes no complaint of misconduct, unfaithfulness, or incompetency on their part. Fincher v. Malcolmson, 96 Cal. 38.

2. *Mistake as to Burden of Proof.* — Ferguson v. Gilbert, 16 Ohio St. 88.

A *Mistake as to the Character of Evidence Necessary*, inducing a party to rest in security and not come prepared to rebut or explain the evidence adduced against him, is a mistake of law and not a sufficient ground for awarding a new trial. Phillips v. Wheeler, 10 Tex. 536.

A *Mistake as to the Effect of an Admission of Facts* in the defendant's affidavit for a continuance, consisting of an erroneous impression that the defendant would be thereby precluded from corroborating certain testimony or giving additional testimony, is not a ground for a new trial although the plaintiff was surprised. Thiele v. Citizens' R. Co., 140 Mo. 319.

3. *Surprise Occasioned by Rulings of Court.* — Fuller v. Hutchings, 10 Cal. 526; Packer v. Heaton, 9 Cal. 569; Lawrence v. Fulton, 19 Cal. 689; Klockenbaum v. Pierson, 22 Cal. 160; Perkins v. Brainard Quarry Co., 11 Misc. Rep. (N. Y. C. Pl.) 328; Giraudat v. Korn, 8 Daly (N. Y.) 406; Anderson v. Market Nat. Bank, 66 How. Pr. (N. Y. Supreme Ct.) 8; Johnson v. Watson, 157 Pa. St. 454.

"Erroneous views of the law, or advice of an attorney contrary to the ruling of the court, is not * * * the 'surprise' for which a new trial will

be granted." Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286.

"One ground of surprise on the part of the petitioners is that the County Court ruled the law different from what they expected, and that ruling was affirmed in this court. This could never form the basis of a petition for a new trial. This is a surprise that overtakes everybody concerned in the administration of civil justice. * * * Human opinion is infinitely various, and always will be." Morgan v. Hous-ton, 25 Vt. 570.

"The surprise alleged is only that the law was different from what the attorney supposed it to be — a state of feeling which in numerous instances, under like circumstances, has been experienced by other counsel, but has never availed to obtain a new trial." Fuller v. Hutchings, 10 Cal. 523.

Where a party's own testimony was rejected because of a statutory prohibition, he will not be entitled to a new trial on the ground of surprise, having made no effort to secure corroboratory witnesses. Bagnall v. Roach, 76 Cal. 106.

A bill of exceptions signed by a judge after his term of office had expired being void, although counsel stipulated that it should be so signed, a party is entitled to renew his motion for a new trial where he has abandoned his motion in reliance upon the stipulation. State v. Weiskittle, 61 Md. 48.

Mere surprise at the result of a trial cannot entitle the party so surprised to a new trial. Lane v. Brown, 22 Ind. 239.

Surprise of counsel occasioned by the court construing certain admissions to be less extensive than he had supposed them to be, is not a ground of new trial. Sanford Mfg. Co. v. Wiggin, 14 N. H. 441.

4. See *supra*, III. 5. c. (5) *Negligence and Incompetence of Counsel.*

5. See *infra*, III. 12. *Errors of Law Occurring at the Trial.* See also

ous, a new trial will be granted.¹

Mistakes and Inconsistent Rulings of Court. — Where the surprise is due to mistakes of the court as to matters of law² or of fact, or to inconsistent rulings,³ which a party has relied upon to his injury, a new trial is usually granted.

(4) *Mistake of Fact.* — A new trial will be granted for a mistake of fact by which a party has been misled to his injury, if he has exercised ordinary prudence in preparing his case.⁴

Mehan v. Chicago, etc., R. Co., 55 Iowa 305.

1. Rulings of the court which misled a party and prevented the introduction of further evidence would constitute surprise if the rulings were correct, but if erroneous they would seem to be errors of law. The decisions do not indicate which ground was relied upon. See *Beekman v. Bemus*, 7 Cow. (N. Y.) 31; *Sanchez v. McMahon*, 35 Cal. 224; *McLennan v. Prentice*, 79 Wis. 488.

Where the defendant offered testimony, but neglected to introduce any because the court intimated that the plaintiff had proved no case, and the jury found for the plaintiff, a new trial will be granted. *Dunham v. Baxter*, 4 Mass. 79.

2. Where a cause has been tried upon an erroneous theory as to the law applicable thereto, assumed by the court and all the parties, the Supreme Court will reverse the cause and grant a new trial. *Guerin v. Smith*, 62 Mich. 369.

Errors as to Statutes. — Where a cause was tried upon the theory of the court that the rights of the parties were determined by a statute, a discovery after trial that the statute had been repealed is good ground for a new trial. *Belmont v. Morrill*, 69 Me. 314.

Where the court has overlooked a statute which fixed the rights of the parties a new trial will be granted. *Cooper v. Cooper*, 86 Ind. 75; *Tarrar v. Nunamaker*, 5 Rich. L. (S. Car.) 484.

3. **Surprise from Inconsistent Rulings.** — Counsel are justified in relying upon repeated rulings of the court concerning the evidence, and if they are misled thereby and inconsistent rulings are made at the time when the decision is rendered, a new trial should be granted for surprise. *Parks v. Nichols*, 20 Ill. App. 143.

Where a party is ready to prove an important fact in his chain of title, but is persuaded not to do so by an intimation or ruling of the court that such

proof is not necessary, a new trial should be granted for mistrial through mistake of the court. *McLennan v. Prentice*, 79 Wis. 488; *Helms v. Chadbourne*, 48 Wis. 690.

4. A new trial will not be granted for surprise caused by the failure to notice that a lease relied upon was a lease for more than one year, as such mistake could have been avoided by ordinary prudence. *Borderre v. Den*, 106 Cal. 594.

Mistake in Agreement as to Facts. — Where the defendant's counsel entered into an agreed statement of the facts as to the common source of title, through mistake and ignorance that there were two persons of the same name in the chain of title, a new trial will be granted, it being made to appear that the court was misled by the agreement and that in fact the plaintiff had no title. *McCorkle v. Everett*, (Tex. Civ. App. 1897) 41 S. W. Rep. 136.

Mistake in Public Records. — A party, on examining the records, found that a power of attorney, upon which his adversary must rely, had no seal attached to the certificate of acknowledgment of the notary. On the trial he was surprised by his adversary producing a certified copy of the instrument indicating a seal thereon. He moved for a continuance on the ground that he did not expect a false copy of a record to be introduced and therefore failed to subpoena witnesses. It was held that a new trial should have been granted. *Holbrook v. Nichol*, 36 Ill. 161.

A new trial should be granted for surprise where a party relied upon an official abstract of title and was surprised by evidence contradicting the abstract on a material point. *Shaw v. Henderson*, 7 Minn. 480.

A new trial should be granted for surprise caused by reliance upon a copy of a judgment where it is discovered after trial that the copy is not correct and that errors affected the result. *Farnham v. Jones* 32 Minn. 7.

i. PROBABILITY THAT NEW TRIAL WILL CHANGE RESULT — Examination of Pleadings and Evidence. — Although the applicant was surprised by some accident or mistake which ordinary prudence could not have guarded against, a new trial will not be granted unless it also appears that the judgment is erroneous, that the applicant has a good cause of action or a good defense,¹ and that the evidence he can produce on a new trial is such as will probably change the result.²

Harmless Error. — New trials on the ground of surprise are granted only in furtherance of justice, and not for technical reasons. The motion will be refused if the evidence in dispute or omitted by surprise is immaterial³ or the surprise complained of is for some

Error of Judgment — Misapprehension. — Where an attorney neglected to make certain necessary defenses because he misunderstood a conversation of opposing counsel as to the line of action he intended to pursue, a new trial will not be granted. "The word 'accident,' used in this connection, indicates that the kind of mistake or error intended is such as results from fortuitous circumstances, and not such as arises from an error of judgment or misapprehension, on the part of the counsel, in reference to the points of the case as they arise in the course of the trial. It would be a most unwise policy to grant new trials for such mistakes and errors." *Handy v. Davis*, 38 N. H. 411.

Mistake as to Quantum of Evidence. — A new trial will not be granted on the ground of surprise where the moving party had sufficient evidence but failed to introduce it because he thought the evidence introduced was sufficient to entitle him to prevail, as such surprise was occasioned rather by the final decision than by anything which occurred at the trial. *Smith v. Rentz*, 73 Hun (N. Y.) 195; *Foster v. Easton*, (Supreme Ct.) 19 N. Y. St. Rep. 447.

A party charged with keeping a disorderly house was surprised by evidence that his tenant in the basement of the house kept such a house. It was held that a new trial would not be granted, as he was negligent in failing to disclose all the facts to his attorney. *People v. O'Brien*, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 203.

1. See *infra*, III. 5. 1. (1) *Affidavits in Support of Motion*.

A new trial will not be granted for surprise in order to permit an inequitable defense, as payment by winning

money by gambling. *Cochrane v. Middleton*, 13 Tex. 275.

2. **That New Trial Will Not Change Result** — *Arkansas*. — *Coker v. State*, 20 Ark. 53; *Dunnahoe v. Williams*, 24 Ark. 264.

California. — *Cook v. De La Guerra*, 24 Cal. 237; *People v. Jocelyn*, 29 Cal. 562; *Brooks v. Douglass*, 32 Cal. 208; *Cartery's Estate*, 56 Cal. 470; *McGuire v. Drew*, 83 Cal. 225.

Georgia. — *Southwestern R. Co. v. Craig*, 62 Ga. 361; *Ferrill v. Marks*, 76 Ga. 21.

Mississippi. — *Haber v. Lane*, 45 Miss. 608.

Missouri. — *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392.

Montana. — *O'Donnell v. Bennett*, 12 Mont. 242.

Nevada. — *McCluskey v. Gerhauser*, 2 Nev. 47.

New Hampshire. — *Handy v. Davis*, 38 N. H. 411.

New York. — *People v. O'Brien*, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 203.

Texas. — *Simnacher v. State*, (Tex. Crim. App. 1897) 43 S. W. Rep. 512.

United States. — *De Florez v. Reynolds*, 16 Blatchf. (U. S.) 397; *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 345.

A new trial will not be granted for surprise caused by a change of theory on the second trial where the result of a new trial would not be different and the evidence to be offered on a new trial is cumulative and incredible. *Toledo, etc., R. Co. v. Endres*, 57 Ill. App. 69.

3. *Chicago, etc., R. Co. v. Vosburgh*, 45 Ill. 311; *Owens v. State*, 35 Tex. Crim. Rep. 345; *Hazen v. State*, 58 Ind. 197; *McClave v. Gibb*, 11 Misc. Rep. (N. Y. Super. Ct.) 708.

reason harmless.¹ It must appear that the surprise had a material bearing upon the case and affected the verdict.²

Cumulative and Impeaching Evidence. — It is held by some courts that a new trial should not be granted for surprise which merely prevented the introduction of cumulative³ or impeaching⁴ evidence. This rule seems to have been applied because such evidence was not sufficient in the case decided to change the result, or because the court failed to distinguish the case from one involving only newly discovered evidence. The true rule appears to be that if the evidence omitted or prevented by surprise is probably sufficient to change the result, a new trial should be granted although such evidence is cumulative and impeaching.⁵

1. Evidence Immaterial or No Injury Resulting — *Alabama*. — *Beadle v. Graham*, 66 Ala. 102.

Arkansas. — *Merrick v. Britton*, 26 Ark. 496.

California. — *Cook v. De La Guerra*, 24 Cal. 237; *Brooks v. Douglass*, 32 Cal. 208; *Butler v. Vassault*, 40 Cal. 74.

Florida. — *Orthing v. Gundersheimer*, 12 Fla. 640.

Indiana. — *Todd v. State*, 25 Ind. 212.

Iowa. — *Key v. Des Moines Ins. Co.*, 77 Iowa 174.

Kentucky. — *Holley v. Christopher*, 3 T. B. Mon. (Ky.) 14; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81.

Mississippi. — *Dorr v. Watson*, 28 Miss. 383; *Haber v. Lane*, 45 Miss. 608.

New York. — *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

Rhode Island. — *Eaton v. Case*, 17 R. I. 429.

Vermont. — *Blake v. Howe*, 1 Aik. (Vt.) 306.

England. — *Hartwright v. Badham*, 11 Price 383.

Surprise at the unexpected appearance of an unknown witness who testifies on the fifth trial that he saw the accident will not be sufficient ground for a new trial where it does not appear that on excluding such testimony the result would be different or that the result would probably be changed on a new trial. *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

Although a party was surprised a new trial will not be granted if he was not placed in a worse position than he would have been in if prepared and advised of the evidence creating the surprise. *Bingham v. Walk*, 128 Ind. 164.

Surprise at the introduction of false evidence is not a sufficient ground

where such evidence related solely to an immaterial point and did not in fact influence the judgment. *Guy v. Hanly*, 21 Cal. 397.

A new trial will not be granted for absence of a witness where the facts which it was expected to prove by the absent witness were fully proved by another witness. *Schlotter v. State*, 127 Ind. 493.

Schellhous v. Ball, 29 Cal. 605; *Wolf v. Brass*, 72 Tex. 133.

Where a motion for a new trial, on the ground of surprise, by reason of illness of counsel during the trial, did not allege that such illness was of such a nature as to affect his faculties, a new trial was refused. *Simmons v. Murray*, 13 Daly (N. Y.) 477. See also *Whillworth v. Murphy*, 29 Iowa 470.

A new trial, applied for on the ground of surprise, should not be granted when it appears that the new testimony to be offered is merely cumulative and not sufficient to change the result. *State v. Wightman*, 27 Mo. 121; *Roach v. Colbern*, 76 Mo. 653; *Toledo, etc., R. Co. v. Endres*, 57 Ill. App. 69; *Bland v. Pope*, 4 J. J. Marsh. (Ky.) 595; *Higginbotham v. State*, 3 Tex. App. 447.

3. Cumulative Evidence. — *Toledo, etc., R. Co. v. Endres*, 57 Ill. App. 69; *Bland v. Pope*, 4 J. J. Marsh. (Ky.) 595; *State v. Wightman*, 27 Mo. 121; *Roach v. Colbern*, 76 Mo. 653; *Higginbotham v. State*, 3 Tex. App. 447.

4. A new trial will not be granted for surprise to enable a party to impeach a witness. See *supra*, III. 5. *f. (2) Impeachment of Witness.*

5. The rule that a new trial will not be granted for merely cumulative and impeaching testimony applies to newly discovered evidence, and not to evidence omitted or prevented by surprise. In a case of surprise by a variance in

j. PROMPT COMPLAINT OF SURPRISE. — A new trial will be refused where a party makes no complaint at the time of the surprise,¹ as the error is waived by proceeding without objection or complaint. A delay in the discovery of a mistake until some time after judgment may bar relief if due to negligence.²

k. FAILURE TO AVERT CONSEQUENCES OF SURPRISE — (1) *General Rule.* — The general rule is that a surprised party must promptly take such steps as he can to avert the consequences of the surprise, either by the introduction of other available testimony or by continuing the case or having it dismissed without prejudice.³

testimony of a witness it is immaterial that the testimony omitted in reliance on such witness is cumulative and impeaching. *Levy v. Brown*, 11 Ark. 16; *McFarland v. Clark*, 9 Dana (Ky.) 134.

A surprised party has a right to contradict and rebut the evidence by which he was surprised. *McFarland v. Clark*, 9 Dana (Ky.) 134.

Where surprise is caused by the absence of a material witness who absented himself during the trial, and the court overrules a motion for a continuance on that ground, on a motion for a new trial for such surprise no affidavit of the proposed witness is necessary, but reference may be had to the defendant's affidavit for a continuance. The rule requiring the affidavit of a newly discovered witness, stating what his testimony will be, is not applicable to surprise by absence of a witness. *Stanley v. State*, 16 Tex. App. 392.

Surprise Preventing Impeachment. — Where a party is surprised by the testimony of a witness and applies for a new trial, it is immaterial that the testimony omitted would tend to impeach such witness. In this respect surprise differs from newly discovered evidence. *McFarland v. Clark*, 9 Dana (Ky.) 136; *Louisville, etc., R. Co. v. Bickel*, 97 Ky. 222.

1. See *infra*, III. 5. *k.* (3) *Failure to Apply for Continuance*; III. 5. *k.* (4) *Failure to Apply for Nonsuit*. See also *Mullens v. State*, 35 Tex. Crim. Rep. 149; *Maher v. Spenhall*, 96 Iowa 634.

The general rule is that a party surprised on the trial must apply for relief at the earliest practicable moment, and by such method as will produce the least vexation, expense, and delay. *Delmas v. Martin*, 39 Cal. 555; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.

Where the trial occurs in the absence of that applicant and his witness, who

return before the adverse party has left the court-room, an application should be made at once to reopen the case. *Ketchum v. Breed*, 66 Wis. 85; *Dettman v. Zimmerman*, 53 Iowa 709.

2. After a delay of several months a new trial will not be granted for surprise on discovery of an omission in a sheriff's return. *Scott, etc., Lumber Co. v. Sharvey*, 62 Minn. 528.

In *Donnelly v. McArdle*, 14 N. Y. App. Div. 217, a new trial was granted for surprise under peculiar circumstances, where nine months after a motion to vacate the judgment was overruled a party moved for a new trial on the ground of surprise by withdrawal of his attorneys three and a half years before. But see dissenting opinions in this case.

Where the testimony of a witness is materially different from his previous statements to the party, and the discrepancy is not discovered until reading the settled case after trial, the trial court may in its discretion grant or refuse a new trial although no complaint of surprise was made at the trial. *Wester v. Hedberg*, 68 Minn. 434.

3. *Statement of Rule.* — "If a party be surprised by an unforeseen occurrence at the trial, he should make his misfortune known to the court instantly and ask for a reasonable postponement to enable him to produce the countervailing proof. If he can relieve himself from his embarrassment by any mode, either by a nonsuit, or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief." *Bragg v. Moberly*, 17 Mo. App. 221, quoted in *Thiele v. Citizens' R. Co.*, 140 Mo. 319.

(2) *By Introducing Available Testimony.* — If a party neglects to introduce other available testimony to contradict the evidence creating the surprise or to take the place of evidence omitted by mistake or excluded by the court, a new trial will be refused.¹

(3) *Failure to Apply for Continuance.* — If the accident or surprise occur during the trial, it is the duty of the aggrieved party to call the court's attention to his misfortune at the earliest possible moment by a motion for a continuance supported by the usual affidavits.² If he proceeds with the trial without complaint he waives his rights.³ After speculating on the chances of a favorable result, a party is not entitled to a new trial on the ground of surprise.⁴

Procedure When Surprised—Refusing Continuance and Granting New Trial. —

When a party is surprised at the trial he should make prompt complaint to the court, stating what facts can be established by absent witnesses. The court, to avoid delay, may treat affidavits in support of the motion for a continuance as made, and may overrule the motion with leave to make the affidavit to complete the record. If after the trial has closed the court becomes satisfied that prejudice resulted from the surprise, a new trial may be granted. The applications for continuance and new trial are both addressed to the sound discretion of the trial court, and its rulings thereon will not be disturbed unless there has been an abuse of discretion. *Gotzian v. McCollum*, 8 S. Dak. 186.

1. Where a party has it in his power to produce evidence that will contradict the testimony which is claimed to have been a surprise, and fails to make use of such power, his negligence will bar a new trial. *Rockford, etc., v. R. Co. v. Rose*, 72 Ill. 183; *Mooney v. Kinsey*, 90 Ind. 33; *State v. Hollier*, 49 La. Ann. 371; *Primm v. Mensing*, 14 Tex. Civ. App. 395; *Henderson v. Albright*, 12 Tex. Civ. App. 368.

Surprise by a Lost Instrument should be averted by proving the contents of the instrument by secondary evidence or by motion for a continuance. *Lindard v. Crossland*, 10 Tex. 462.

2. See article CONTINUANCES, vol. 4, p. 822.

3. *California.* — *Dewey v. Frank*, 62 Cal. 343; *Schellhous v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 38 Cal. 456.

Illinois. — *Bell v. Gardner*, 77 Ill. 319.

Indiana. — *Grant v. Popejoy*, 15 Ind. 311.

Kansas. — *Kansas State Agricultural College v. Linscott*, 30 Kan. 240.

Kentucky. — *Shipp v. Suggett*, 9 B. Mon. (Ky.) 5.

Missouri. — *Albert v. Seiler*, 31 Mo. App. 247.

New Jersey. — *Read v. Barker*, 30 N. J. L. 378.

New York. — *Hurlbert v. Parker*, 43 Hun (N. Y.) 634, 5 N. Y. St. Rep. 454; *Seaman v. Koehler*, (Supreme Ct.) 12 N. Y. St. Rep. 582; *People v. Mack*, 2 Park. Cr. Rep. (Dutchess Special Term) 673; *De Leyer v. Michaels*, 5 Abb. Pr. (N. Y. C. Pl.) 203.

Rhode Island. — *Potter v. Padelford*, 3 R. I. 162.

Texas. — *Devine v. Martin*, 15 Tex. 25.

Reason of the Rule. — "It must be shown that immediately when the cause of surprise arose he made objection, or called the matter to the attention of the trial court, and promptly sought to avail himself of some legal relief to which he might be entitled. It is not sufficient that he hold the fact of this surprise as a secret in his own bosom, and make no manifestation of it until after the verdict is rendered and he discovers that it is against him. If the rule were otherwise, it would result in giving an unfair advantage to the surprised party. It would be difficult to bring about the final determination of a cause if this mode of practice were permitted to shrewd and able counsel." *Lee-Clark-Andreesen Hardware Co. v. Yankee*, 9 Colo. App. 443.

4. *Alabama.* — *Allington v. Tucker*, 38 Ala. 655; *Baker v. Boon*, 100 Ala. 622; *Hoskins v. Hight*, 95 Ala. 284; *Barron v. Robinson*, 98 Ala. 351; *Simpson v. Golden*, 114 Ala. 336; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496.

(4) *Failure to Apply for Nonsuit.* — Nor will a new trial be granted to the plaintiff for surprise occurring at the trial unless he asked for a continuance or moved for a nonsuit, as a plaintiff

- Arkansas.* — Nickens v. State, 55 Ark. 567; Overton v. State, 57 Ark. 60.
- California.* — Rogers v. Huie, 1 Cal. 429; Turner v. Morrison, 11 Cal. 21; Live Yankee Co. v. Oregon Co., 7 Cal. 40; Dewey v. Frank, 62 Cal. 343; Schellhous v. Ball, 29 Cal. 605; Doyle v. Sturla, 38 Cal. 456; Bailey v. Richardson, 66 Cal. 416; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416.
- Colorado.* — Reynolds v. Manville, 5 Colo. App. 486; Lee-Clark-Andreesen Hardware Co. v. Yankee, 9 Colo. App. 443.
- Georgia.* — Crawford v. Georgia Pac. R. Co., 86 Ga. 5; Carey v. King, 5 Ga. 75.
- Illinois.* — Kendall v. Limberg, 69 Ill. 355; Dueber Watch Case Mfg. Co. v. Lapp, 35 Ill. App. 372; Chicago, etc. R. Co. v. Meech, 163 Ill. 305; Toledo, etc., R. Co. v. Endres, 57 Ill. App. 69; Kunkel v. Chicago, 64 Ill. App. 354.
- Indiana.* — Grant v. Popejoy, 15 Ind. 311; Washer v. White, 16 Ind. 136; Lane v. State, 27 Ind. 108; Kelley v. Kelley, 8 Ind. App. 606; Stewart v. Smith, 111 Ind. 526.
- Iowa.* — Mays v. Deaver, 1 Iowa 216; Cahalan v. Cahalan, 82 Iowa 416; Mehan v. Chicago, etc., R. Co., 55 Iowa 305; Smith v. State Ins. Co., 58 Iowa 487; Gee v. Moss, 68 Iowa 318; Nolan v. Grant, 53 Iowa 392; Dettman v. Zimmerman, 53 Iowa 709; State v. Morgan, 80 Iowa 413.
- Kansas.* — Tripp, etc., Boot, etc., Co. v. Martin, 45 Kan. 765.
- Kentucky.* — Shipp v. Suggett, 9 B. Mon. (Ky.) 5; Thompson v. Porter, 4 Bibb (Ky.) 70; Kirtley v. Kirtley, 1 J. J. Marsh. (Ky.) 96.
- Louisiana.* — State v. Chambers, 43 La. Ann. 1108; McClure v. King, 15 La. Ann. 220.
- Minnesota.* — Elch v. Taylor, 17 Minn. 172.
- Missouri.* — Wells v. Sanger, 21 Mo. 354; Albert v. Seiler, 31 Mo. App. 247; Dalton v. Shaffner, 38 Mo. App. 165; Bragg v. Moberly, 17 Mo. App. 221; Thiele v. Citizens' R. Co., 140 Mo. 319; Frick Co. v. Caffery, 48 Mo. App. 120.
- Nebraska.* — Goracke v. Hintz, 13 Neb. 390; Van Etten v. Butt, 32 Neb. 285; Lincoln v. Staley, 32 Neb. 63; McMurtry v. Blake, 45 Neb. 213; Corbett v. National Bank, 44 Neb. 230; Kreamer v. Irwin, 46 Neb. 827.
- New Hampshire.* — Willard v. Wetherbee, 4 N. H. 118.
- New York.* — Hartman v. Morning Journal Assoc., (C. Pl.) 46 N. Y. St. Rep. 403; Van Tassell v. New York, etc., R. Co., 1 Misc. Rep. (N. Y. C. Pl.) 312; Cassiano v. Strano, 4 Misc. Rep. (N. Y. City Ct.) 282; Leonard v. Germania F. Ins. Co., 2 Misc. Rep. (N. Y. C. Pl.) 548, 23 Civ. Pro. Rep. (N. Y.) 155; Randall v. Packard, 1 Misc. Rep. (N. Y. C. Pl.) 347; Messenger v. New York Fourth Nat. Bank, 6 Daly (N. Y.) 190; Berman v. Goldsand, 22 Misc. Rep. (N. Y. Supreme Ct.) 735; Peck v. Hiler, 30 Barb. (N. Y.) 655; Glendenning v. Canary, 5 Daly (N. Y.) 489; Sayer v. King, (Supreme Ct.) 47 N. Y. Supp. 422.
- Rhode Island.* — Davidson v. Wheeler, 17 R. I. 433; Riley v. Shannon, 19 R. I. 503.
- Tennessee.* — McAuly v. Lockhart, 4 Humph. (Tenn.) 229.
- Texas.* — Cotton v. State, 4 Tex. 260; Hartless v. State, 32 Tex. 95; Higginbotham v. State, 3 Tex. App. 447; Poage v. State, 43 Tex. 455; Chambers v. Ker, 6 Tex. Civ. App. 373; Love v. Breedlove, 75 Tex. 649; Childs v. State, 10 Tex. App. 183; Walker v. State, 7 Tex. App. 245; Pickett v. Martin, (Tex. 1891) 16 S. W. Rep. 1007; Reagan v. State, 28 Tex. App. 227; Robbins v. State, 33 Tex. Crim. Rep. 573; Robinson v. State, 35 Tex. Crim. Rep. 181; Taylor v. State, 32 Tex. Crim. Rep. 110; Texas, etc., R. Co. v. Porter, (Tex. Civ. App. 1897) 41 S. W. Rep. 88; Sargent v. State, 35 Tex. Crim. Rep. 325; Bryant v. State, 35 Tex. Crim. Rep. 394; Loonie v. Burt, 80 Tex. 582.
- Vermont.* — Badger v. State, 69 Vt. 217.
- Virginia.* — Young v. Com., 4 Gratt. (Va.) 550.
- Washington.* — Pincus v. Puget Sound Brewing Co., 18 Wash. 108.
- United States.* — Flint, etc., R. Co. v. Marine Ins. Co., 71 Fed. Rep. 210.
- When Motion for Continuance Not Necessary.** — A motion for a continuance will not be required where the surprise

can always avert the consequences of surprise in this way.¹ The

occurs at the last stage of a jury trial, at the close of the evidence, at a time when a party and his counsel have no time to consult and decide what course should be pursued. *Delmas v. Martin*, 39 Cal. 558.

Where a party surprised at the trial does not know of sufficient evidence, or to what his absent witness can testify, and is therefore unable to make a sufficient showing for a continuance, a motion for a continuance is not a prerequisite to obtaining a new trial on the ground of surprise. *Rodriguez v. Comstock*, 24 Cal. 88; *Russell v. Reed*, 32 Minn. 45.

But it is doubtful whether a party should forestall the action of the court by passing upon his own application for a continuance in this way. If the facts known are insufficient for a continuance a new trial may be obtained for newly discovered evidence discovered after the surprise. See *infra*, II. *Newly Discovered Evidence*.

A failure to move for a continuance will not bar the accused from a new trial for surprise at the testimony of a witness that he and the affiant saw the alleged rape committed, where it appears that the accused as well as the prosecution had made many unsuccessful efforts to secure the affiant's testimony and the affiant denies the testimony of the witness. *Owens v. State*, 35 Tex. Crim. Rep. 345.

In *Cleveland Nat. Bank v. Reynolds*, 76 Ga. 834, a motion for a continuance was excused where the defendant was absent on account of sickness of relatives and her attorney was not aware of this fact and was unable to prove it as a ground for a continuance.

Failure to Except to Refusal of Continuance. — A new trial will not be granted because of the absence of a party on account of sickness where his counsel applied for a continuance but preserved no exception when the continuance was refused. *Townsend v. Rhea*, 18 Ky. L. Rep. 901, (Ky. 1897) 38 S. W. Rep. 865.

Error in Refusing a Continuance in a proper case should be corrected on motion for a new trial on the ground of surprise, and a failure to do so is reversible error. *Hodde v. State*, 8 Tex. App. 382.

Refusal to Pay Costs of Continuance. — In *Eltzroth v. Ryan*, 91 Cal. 584, an

attorney asked for a short postponement of the case on the ground that he had just been employed and had not had time to consult the attorney who prepared the case and who was unable to appear because of sickness. It was held no ground for a new trial that the court made it a condition of granting the continuance that the party asking it should pay the costs occasioned thereby, which condition was not accepted by the party.

1. *California*. — *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.

Georgia. — *Beckford v. Chipman*, 44 Ga. 543.

Illinois. — *Bell v. Gardner*, 77 Ill. 319.

Indiana. — *Cummins v. Walden*, 4 Blackf. (Ind.) 307; *Atkisson v. Martin*, 39 Ind. 243; *Graeter v. Fowler*, 7 Blackf. (Ind.) 554; *Travis v. Barkhurst*, 4 Ind. 171; *Larrimore v. Williams*, 30 Ind. 18; *Helm v. Huntington First Nat. Bank*, 91 Ind. 44; *Working v. Garn*, 148 Ind. 546.

Missouri. — *Savoni v. Brashear*, 46 Mo. 345; *Albert v. Seiler*, 31 Mo. App. 247; *Dalton v. Shaffner*, 38 Mo. App. 165.

New York. — *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Messenger v. New York Fourth Nat. Bank*, 6 Daly (N. Y.) 190.

Texas. — *Zollicoffer v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 775.

At the time when a party is surprised he should move for a continuance, or for a nonsuit, with leave to set it aside, instead of taking the chances of a verdict in his favor. *Kilgore v. Jordan*, 17 Tex. 346; *Dotson v. Moss*, 58 Tex. 152.

Although the statute permits a new trial on the ground of "accident or surprise which ordinary prudence could not have guarded against," the plaintiff should dismiss without prejudice when surprised. In *Helm v. Huntington First Nat. Bank*, 91 Ind. 44, the rule was adhered to. *Hammond, J.*, observed: "But it seems to be quite well established that a plaintiff is not entitled to a new trial on account of surprise at any evidence given for the defendant, for the reason that he has it in his power to dismiss his case, without prejudice to his right, and commence another suit."

Failure to Take Nonsuit. — A new trial will not be granted to a plaintiff on the

defendant, however, can only move for a continuance.¹ It has been held that a plaintiff must dismiss without prejudice if his application for a continuance is refused;² but it would seem that such ruling deprives the plaintiff of a statutory right to a new trial for accident and surprise.³

1. EVIDENCE OF SURPRISE—(1) *Affidavits in Support of Motion*.—The affidavits in support of an application for a new trial should state the circumstances of the surprise and the facts showing the diligence of the applicant,⁴ or excusing the absence of a party, attorney, or witness.⁵ The affidavits should be made

ground of surprise where he has not offered to take a nonsuit. *Callender Insulating, etc., Co. v. Badger*, 30 Ill. App. 314.

Where a plaintiff is surprised by the defendant's evidence and knows of sufficient evidence in rebuttal which could be produced on another trial, his only remedies are to take a nonsuit before the case is submitted to the jury or to obtain a continuance. A new trial will not be granted for surprise and newly discovered evidence, since the evidence was not discovered after trial. *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 375; *Hellman v. Schwartz*, 44 Ill. App. 84; *Beadle County Nat. Bank v. Hyman*, 33 Ill. App. 618.

1. The Defendant Can Only Continue Case.—"But the rule of law with reference to granting new trials on the ground of surprise is not as liberal in its application to plaintiffs as to defendants. A plaintiff can always avert the consequences of a surprise by moving for a continuance or dismissing his case. To proceed with the case is to waive the surprise. The fact that there was a plea of set-off did not prevent a motion to the court for leave to dismiss or to continue, and the court would have acted upon such motion as sound legal discretion should require." *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372.

2. Plaintiff Must Dismiss if Continuance Refused.—Where a plaintiff is unable to make a case on account of accident or surprise it is held that he must ask a continuance, and if this is refused he must dismiss. In *Tripp, etc., Boot, etc., Co. v. Martin*, 45 Kan. 765, it was held that if a plaintiff finds himself unprepared to meet the defendant's evidence he should ask at the trial for time to meet it. Generally this will be allowed upon such terms as may seem

just; but if this is not allowed, he always has it in his power to dismiss his action without prejudice, which will leave him at liberty to sue again for the same cause of action. He cannot, as a general rule, be permitted to take the chances upon the evidence to which he does not object, and, when judgment is rendered against him, obtain a new trial simply because he was surprised at the evidence presented. *Approved in Argentine v. Simmons*, (Kan. 1898) 52 Pac. Rep. 424.

3. The reason of the rule requiring a plaintiff to make prompt complaint of accident or surprise is to prevent an estoppel by silence and also to take such steps as are possible during the trial to overcome the effect of the surprise by a continuance or postponement of the case. The authorities cited in the last note above hold in effect that a plaintiff has no right to a new trial on the ground of surprise, since a plaintiff can always dismiss without prejudice.

4. Affidavits Must Show Diligence.—*Brooks v. Lyon*, 3 Cal. 113; *Brownson v. Reynolds*, 77 Tex. 254; *Johnson v. Templeton*, 60 Tex. 238; *Nichols v. Dibrell*, 61 Tex. 539; *Harn v. Phelps*, 65 Tex. 592; *Merrill v. Roberts*, 78 Tex. 28; *Woolley v. Sullivan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 919.

5. On a motion for a new trial it is not enough that the applicant account for his absence at his trial. He should also show due diligence in preparing and that because of his absence his preparation was unavailing. *Mussin v. Collins*, 1 A. K. Marsh. (Ky.) 350.

An affidavit that the defendant was absent from court on the day when the case was called and tried, because somebody had told him that the presiding judge had given public notice to all parties in litigated cases that they need not attend court on that day, is in-

by the person who knows the facts and sustained the surprise; and this is usually the applicant's attorney.¹

Affidavit of Merits. — The application of a defendant should be accompanied by a showing that he has a good defense to the action.² Facts should be stated to show that the applicant was injured by the surprise and that a new trial will probably result in his favor.³ The names of absent witnesses should be stated.⁴

Affidavit of Witness. — The affidavit of the absent witness should accompany the motion,⁵ or reasons should be given why it was

sufficient, as it must appear from whom such information was obtained and that it was true. *Massey v. Allen*, 48 Ga. 21.

Where a new trial is asked for absence of material witnesses who attended the trial but were absent and could not be found when wanted, the motion will be denied if none of the affidavits states whether or not the witnesses were absent by consent of the applicant. *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, *affirmed* 128 Ill. 613.

1. Affidavit of Attorney. — The affidavit of an attorney is sufficient to show a mistake by him in omitting material evidence. *Greene v. Farlow*, 138 Mass. 146.

The best evidence of surprise occurring during the trial occasioned by a question of law is the affidavit of the attorney, and not of the party surprised. *Schellhous v. Ball*, 29 Cal. 605.

Affidavits of persons who heard the testimony of the witness before trial are the best evidence of surprise. *Lillienthal v. Anderson*, 1 Idaho 673.

2. Arkansas. — *Merrick v. Britton*, 26 Ark. 496.

California. — *Cook v. De La Guerra*, 24 Cal. 237.

Georgia. — *Ferrill v. Marks*, 76 Ga. 21; *Ross v. McDuffie*, 91 Ga. 120.

Illinois. — *Byrne v. O'Neill*, 35 Ill. App. 361; *Porter v. Triola*, 84 Ill. 325.

Indiana. — *Prudential Ins. Co. v. De Bord*, 17 Ind. App. 224.

Kentucky. — *Robinson v. Amann*, 1 Ky. L. Rep. 326; *Hayman v. Hallam*, 79 Ky. 389.

Minnesota. — *O'Keefe v. Lenfest*, 35 Minn. 237.

Mississippi. — *Haber v. Lane*, 45 Miss. 608.

Texas. — *Sheppard v. Avery*, (Tex. Civ. App. 1895) 32 S. W. Rep. 791; *Holliday v. Holliday*, 72 Tex. 581.

Vermont. — *Dow v. Hinesburgh*, 1 Aik. (Vt.) 35.

Wisconsin. — *Holden v. Kirby*, 21 Wis. 150; *Stilson v. Rankin*, 40 Wis. 527.

A mere statement in an affidavit that the defendant has a good defense to the action, without describing the defense, is insufficient. *Ross v. McDuffie*, 91 Ga. 120.

Where a case is tried out of its regular order it is not necessary to show a meritorious defense or diligence. *Donallen v. Lennox*, 6 Dana (Ky.) 89; *Price v. Ford*, 7 T. B. Mon. (Ky.) 399.

No additional showing is required where a garnishee applies for a new trial for surprise and has been examined in court, as the court will take notice of his defense as stated in his examination. *Storm Lake First Nat. Bank v. Harwick*, 74 Iowa 227.

The affidavit of the defendant's attorney that the allegations of the answer on file can be proved appears to be sufficient. *Lanius v. Shuber*, 77 Tex. 24.

See in general article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1. p. 338.

3. Blake v. Howe, 1 Aik. (Vt.) 306; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Holley v. Christopher*, 3 T. B. Mon. (Ky.) 14; *Cook v. De La Guerra*, 24 Cal. 237.

"The defendant ought not only to show a surprise, but to show that he is injured by it." *Blake v. Howe*, 1 Aik. (Vt.) 306.

A new trial will be refused where it is disclosed that the proposed witness is a fugitive from justice and cannot be procured. *Maloney v. State*, (Tex. Crim. App. 1898) 43 S. W. Rep. 980.

4. The Names of the Absent Witnesses for whose testimony a new trial is requested should be stated, in order that the adverse party may procure their affidavits stating that they were present during the trial and could have been examined or that they could not testify as represented by the applicant. *McPherson v. State*, 29 Ark. 225.

5. Ward v. Cobbs, 14 Tex. 303; *Higinbotham v. State*, 3 Tex. App. 447.

not obtained.¹ The substance of the proposed testimony of the absent witness should be set out in the affidavit in order that the court can determine whether his testimony would be sufficient to change the result or merely cumulative.²

(2) *Counter-affidavits*. — The showing made by the applicant may be contradicted by counter-affidavits³ or by showing the former testimony of the absent witness.⁴

Upon an application for a new trial on the ground of surprise arising from the sudden illness of a witness, what such witness would have testified must be shown, and the court is not bound to take the statement of the applicant or his counsel for that purpose. *Swartzell v. Rogers*, 3 Kan. 374; *Warren v. Ritter*, 11 Mo. 354.

Mistake of Witness. — An affidavit of a witness that he was mistaken in his testimony must also relate the testimony that he will give on the new trial, in order that the sufficiency and materiality of his testimony may appear. *Spillars v. Curry*, 10 Tex. 143. The mere statement of the witness that he was mistaken is not sufficient. *Jossey v. Stapleton*, 57 Ga. 144; *O'Kelly v. Felker*, 71 Ga. 775. But see *Mann v. State*, 44 Tex. 642.

Requisites of Affidavit Alleging Absence of Witness. — An affidavit for a new trial because the first was had in the absence of material witnesses must explain why a continuance was not asked for. *Jones v. Gaither*, 3 A. K. Marsh. (Ky.) 166.

1. *Nelson v. Waters*, 18 Ark. 570.

Where two of the defendant's witnesses, being present when the trial commenced, disappeared without leave or notice, and the defendant, in support of a motion for a new trial, filed the next day his own affidavit and that of another, it was held that his affidavit ought to have been accompanied by the affidavit of the witnesses, showing the facts to which they would testify; it ought to have stated that the defendant could not prove the same facts by other testimony; and if the affidavits of the absent witnesses could not be procured, that fact should have been stated. *Cotton v. State*, 4 Tex. 260. See also *Mann v. Clifton*, 3 Blackf. (Ind.) 304; *Ward v. Cobbs*, 14 Tex. 303.

On an application for a new trial for failure to grant a continuance for the absence of witnesses, the applicant must procure the affidavits of the absent witnesses, showing that they can

testify to material facts, or give sufficient reasons why such affidavits cannot be produced. *People v. Jocelyn*, 29 Cal. 562; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161; *People v. De Lacey*, 28 Cal. 589; *Rogers v. Huie*, 1 Cal. 429.

2. Loss of Deposition. — An affidavit proving loss of a deposition must state the substance thereof so as to disclose its materiality. A mere averment that it fully supports the allegations of the answer is a mere conclusion and therefore insufficient. *Felton v. Moffett*, 29 Neb. 582.

3. Counter-affidavits Are Admissible to prove negligence and to contradict the applicant's showing of surprise and diligence. *Wheeler v. Olson*, 37 Neb. 562; *Davis v. Ransom*, 57 Tex. 333; *Turner v. Booker*, 2 Dana (Ky.) 334; *Wintermute v. Stinson*, 19 Minn. 394.

Counter-affidavits are admissible to prove that a witness for whose absence a continuance was refused at the trial was a fictitious person. *Sargent v. State*, 35 Tex. Crim. Rep. 325.

4. The proposed witness whose testimony was not produced on account of surprise may be contradicted by showing his statements in his deposition in another case. *U. S. v. Bellaire First Nat. Bank*, 86 Fed. Rep. 861.

Former Testimony Considered. — On a motion for new trial for refusal of a continuance for an absent witness who testified on the examining trial, the evidence of such witness given on the examining trial may be considered by the court to ascertain whether or not he would testify as stated in the application for continuance. *Maloney v. State*, (Tex. Crim. App. 1898) 43 S. W. Rep. 980.

Impeaching Testimony. — Counter-affidavits of a proposed witness to the effect that his testimony will not be impeaching are not admissible on a motion for a new trial for error in excluding impeaching testimony, since an *ex parte* affidavit precludes cross-examination and opportunity to refresh

6. Excessive or Inadequate Damages — a. GENERAL PRINCIPLES — Verdict Against the Weight of Evidence. — The award by a jury of excessive or inadequate damages as a ground for a new trial is but a branch of the more general ground, to be noticed hereafter, that the verdict is contrary to the evidence, for it is evident that if the damages be either excessive or too small the verdict must be contrary to the evidence.¹

When Verdict Will Be Set Aside — General Rule. — On a motion for a new trial on the ground that the damages awarded are excessive or inadequate, the verdict is never set aside for mere difference in opinion as to the correct amount. The court never substitutes its opinion for the verdict of the jury. It is only where it is clear that the jury has erred that a new trial will be granted.²

Discretion of Trial Court. — Whether a new trial should be granted for excessive or inadequate damages rests within the discretion of the trial court in cases where there is no legal measure of damages or where the correctness of the decision of the court cannot be determined by the application of definite and precise rules.³

Increasing Amount of Verdict. — When a trial court determines that the damages awarded are inadequate a new trial should be granted. The court cannot render judgment for an amount greater than the verdict, nor can a new trial be refused on condition that the

the witness's memory. *Wyatt v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 598.

1. 4 Minor's Inst. 757; *Bennett v. Hobro*, 72 Cal. 178; *De Brutz v. Jessup*, 54 Cal. 118; *Benjamin v. Stewart*, 61 Cal. 608.

Failure to Assess Nominal Damages. — A new trial will not be granted for any cause where the plaintiff is entitled to nominal damages only. See *infra*, XV. 7. *New Trial to Recover Nominal Damages; General Principles Governing Decision; Failure to Assess Nominal Damages.*

2. See the following subdivision of this section, and see also the following cases: *Berry v. Lake Erie, etc.*, R. Co., 72 Fed. Rep. 488; *Ferguson v. Ehret*, 14 Misc. Rep. (N. Y. City Ct.) 454; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394; *Oklahoma City v. Welsh*, 3 Okla. 288; *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108; *Farish v. Reigle*, 11 Gratt. (Va.) 697; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34; *Richmond R., etc., Co. v. Garthright*, 92 Va. 627; *Gilbert v. Berlinshaw*, Lofft, 771, 1 Cowp. 230.

Where it appeared from the testimony of the jurors that they assessed

the damages on the erroneous supposition that the defendant was entitled to one-half of a lottery ticket, when in fact he was only entitled to one-fourth, a new trial was granted. *Woods v. Macrae*, Wythe (Va.) 78.

For the Rules of Law Concerning Excessive and Inadequate Damages, see tit. *Damages*, 8 Am. and Eng. Encyc. of Law (2d ed.) 628 *et seq.*

3. *Rogers v. Winch*, 65 Iowa 168; *Pratt v. Pioneer Press Co.*, 32 Minn. 217. See also the dissenting opinion of Sawyer, C. J., in *Kinse v. Wallace*, 36 Cal. 484.

Mistake and Retraction by Jury. — After returning a verdict for "one thousand dollars jointly," in an action against joint trespassers, the jury, after having dispersed and had opportunity to discuss the matter with the parties and their friends, appeared in court and almost every one claimed that the verdict was a mistake, as they intended to render a verdict of five hundred dollars against each defendant. It was held that a refusal of a new trial would not be reversed for abuse of discretion, as the trial court had better facilities for ascertaining the merits of the application than the appellate court. *Alexander v. Humber*, 86 Ky. 565.

defendant pay a sum fixed by the court, since the plaintiff has a right to have his damages assessed by a jury.¹

b. ERROR IN ASSESSMENT OF AMOUNT OF RECOVERY. — In actions where there is a legal measure of damages the rule is that a new trial may be granted on the ground of "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon contract, or for the injury or detention of property."²

c. RULE WHERE THERE IS NO LEGAL MEASURE OF DAMAGES — **Amount Discretionary with Jury.** — Where the damages are unliquidated or there is no fixed rule by which the measure of damages can be ascertained, as in torts and personal-injury cases, the amount is referred to the discretion of the jury, and the court will not ordinarily interfere. In such cases no mere difference of opinion as to the amount of damages will justify an interference by the court unless the amount is so unreasonable and excessive as to be indicative of passion, prejudice, partiality, or corruption of the jury.³

1. *Bradwell v. Pittsburgh, etc.*, Pass. R. Co., 139 Pa. St. 404.

Where a verdict is too small the court may give the defendant his election between a new trial or an increase in the amount of the verdict. *Carr v. Miner*, 42 Ill. 179; *James v. Morey*, 44 Ill. 352.

2. This is a ground for a new trial under many of the codes. It is not applicable in actions for damages for injuries to the person or reputation. See VII. 9. d. (6) *Error in the Assessment*. In actions for injuries to the person or reputation a new trial is prohibited. See *infra*, III. 6. i. *Inadequate Damages*.

Where Improper Items of Damages Have Been Included, and the court is able to estimate the amount of such items, or the verdict as to damages is special, a new trial will be refused, as the court can render a judgment for the proper amount. *Foster v. Cleveland, etc.*, R. Co., 56 Fed. Rep. 434.

Promissory Note — Interest. — Where the jury returns a verdict for the face of a note, without any deduction for payments or indorsements, a new trial will be granted. *Houston v. Morrison*, 10 Tex. 1; *Rockdale Paper Mills v. Stevens*, 65 Ga. 380.

A verdict for a gross sum, apparently including the principal and interest, when no interest is due, must be set aside and a new trial granted. *Lesesne v. Grant*, 1 Brev. (S. Car.) 403.

A mistake by the jury in computing interest should be remedied by a mo-

tion for a new trial. *Whitwell v. Atkinson*, 6 Mass. 272; *Winn v. Young*, 1 J. J. Marsh. (Ky.) 51.

3. *Alabama.* — *Alabama G. S. R. Co. v. Bailey*, 112 Ala. 167; *Kansas City, etc., R. Co. v. Lackey*, 114 Ala. 152.

Arkansas. — *McClintock v. Lary*, 23 Ark. 215; *Ford v. Ward*, 26 Ark. 360; *Walworth v. Pool*, 9 Ark. 405; *Peterson v. Gresham*, 25 Ark. 381; *Sexton v. Brock*, 15 Ark. 345; *Ayliff v. Hardy*, 25 Ark. 49.

California. — *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach, etc.*, R. Co., 36 Cal. 590; *Boyce v. California Stage Co.*, 25 Cal. 460; *Kinsey v. Wallace*, 36 Cal. 481; *George v. Law*, 1 Cal. 363; *Wolford v. Lyon Gravel Gold Min. Co.*, 63 Cal. 483; *Russell v. Dennison*, 45 Cal. 337; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513.

Colorado. — *Denver v. Dunsmore*, 7 Colo. 328; *Wall v. Livezey*, 6 Colo. 465; *Williams v. Williams*, 20 Colo. 51; *Sanderson v. Frazier*, 8 Colo. 79.

Connecticut. — *Clark v. Pendleton*, 20 Conn. 495; *Waters v. Bristol*, 26 Conn. 398; *Douglas v. Chapin*, 26 Conn. 76; *Haight v. Hoyt*, 50 Conn. 583.

Dakota. — *Larson v. Grand Forks*, 3 Dakota 307.

Florida. — *McMurray v. Basnett*, 18 Fla. 609.

Georgia. — *Davis v. Central R. Co.*, 60 Ga. 329; *Dye v. Denham*, 54 Ga. 224; *Snelling v. Darrell*, 17 Ga. 141; *Broach v. King*, 23 Ga. 500; *Pomeroy*

The Reason for holding parties so tenaciously to the damages found by the jury in personal torts is that in cases of this class there is no scale by which the damages are to be graduated with certainty. To the jury is committed the exclusive task of examin-

- v. Golly*, Ga. Dec. pt. i. 26; *Brown v. Autrey*, 78 Ga. 753; *Longstreet v. Reeside*, Ga. Dec. pt. i. 39; *Goins v. Alabama Western R. Co.*, 59 Ga. 426; *Central R. Co. v. Roach*, 70 Ga. 434; *Western, etc., R. Co. v. Lewis*, 84 Ga. 211; *Bishop v. Macon*, 7 Ga. 204.
- Illinois*. — *Chicago v. Smith*, 48 Ill. 107; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188; *Chicago, etc., R. Co. v. Peacock*, 48 Ill. 253; *Cummins v. Crawford*, 88 Ill. 312; *Illinois Cent. R. Co. v. Parks*, 88 Ill. 373; *Chicago West Div. R. Co. v. Hughes*, 87 Ill. 94; *Chicago, etc., R. Co. v. Payzant*, 87 Ill. 125; *McNamara v. King*, 7 Ill. 432; *Ross v. Innis*, 35 Ill. 487; *Illinois Cent. R. Co. v. Simmons*, 38 Ill. 242; *Fidler v. McKinley*, 21 Ill. 308; *Elgin v. Renwick*, 86 Ill. 498; *Schlencker v. Risley*, 4 Ill. 483; *Paul v. Leyenberger*, 17 Ill. App. 167; *Harrison v. Ely*, 120 Ill. 83; *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181; *North Chicago St. R. Co. v. Broms*, 62 Ill. App. 127; *Chicago v. Colman*, 33 Ill. App. 557.
- Indiana*. — *Guard v. Risk*, 11 Ind. 156; *Harris v. Rupel*, 14 Ind. 209; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Lake Erie, etc., R. Co. v. Acres*, 108 Ind. 548; *Westerville v. Freeman*, 66 Ind. 255; *Pittsburg, etc., R. Co. v. Hennigh*, 39 Ind. 509; *Elkhart, etc., R. Co. v. Waldorf*, 17 Ind. App. 29; *Michigan City v. Ballance*, 123 Ind. 334.
- Indian Territory*. — *Missouri, etc., R. Co. v. Turley*, (Indian Ter. 1896) 37 S. W. Rep. 52; *Kansas, etc., Coal Co. v. Reid*, (Indian Ter. 1897) 40 S. W. Rep. 898.
- Iowa*. — *Pankett v. Livermore*, 5 Iowa 277; *Stevenson v. Belknap*, 6 Iowa 97; *Garlick v. Pella*, 53 Iowa 646; *Bryant v. Omaha, etc., R., etc., Co.*, 98 Iowa 483.
- Kansas*. — *Missouri, etc., R. Co. v. Weaver*, 16 Kan. 456; *Union Pac. R. Co. v. Hand*, 7 Kan. 380; *Atchison, etc., R. Co. v. Stewart*, 55 Kan. 667; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 653.
- Kentucky*. — *North v. Cates*, 2 Bibb (Ky.) 591; *Respass v. Parmer*, 2 A. K. Marsh. (Ky.) 365; *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345; *Taylor v. Giger*, Hard. (Ky.) 595; *Vanzant v. Jones*, 3 Dana (Ky.) 464; *Owings v. Ulory*, 3 A. K. Marsh. (Ky.) 454; *Bell v. Howard*, 4 Litt. (Ky.) 117; *Holburn v. Neal*, 4 Dana (Ky.) 120; *Letton v. Young*, 2 Metc. (Ky.) 558; *Duncan v. Finnyhorn*, Sneed (Ky.) 262; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 137; *Louisville, etc., R. Co. v. Moore*, 83 Ky. 678; *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369; *Louisville, etc., R. Co. v. Mattingly*, (Ky. 1897) 38 S. W. Rep. 686; *Louisville, etc., R. Co. v. Banks*, (Ky. 1896) 33 S. W. Rep. 627.
- Louisiana*. — *Redwitz v. Waggaman*, 33 La. Ann. 26; *Lampkins v. Vicksburg, etc., R. Co.*, 42 La. Ann. 997.
- Maine*. — *Humphries v. Parker*, 52 Me. 502; *Gilbert v. Woodbury*, 22 Me. 246.
- Massachusetts*. — *Worster v. Canal Bridge*, 16 Pick. (Mass.) 541; *Treanor v. Donahoe*, 9 Cush. (Mass.) 228; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379; *Clark v. Binney*, 2 Pick. (Mass.) 113; *Shute v. Barrett*, 7 Pick. (Mass.) 82; *Coffin v. Coffin*, 4 Mass. 1.
- Minnesota*. — *Shartle v. Minneapolis*, 17 Minn. 308; *Beaulieu v. Parsons*, 2 Minn. 37; *Pratt v. Pioneer Press Co.*, 32 Minn. 217; *St. Martin v. Desnoyer*, 1 Minn. 156; *Lynd v. Pickett*, 7 Minn. 184; *Howe v. Minneapolis, etc., R. Co.*, 62 Minn. 71.
- Mississippi*. — *Ingraham v. Russell*, 3 How. (Miss.) 304; *Bell v. Morrison*, 27 Miss. 68; *Mississippi Cent. R. Co. v. Caruth*, 51 Miss. 77; *New Orleans, etc., R. Co. v. McBride*, 38 Miss. 32; *Harris v. Halliday*, 4 How. (Miss.) 338.
- Missouri*. — *Wells v. Sanger*, 21 Mo. 354; *Goetz v. Ambts*, 27 Mo. 28; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Allred v. Bray*, 41 Mo. 484; *Fallenstein v. Booth*, 13 Mo. 427; *Stonseifer v. Sheble*, 31 Mo. 243; *Fairgrieve v. Moberly*, 29 Mo. App. 141; *Watson v. Harmon*, 85 Mo. 443; *Merrill v. St. Louis*, 12 Mo. App. 466; *Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Honeycutt v. St. Louis, etc., R. Co.*, 40 Mo. App. 674; *Klutts v. St. Louis, etc., R. Co.*, 75 Mo. 642; *Le-moine v. Cook*, 36 Mo. App. 193; *Brown v. Hannibal, etc., R. Co.*, 99

ing the facts and circumstances, valuing the injury, and awarding compensation. The law that confers on them this power favors the presumption that they are actuated by pure motives, and it is not until the result of the deliberations of the jury appears in a

Mo. 310; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669.

Nevada. — *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *Solen v. Virginia etc., R. Co.*, 13 Nev. 106.

New Jersey. — *Allen v. Craig*, 13 N. J. L. 294; *Reuck v. McGregor*, 32 N. J. L. 70; *Vunck v. Hull*, 3 N. J. L. 165; *Deacon v. Allen*, 4 N. J. L. 386; *Merritt v. Harper*, 44 N. J. L. 73; *Ogden v. Gibbons*, 5 N. J. L. 598.

New York. — *Collins v. Albany, etc., R. Co.*, 12 Barb. (N. Y.) 492; *Coleman v. Southwick*, 9 Johns. (N. Y.) 45; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461; *Diblin v. Murphy*, 3 Sandf. (N. Y.) 19; *Rompillon v. Abbott*, (Supreme Ct.) 1 N. Y. Supp. 662; *Bierbauer v. New York Cent., etc., R. Co.*, 15 Hun (N. Y.) 559; *Tinney v. New Jersey Steamboat Co.*, 5 Lans. (N. Y.) 507; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Scherpf v. Szadeczyk*, 1 Abb. Pr. (N. Y. C. Pl.) 366; *M'Connell v. Hampton*, 12 Johns. (N. Y.) 236; *Gale v. New York Cent., etc., R. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 385; *Curtiss v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282; *Southwick v. Stevens*, 10 Johns. (N. Y.) 443; *Sargent v. —*, 5 Cow. (N. Y.) 106; *Moody v. Baker*, 5 Cow. (N. Y.) 351; *Cole v. Perry*, 8 Cow. (N. Y.) 214; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; *Finch v. Brown*, 13 Wend. (N. Y.) 601; *Bump v. Betts*, 23 Wend. (N. Y.) 85; *Knight v. Wilcox*, 18 Barb. (N. Y.) 212; *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Hager v. Danforth*, 8 How. Pr. (N. Y. Supreme Ct.) 435; *Blum v. Higgins*, 3 Abb. Pr. (N. Y. C. Pl.) 104; *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63; *Potter v. Thompson*, 22 Barb. (N. Y.) 87; *Fry v. Bennett*, 9 Abb. Pr. (N. Y. Super. Ct.) 45; *Ingerson v. Miller*, 47 Barb. (N. Y.) 47; *Cook v. Hill*, 3 Sandf. (N. Y.) 341; *Sherry v. Freckling*, 4 Duer (N. Y.) 452; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394; *Ferguson v. Ehret*, 14 Misc. Rep. (N. Y. City Ct.) 454; *Chapman v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 384; *Kilbane v. Westchester Electric R. Co.*, 19 Misc. Rep. (N. Y. Supreme Ct.) 184; *Howe v. Boorum, etc.,*

Co., 20 Misc. Rep. (N. Y. Supreme Ct.) 345; *Quinn v. O'Keeffe*, 9 N. Y. App. Div. 68; *Smith v. Third Ave. R. Co.*, 10 N. Y. App. Div. 409; *Egan v. Dry Dock, etc., R. Co.*, 12 N. Y. App. Div. 556; *Mayer v. Liebmann*, 16 N. Y. App. Div. 54; *Thomas v. Union R. Co.*, 18 N. Y. App. Div. 185.

North Carolina. — *Denby v. Hairs-ton*, 1 Hawks (N. Car.) 315; *McRae v. Lilly*, 1 Ired. L. (N. Car.) 118; *Dodd v. Hamilton*, Term (N. Car.) 31.

Ohio. — *Simpson v. Pitman*, 13 Ohio 365; *Fisher v. Patterson*, 14 Ohio 418; *Toledo Electric St. R. Co. v. Tucker*, 13 Ohio Cir. Ct. Rep. 411, 7 Ohio Circuit Dec. 169.

Oklahoma. — *Oklahoma City v. Welsh*, 3 Okla. 288.

Pennsylvania. — *Whipple v. West Philadelphia Pass. R. Co.*, 11 Phila. (Pa.) 345, 33 Leg. Int. (Pa.) 140.

South Carolina. — *Bourke v. Bulow*, 1 Bay (S. Car.) 49; *Nettles v. Harrison*, 2 McCord L. (S. Car.) 230; *Richardson v. Murray*, Cheves L. (S. Car.) 11; *Morgan v. Livingston*, 2 Rich. L. (S. Car.) 573; *Mayson v. Sheppard*, 12 Rich. L. (S. Car.) 254; *Poppenheim v. Wilkes*, 2 Rich. L. (S. Car.) 354; *Fripp v. Martin*, 1 Spears L. (S. Car.) 236; *Davis v. Ruff*, Cheves L. (S. Car.) 17; *Stott v. Ryan*, 3 Brev. (S. Car.) 417.

Tennessee. — *Goodall v. Thurman*, 1 Head (Tenn.) 209; *Boyers v. Pratt*, 1 Humph. (Tenn.) 90; *Moore v. Burchfield*, 1 Heisk. (Tenn.) 203; *Nashville, etc., R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Tennessee Coal, etc., Co. v. Roddy*, 85 Tenn. 400; *Tinkle v. Duni-vant*, 16 Lea (Tenn.) 503; *Thompson v. French*, 10 Verg. (Tenn.) 452; *West Memphis Packet Co. v. White*, (Tenn. 1897) 41 S. W. Rep. 583.

Texas. — *Hamman v. Willis*, 62 Tex. 507; *Barnette v. Hicks*, 6 Tex. 352; *McGehee v. Shafer*, 9 Tex. 20; *Cook v. De La Garza*, 9 Tex. 358; *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277; *International, etc., R. Co. v. Brett*, 61 Tex. 483; *Howard Oil Co. v. Davis*, 76 Tex. 630; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397; *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653; *Chicago, etc., R.*

form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that the courts have found themselves compelled to interpose.¹

Inadequate Damages. — The same rule applies where the damages are inadequate.² Although the amount of the verdict is less than the court would approve, it will not be set aside unless the amount is so unreasonably small as to evince mistake, passion, or partiality of the jury.³ The courts are reluctant to interfere, and never do so except in a clear case.⁴

Code Rule — Verdict the Result of Passion or Prejudice. — The above rule, that where damages are discretionary with the jury a new trial will not be granted for excessive damages unless the verdict is the result of passion or prejudice, has been codified and made a ground for a new trial as follows: "excessive damages⁵ appearing to have been given under the influence of passion or prejudice."⁶ This ground applies only to damages for torts, and not to error in assessment of the amount of recovery upon a contract

Co. v. Yarbrough, (Tex. Civ. App. 1896) 35 S. W. Rep. 422; Missouri, etc., R. Co. v. Johnson, (Tex. Civ. App. 1896) 37 S. W. Rep. 771.

Utah. — Daniels v. Union Pac. R. Co., 6 Utah 357.

Virginia. — Norfolk v. Johnakin, 94 Va. 285; Norfolk, etc., R. Co. v. Ampey, 93 Va. 108; Farish v. Reigle, 11 Gratt. (Va.) 697; Richmond R., etc., Co. v. Garthright, 92 Va. 627.

Washington. — Ogle v. Jones, 16 Wash. 319; Lorence v. Ellensburgh, 13 Wash. 341.

West Virginia. — Vinal v. Core, 18 W. Va. 1.

Wisconsin. — Birchard v. Booth, 4 Wis. 67; Bass v. Chicago, etc., R. Co., 42 Wis. 654; Hammond v. Mukwa, 40 Wis. 35; Goodno v. Oshkosh, 28 Wis. 300; Plath v. Braunsdorff, 40 Wis. 107; Cottrill v. Cramer, 59 Wis. 231; Whitney v. Milwaukee, 65 Wis. 409.

Wyoming. — Union Pac. R. Co. v. Hause, 1 Wyoming 27.

United States. — Reese v. Third Ave. R. Co., 16 Fed. Rep. 368; Lancaster v. Providence, etc., S. S. Co., 26 Fed. Rep. 233; Frericks v. Bermes, 22 Fed. Rep. 424; Whipple v. Cumberland Mfg. Co., 2 Story (U. S.) 661; Blunt v. Little, 3 Mason (U. S.) 102; Walker v. Smith, 1 Wash. (U. S.) 152; Stephens v. Felt, 2 Blatchf. (U. S.) 37; Aiken v. Bemis, 3 Woodb. & M. (U. S.) 348; Carr v. Gale, 3 Woodb. & M. (U. S.) 38; Wightman v. Providence, 1 Cliff. (U. S.) 524; Palmer v. Fiske, 2 Curt. (U. S.) 14; Clear v. Fox, 26 Fed. Rep. 90; Engler

v. Western Union Tel. Co., 69 Fed. Rep. 185; Lowry v. Mt. Adams, etc., Incline Plane R. Co., 68 Fed. Rep. 827; Dwyer v. St. Louis, etc., R. Co., 52 Fed. Rep. 87.

England. — Armytage v. Haley, 4 Q. B. 917, 45 E. C. L. 917; Chambers v. Caulfield, 6 East 245; Sharpe v. Brice, 2 W. Bl. 942; Edgell v. Francis, 1 M. & G. 222, 39 E. C. L. 422; Creed v. Fisher, 9 Exch. 472; Williams v. Currie, 1 C. B. 841, 50 E. C. L. 841; Price v. Severn, 7 Bing. 402, 20 E. C. L. 180; Gilbert v. Berkinshaw, Lofft. 771, 1 Cowp. 230; Lambkin v. South Eastern R. Co., L. R. 5 App. 352, 28 W. R. 837; Corkery v. Hickson, 10 Ir. R. C. L. 174; M'Grath v. Bourne, 10 Ir. R. Ch. 160.

1. 1 Graham and Waterman on New Trials 452, quoted with approval in Dowd v. Westinghouse Air Brake Co., 132 Mo. 579; Pritchard v. Hewitt, 91 Mo. 547.

2. Berry v. Lake Erie, etc., R. Co., 72 Fed. Rep. 488.

For the statement of the rule as to excessive and inadequate damages, see tit. *Damages*, 8 Am. and Eng. Encyc. of Law (2d ed.) 628 *et seq.*

3. See *infra*, III. 6. i. *Inadequate Damages.*

4. Corcoran v. Harran, 55 Wis. 128; Mechelke v. Bramer, 59 Wis. 57.

5. Some codes include both excessive and inadequate damages in this ground for a new trial.

6. This ground is common to nearly all the codes.

or for the injury or detention of property.¹

Passion or Prejudice Determined from Amount of Verdict.— Whether a verdict is the result of passion or prejudice cannot be shown by affidavits² or evidence of the misconduct or declarations of jurymen. It must be determined solely from the evidence in the case and the amount of the verdict.³

1. Applicable to Torts Only.— In actions for damages for injury or detention of property or upon contracts, the proper ground is error in the assessment of the amount of recovery. See *infra*, *Assignment of Grounds for New Trial*.

2. Affidavit Showing Prejudice.— An affidavit showing conduct of a referee from which prejudice might be inferred is not admissible to show that the damages were awarded under the influence of passion or prejudice, since *Iowa Code*, § 2837, does not provide for the use of affidavits except where misconduct, accident, surprise, or newly discovered evidence is stated as ground for new trial. *Feister v. Kent*, 92 *Iowa* 1.

3. Whether Amount of Damages Warranted by Evidence.— Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury—a question which cannot be aided by the showing of extrinsic facts, by affidavit or otherwise. *Harrison v. Sutter St. R. Co.*, 116 *Cal.* 156.

The affidavit of a party that the jury was prejudiced against him is not entitled to much weight, but may strengthen the claim where the verdict is against the weight of evidence. *Withers v. Butts*, 7 *Dana* (Ky.) 329.

Circumstances from Which Prejudice of Jury Will Be Inferred.— Where there is a special finding against the express admission of the party who obtains the verdict, it will be presumed that the jurors were governed by passion and prejudice. *Jeffrey v. Keokuk, etc., R. Co.*, 51 *Iowa* 439.

The fact that the jury erred in including an item not sustained by sufficient evidence, and for which a remittitur was required by the trial court, does not justify an inference of passion or prejudice of the jury. *Grant v. Wolf*, 34 *Minn.* 32.

When the evidence is such that one person might think in one way and another in another way, it cannot be said that the jurors were influenced by any wrong motives in finding either way.

Wilcox v. New York, etc., R. Co., 81 *Fed. Rep.* 143.

Prejudice or Compromise Presumed from Small Verdict.— Where the plaintiff in a personal injury case was entitled to a large sum or nothing, a verdict for twenty-four dollars and twenty-seven cents was set aside as perverse, and a new trial granted. The court said: "This verdict on its face is perverse. If the jury were warranted in finding for the plaintiff on the evidence, and we think they were, then he was entitled to recover a very much larger sum in damages. It is quite obvious that this verdict, so particular and precise even to a cent, was either the result of an unlawful and unseemly compromise or of prejudice. Such a verdict is trifling with a case in court and public justice, and unworthy of twelve good and lawful men, and is justly calculated to cast odium on the jury system and jury trials." *Whitney v. Milwaukee*, 65 *Wis.* 409.

Excessive in Comparison with Other Verdicts.— In three successive trials of an action for personal injuries the plaintiff obtained verdicts of three thousand, two thousand five hundred, and six thousand dollars, respectively, upon substantially the same evidence as to the extent of his injuries. It was held that, in view of the first two verdicts, the damages awarded by the third were excessive, and the judgment thereon was reversed for that reason. *Baker v. Madison*, 62 *Wis.* 137.

Where the former verdict, in an action for personal injuries caused by a defective sidewalk, was for two thousand dollars, a second verdict for eight thousand dollars was held so excessive that a new trial would be granted unless the plaintiff should remit three thousand dollars therefrom. *McLimans v. Lancaster*, 63 *Wis.* 596.

Failure to Give Fair and Candid Consideration.— In an action for damages for wrongful act, the jury gave careless and conflicting answers to special questions submitted to it. The damages allowed for loss of wages were excessive and did not exclude loss of time

d. AMOUNT DETERMINED BY FIXED RULE. — A verdict should be set aside where it is in excess of the amount of damages as determined by some fixed rule in the case. When an exact rule can be discovered, the jury is bound to adopt it. If it is established that the plaintiff should recover so much as will repair the injury sustained at the hands of the defendant, there can be no other measure of damages, and where this amount can be accurately ascertained the jury seems to have no discretion.¹

e. EXCESS OF AMOUNT CLAIMED. — If the amount of the verdict exceeds that claimed by the pleadings the verdict will be set aside.² But if the excess is small the court may allow the ver-

necessarily resulting from a mortal disease. The allowance of two thousand two hundred dollars per year for pain and suffering was excessive in comparison with the sums allowed in other cases. It was held that a new trial should have been granted, as the jury failed to give the case the fair and candid consideration it demanded. *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411.

1. See *Walker v. Smith*, 1 Wash. (U. S.) 152; *Lang v. Hopkins*, 10 Ga. 37; *South-Western R. Co. v. Paulk*, 24 Ga. 356; *Fish v. Roseberry*, 22 Ill. 288; *Nutter v. Junction R. Co.*, 13 Ind. 479; *Coffin v. Coffin*, 4 Mass. 1; *Com. v. Justices*, 5 Mass. 435; *McDonald v. Walter*, 40 N. Y. 551; *Atkinson v. Fraser*, 5 Rich. L. (S. Car.) 519.

Damages Exceeding Actual Pecuniary Injury. — "The court, in actions of trespass, especially for personal torts, when damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case. But when the plaintiff complains of no injury to his person or his feelings — where no malice is shown — where no right is involved beyond a mere question of property — where there is a clear standard for the measure of damages, and no difficulty in applying it — the measure of damages is a question of law, and is necessarily under the control of the court." *Berry v. Vreeland*, 21 N. J. L. 183.

Verdict Inconsistent with Legal Principles. — Where it is impossible to reconcile the amount of damages found by the jury with any legal principle, the verdict will be set aside. *Ellsworth v. Central R. Co.*, 34 N. J. L. 93; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Albion Consol. Min. Co. v. Richmond*

Min. Co., 19 Nev. 225; *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312.

2. *California.* — *Garlick v. Bower*, 62 Cal. 65.

Indiana. — *Roberts v. Muir*, 7 Ind. 544; *Hall v. Hall*, 42 Ind. 585; *Raymond v. Williams*, 24 Ind. 416; *Hill v. Newman*, 47 Ind. 187.

Kentucky. — *Stewart v. Tevis*, 7 T. B. Mon. (Ky.) 109.

Mississippi. — *Lester v. Barnett*, 33 Miss. 584.

Missouri. — *Koeltz v. Bleckman*, 46 Mo. 320.

New York. — *McIntire v. Clark*, 7 Wend. (N. Y.) 330; *Dox v. Dey*, 3 Wend. (N. Y.) 356.

Vermont. — *Tarbell v. Tarbell*, 60 Vt. 486.

Virginia. — *Hook v. Turnbull*, 6 Call (Va.) 85.

Wisconsin. — *Manson v. Robinson*, 37 Wis. 339.

Where the verdict of the jury, or the finding of the court on trial by consent without a jury, awards damages in excess of the amount claimed in the complaint, the plaintiff, if he desires to amend the complaint in respect to the amount claimed, must abandon the verdict or finding, pay costs, and consent to a new trial. *Decker v. Parsons*, 11 Hun (N. Y.) 295.

A new trial will not be granted after verdict because the amount of damages assessed by the verdict exceeds the amount claimed in the writ, but not the amount laid in the declaration. *Roderick v. Baltimore, etc., R. Co.*, 7 W. Va. 54.

Where the verdict is in excess of the amount recoverable on the first of two causes of action, and when the second does not state facts sufficient to constitute a cause of action, a new trial must be granted. *Fish Keck Co. v. Redlon*, (Kan. App. 1898) 53 Pac. Rep. 72.

dict to stand and require the plaintiff to remit the excess.¹

f. EXCESS OF AMOUNT PERMITTED BY INSTRUCTIONS — Disregard of Instructions. — Where it can be ascertained that the jury in assessing the damages disregarded the instructions of the court as to the measure of damages, a new trial must be granted² unless the error can be cured by remittitur.³

Substantial Instead of Nominal Damages. — As a general rule a new trial will not be granted where the jury awards substantial damages in violation of an instruction to allow merely nominal damages, as a new trial will not be granted to permit a party to recover merely nominal damages.⁴

g. EXCESS OF AMOUNT PROVED. — A verdict exceeding the

1. *Harmless Error — Small Excess.* — Where a verdict in an action on a note exceeded the amount claimed by the complaint by six dollars, and the verdict was in accordance with the evidence, it was held that a new trial should be refused, as under the provisions of the code such error was harmless, and the court was authorized to enter a judgment on such verdict; such error could be cured by amendment, and such amendment would be deemed to have been made. *Webb v. Thompson*, 23 Ind. 428.

Amendment of Pleadings to Cure Excess. — Where a verdict exceeds the amount claimed in the pleadings, but not the amount shown to be due by the evidence, a new trial is not necessary, as the error may be cured by amendment of the pleadings to conform to the evidence. The appellate court will regard such amendment as having been made. *Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541 [*citing* *Carpenter v. Sheldon*, 22 Ind. 259; *Webb v. Thompson*, 23 Ind. 428].

2. *Hoffman v. Bosch*, 18 Nev. 360; *Rafferty v. Missouri Pac. R. Co.*, 15 Mo. App. 559; *Johnson v. Root*, 2 Cliff. (U. S.) 108; *Tietz v. Philadelphia Traction Co.*, 169 Pa. St. 516.

3. *Knapp v. Williamsport Nat. Bank*, 15 Fed. Rep. 333.

Exemplary Damages. — Where it is clear that the jury has allowed exemplary damages in a case where such damages are improper, a new trial must be granted. *Pegram v. Stortz*, 31 W. Va. 220.

4. A verdict for substantial damages where only nominal damages are allowable may be cured by remittitur. See article REMITTITUR.

That a new trial will not be granted to recover nominal damages, see *infra*,

XV. *Decision of Motion—General Principles Governing.*

Disregard of Instruction to Find Nominal Damages. — Where only nominal damages can be recovered and the jury returns a verdict for substantial damages it is reversible error for the court to enter judgment notwithstanding the verdict. In such case the court should award a new trial. *Carl v. Granger Coal Co.*, 69 Iowa 519.

A verdict for substantial damages will be set aside when rendered in disregard of an instruction to find only nominal damages. *Johnson v. Root*, 2 Cliff. (U. S.) 108.

Where the jury found substantial damages in violation of an instruction to find only nominal damages the court should reduce the amount of the verdict to a nominal sum. In such case it is error to allow the plaintiff an option to take judgment for a nominal sum or submit to a new trial. *Morlan v. Russell*, 71 Iowa 214.

After such a verdict is reduced to one for merely nominal damages on the court's own motion, the court cannot grant a new trial on the ground that the jury disregarded its instructions. *Morlan v. Russell*, 71 Iowa 214.

Where an appellate court determines that the plaintiff cannot recover substantial damages because they are too remote, a new trial must be granted if it does not clearly appear that an award of damages sufficient to carry costs would be unwarranted. *Lewis v. Flint, etc., R. Co.*, 56 Mich. 638.

Where a jury finds substantial damages although instructed to find merely nominal damages the verdict may be allowed to stand. *Chilvers v. Greaves*, 5 M. & G. 578, 44 E. C. L. 305, 6 Scott N. R. 539.

highest amount shown by the testimony will be set aside as excessive and contrary to the evidence.¹

h. REMITTITUR. — Where the damages are excessive the court may impose upon the successful party the option of remitting such portion of the damages as justice may require or of submitting to a new trial. But as a general rule a remittitur can be required only where the damages can be ascertained by the court by application of fixed rules of law, or where elements of the damages can be computed. See for a full discussion of this subject, article REMITTITUR.

i. INADEQUATE DAMAGES — (1) *Rule Where There Is a Legal Measure of Damages.* — In actions where there is a legal measure of damages for torts, as in actions for breach of contract or injury to property, a new trial will be readily granted where the damages awarded are inadequate or the jury have erred in their calculations.²

(2) *Verdict for Less than Sum Admitted.* — A verdict for a sum less than the sum admitted by the defendant, in either his pleadings or his testimony, will be set aside as inadequate.³

(3) *Damages Not Equal to Amount Proved.* — A verdict for less than the amount clearly established by the evidence must be set aside.⁴ The damages must equal the actual pecuniary loss

1. *Imel v. Van Deren*, 8 Colo. 90; *Budlong v. Cunningham*, 11 Ill. App. 28; *Schneider v. McCabe*, 36 N. Y., Super. Ct. 83; *Finch v. Brown*, 13 Wend. (N. Y.) 601; *Brotton v. Langert*, 1 Wash. 227; *Jones v. Van Zandt*, 2 McLean (U. S.) 611. But see *contra*, *Tarleton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67; *Thompson v. Porter*, 4 Bibb (Ky.) 70.

Where it is disclosed by the findings of the jury that it has allowed the plaintiff certain items of damages in excess of his undisputed testimony, a new trial must be granted by an appellate court. *Miller v. Brown*, 82 Iowa 79.

Where the damages are excessive upon any view or construction of the evidence, a new trial will be granted. *Bell v. Cherrie*, 8 Ill. App. 310; *Pierce v. Roche*, 40 Ill. 293.

If an undisputed item in an account is wholly unconsidered and overlooked by the jury, the verdict will be set aside. *Wyman v. Erickson*, 35 Minn. 202.

2. *Watson v. Harmon*, 85 Mo. 443; *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 11; *Bagby v. Lewis*, 2 T. B. Mon. (Ky.) 76; *Chambers v. Collier*, 4 Ga. 193; *English v. Clerry*, 3 Hill L. (S. Car.) 279; *Bacot v. Keith*, 2 Bay (S.

Car.) 466; *Potter v. Swindle*, 77 Ga. 419.

Breach of Contract. — Where the damages may be estimated, as in an action for damages for breach of contract, if there is a glaring deficiency justice requires that the case shall be revised. *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 11.

3. *Coffman v. Brown*, 7 Colo. 147; *State v. Wilson*, 90 Ind. 114; *Williams v. Reynolds*, 86 Ill. 263; *Fagan v. Whitcomb*, (Tex. App. 1889) 14 S. W. Rep. 1018; *Traylor v. Evertson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 637.

A verdict in an action of trover for a less sum than that fixed by the defendant cannot stand. *Bernstein v. Walker*, 25 Ill. App. 224.

4. *Verdict Less than Amount Proved.* — *Hallberg v. Brosseau*, 64 Ill. App. 520; *Zeigler v. Osborn*, 23 Kan. 464.

Where the damages awarded by the jury are less than one-half the value of the property sued for, as testified to by all the witnesses, this may be considered as a circumstance indicating that the jury disregarded the clear weight and preponderance of the evidence, in awarding any verdict in favor of the successful party. *Powell v. Missouri Pac. R. Co.*, 59 Mo. App. 335.

sustained,¹ even in personal-injury cases.²

(4) *Disregard of Instructions to Award Substantial Damages.* — Where the plaintiff is entitled to recover substantial damages, if entitled to recover at all, a verdict for nominal damages will be set aside and a new trial granted.³

(5) *Miscalculation of Damages.* — Where separate items of the damages arising from a tort are clearly proved, a new trial will be granted if the verdict is so small as to disclose the omission of one or more items.⁴

(6) *Rule Where There Is No Legal Measure of Damages.* — In cases where there is no legal measure of damages a verdict for substantial damages will not be disturbed except where the damages found are grossly inadequate or where it is clear that the jury has erred in calculating the items of damages.⁵ A new trial will not be granted for a mere difference of opinion between the court and the jury as to the proper amount due for personal injuries.⁶

(7) *Inadequate Damages for Torts — Common-law Rule.* — At common law new trials were not granted on the ground that the damages awarded for torts were inadequate or insufficient;⁷ at

The evidence being in writing, and practically undisputed, as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained. *Porter v. Sherman County Banking Co.*, 36 Neb. 271.

1. *Baily v. Cincinnati*, 1 Handy (Ohio) 438; *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 11.

2. A verdict for one farthing damages was set aside where it appeared that the plaintiff's thigh had been broken and that he had paid ten pounds for surgical attendance. *Armytage v. Haley*, 4 Q. B. 917, 45 E. C. L. 917. But see *contra*, *Bradlaugh v. Edwards*, 11 C. B. N. S. 377, 103 E. C. L. 377; *Howard v. Barnard*, 11 C. B. 653, 73 E. C. L. 653.

3. *Verdict for Nominal Instead of Substantial Damages.* — *Lough v. Romaine*, 36 N. Y. Super. Ct. 332; *Robbins v. Hudson River R. Co.*, 7 Bosw. (N. Y.) 1; *Gartner v. Saxon*, 19 R. I. 461; *Conrad v. Dobmeier*, 57 Minn. 147; *Lee v. Knapp*, 137 Mo. 385; *Moseley v. Jamison*, 68 Miss. 336; *Bradwell v. Pittsburgh*, etc., Pass. R. Co., 139 Pa. St. 404.

Where the plaintiff is entitled to substantial damages for personal injuries, a verdict of six cents is so contrary to and inconsistent with the evidence that a new trial will be granted at the instance of the plaintiff. *Miller v. Delaware*, etc., R. Co., 58 N. J. L. 428.

4. *Failure to Award Items of Damages.*

— *Phillips v. South-Western R. Co.*, 4 Q. B. Div. 406; *Brown v. Foster*, 1 N. Y. App. Div. 578; *Wilson v. Morgan*, 58 N. J. L. 426; *Georgia Southern*, etc., R. Co. v. *Jones*, 90 Ga. 292; *Wauflie v. McLellan*, 51 Wis. 484.

A verdict awarded certain damages to the plaintiff, and also found that a certain conveyance was void, although there was no issue on that point. It was held that a motion for a new trial on the grounds that the action of the jury had been irregular, that the verdict was contrary to law, and that the damages awarded were excessive, should have been sustained, as the verdict showed upon its face that the damages were assessed upon a basis unwarranted alike by the pleadings, the evidence, the charge of the court, and the law governing the case. *Holden v. Belmont*, 32 Ohio St. 585.

5. See Am. and Eng. Encyc. of Law, tit. *Damages*.

6. *Berry v. Lake Erie*, etc., R. Co., 72 Fed. Rep. 488; *Reger v. Rochester R. Co.*, 2 N. Y. App. Div. 5.

A new trial will not be granted for inadequate damages although the verdict is less than the court would have approved. *Lancaster v. Providence*, etc., Steamship Co., 26 Fed. Rep. 233; *Walker v. Smith*, 1 Wash. (U. S.) 202.

7. *Mauricet v. Brecknock*, 2 Doug. 509; *Rendall v. Hayward*, 5 Bing. N.

least such was the rule as to damages for trespass and slander, which were regarded as analogous to prosecutions for crime.¹ It was also said that where there was no legal measure of damages the verdict should be conclusive. The rule was to some extent influenced by a rule of court that a new trial would not be granted where the verdict was small in proportion to the costs required for a new trial.²

Modern Rule. — But the modern rule is that a new trial may be granted in actions for torts where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive.³

Cas. 424, 35 E. C. L. 161, 7 Scott 407; *Forsdike v. Stone*, L. R. 3 C. P. 607; *Bradlaugh v. Edwards*, 11 C. B. N. S. 377, 103 E. C. L. 377; *Howard v. Barnard*, 11 C. B. 653, 73 E. C. L. 653; *Gibbs v. Tunaley*, 1 C. B. 640, 50 E. C. L. 640; *Hawkins v. Alder*, 18 C. B. 640, 86 E. C. L. 640; *Apps v. Day*, 14 C. B. 112, 78 E. C. L. 112; *Watson v. Reeve*, 5 Bing. N. Cas. 112, 35 E. C. L. 48, 6 Scott 783.

1. *Armstrong v. Haley*, 4 Q. B. 917, 45 E. C. L. 917.

New Trials for Inadequate Damages Not Granted at Common Law. — "There has been never a doubt that the power to grant new trials for excessive damages exists at common law, as well in actions *ex delicto* as in actions *ex contractu*; but smallness of damages seems not to have been ground for a new trial, at least in actions of trespass, until it was made such by statute, apparently for no better reason than that actions for torts, at least actions of trespass *vi et armis*, were considered as bearing an analogy to prosecutions for crimes, as to which it is an admitted doctrine that whilst a new trial may be granted upon the application of the accused upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth, because the penalty assessed by the jury is too small." 4 Minor's Inst. 758 [citing *Jackson v. Boast*, 2 Va. Cas. 49; *Rixey v. Ward*, 3 Rand. (Va.) 52; *Humphreys v. West*, 3 Rand. (Va.) 516; Com. Dig., Pleader, R. 17]. See also Bac. Abr., tit. Trial, (L) 4 [citing *Marshall v. Buller*, 2 Rolle Rep. 21; *Hayward v. Newton*, 2 Stra. 940; *Barker v. Dixie*, 2 Stra. 1051; *Mauricet v. Brecknock*, 2 Doug. 509, and other cases].

3. Amount Involved Less than Twenty Pounds. — The above decisions are to

be considered with reference to a rule of practice that where the verdict is less than twenty pounds a new trial will not be granted although contrary to the evidence and to the opinion of the trial judge, as the applicant would not derive much advantage after paying the costs. *Branson v. Didsbury*, 4 P. & D. 441, 12 Ad. & El. 631, 40 E. C. L. 140; *Young v. Harris*, 2 Crompt. & J. 14; *Scott v. Watkinson*, 4 M. & P. 237; *Howard v. Barnard*, 11 C. B. 653, 73 E. C. L. 653.

But in instances where a new trial should be granted without imposing costs, as where the verdict is perverse or the court misdirected the jury, a new trial will be granted although the verdict is less than twenty pounds. *Bryson v. Phillips*, 3 Tyrw. 181, 1 Crompt. & M. 26; *Freeman v. Price*, 1 Y. & J. 402; *Manning v. Underwood*, 1 McClel. & Y. 266.

3. *Alabama*. — *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15.

California. — *Bennett v. Hobro*, 72 Cal. 178; *Townsend v. Briggs*, 88 Cal. 230.

Georgia. — *Bishop v. Macon*, 7 Ga. 200.

Illinois. — *Hackett v. Pratt*, 52 Ill. App. 346.

Minnesota. — *Henderson v. St. Paul, etc., R. Co.*, 52 Minn. 479.

Missouri. — *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328.

New York. — *Platz v. Cohoes*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 392; *McDonald v. Walter*, 40 N. Y. 551; *Smith v. Dittman*, 16 Daly (N. Y.) 427; *Kelly v. Rochester*, (Supreme Ct.) 15 N. Y. Supp. 29.

Texas. — *Chicago, etc., R. Co. v. Yarborough*, (Tex. Civ. App. 1896) 35 S. W. Rep. 422.

Wisconsin. — *Whitney v. Milwaukee*, 65 Wis. 409; *Robinson v. Waupaca*, 77 Wis. 544.

Verdict a Result of Passion and Prejudice. — Even where there is no legal measure of damages a new trial will be granted where the damages awarded are so grossly inadequate as to indicate that the jury was influenced by passion and prejudice.¹ But the courts are reluctant to interfere except in clear cases.²

Code Provisions. — The code provisions as to new trials for inadequate damages appear in general to be merely declaratory of the common law. In some states the codes have been amended so as to permit new trials where the verdict is so inadequate as to indicate passion or prejudice. In the absence of such amendment a new trial may be granted for inadequate damages on the theory that the verdict is contrary to the evidence.³

England. — Phillips v. South-Western R. Co., 4 Q. B. Div. 406.

"A Verdict for a Grossly Inadequate Amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount." McDonald v. Walter, 40 N. Y. 551.

1. **Verdict Grossly Inadequate.** — Mariani v. Dougherty, 46 Cal. 27; Bennett v. Hobro, 72 Cal. 178; Wolford v. Lyon Gravel Gold Min. Co., 63 Cal. 483; Hall v. The Bark Emily Banning, 33 Cal. 522; Welch v. McAllister, 13 Mo. App. 89; Lee v. Knapp, 137 Mo. 385; McDonald v. Walter, 40 N. Y. 551; Robbins v. Hudson River R. Co., 7 Bosw. (N. Y.) 1; Whitney v. Milwaukee, 65 Wis. 409; Carter v. Wells, 64 Fed. Rep. 1005.

2. Corcoran v. Harran, 55 Wis. 128; Mechelke v. Bramer, 59 Wis. 57.

While courts have the power to grant new trials for inadequacy of damages, it is less usual for them to do so. Gaither v. Kansas City, etc., R. Co., 27 Fed. Rep. 545.

Verdict Not Disturbed in Ordinary Cases. — Pritchard v. Hewitt, 91 Mo. 547; Gregory v. Chambers, 78 Mo. 294; Brown v. Union R. Co., 51 Mo. App. 192; Caruth v. Richeson, 96 Mo. 186; Dowd v. Westinghouse Air Brake Co., 132 Mo. 579.

Where the evidence as to the extent of the plaintiff's injuries is conflicting, and substantial damages have been awarded by the jury, the judgment will not be disturbed. Boggess v. Metropolitan St. R. Co., 118 Mo. 328.

Verdict Conclusive as to Damages for Personal Injuries. — "That courts have no authority to annul the verdict of a jury solely on account of the smallness or insignificance of the sum allowed, is well settled. They have the authority

only where gross injustice clearly appears *aliunde* the verdict. It is a power the courts are loath to exercise; for in no case is there greater danger of usurping the exclusive functions of the jury. In actions of the nature of the one at bar there is no measure of sums. No custom or market or law fixes a value to the injury done, and therefore the law has made it the exclusive and peculiar province of the jury to name the amount to which a plaintiff may be entitled. No other judgment or opinion must be substituted for the combined judgment and opinion of the jury." Brown v. Union R. Co., 51 Mo. App. 192.

3. Emmons v. Sheldon, 26 Wis. 648.

California — The Award of Inadequate Damages Is Not a Ground for a New Trial under the Code, the only provision being for "excessive damages appearing to have been given under the influence of passion or prejudice." It may be that where the damages awarded in tort do not exceed the actual pecuniary injury sustained a new trial could be granted because the verdict is contrary to the evidence. Benjamin v. Stewart, 61 Cal. 605. Or it may be specified that the verdict as to the damages is not sustained by the evidence and is contrary to the law and the evidence. Du Brutz v. Jessup, 54 Cal. 118. Or that the injuries of the plaintiff were very serious and that the award was unreasonably or grossly inadequate. Bennett v. Hobro, 72 Cal. 178.

Iowa. — Code Iowa, § 2837, does not provide that a new trial may be granted for inadequate damages, but it may be inferred from section 2839 that a new trial may be granted where the damages found by the jury are less than the actual pecuniary damage sustained; and this question may be raised by mo-

(8) *Smallness of Damages for Injuries to Person or Reputation.*

— The common-law rule has been expressed in many codes substantially as follows: "A new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."¹ This is construed to prohibit absolutely a new trial for smallness of damages for injuries to the person or reputation, although the damages awarded do not equal the actual pecuniary injury sustained.² The reason of the rule appears to be that in actions for personal injuries there is no precise measure by which the court can determine whether the jury erred in estimating damages for pain etc., or in failing to allow punitive damages.³ Therefore

tion on the ground that the verdict of the jury is contrary to the evidence. *Kinser v. Soap Creek Coal Co.*, 85 Iowa 26.

Section 2839, Iowa Code 1873 (not retained in Code 1897), providing that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained," is an absolute limitation upon the power of the court to grant new trials in such cases. But the courts are not required to grant new trials where the damages do not equal the actual pecuniary injury sustained. *Hubbard v. Mason City*, 64 Iowa 245.

Minnesota. — Under Gen. Stat. Minn. 1878, c. 66, § 253, as amended in 1891, providing for a new trial on the ground of "excessive or inadequate and insufficient damages," a new trial is properly granted where the verdict is for one dollar and the plaintiff is entitled to substantial damages or else is not entitled to a verdict at all. *Conrad v. Dobmeier*, 57 Minn. 147.

Texas. — Rev. Stat. Texas, art. 1448, providing that "new trials may be granted as well when the damages are manifestly too small as when they are too large," was intended to change the rule that a new trial cannot be granted for smallness of damages. This provision applies to actions *ex delicto* as well as to those *ex contractu*. *Allison v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1895) 29 S. W. Rep. 425.

1. Rev. Stat. Ohio 1897, § 5306; Rev. Stat. Ind. 1881, art. 23, § 560; Comp. Stat. Neb. 1897, § 5888; Code Neb., § 315.

Constitutionality. — It is probable that

the code rule is in violation of the Seventh Amendment to the Federal Constitution, providing that "the right of trial by jury shall be preserved," etc. See a dictum in *Hughey v. Sullivan*, 80 Fed. Rep. 72.

When Code Rule Applicable. — The code rule does not apply where special damages are pleaded and proved. *Jesse v. Shuck*, (Ky. 1889) 12 S. W. Rep. 304.

Federal Practice. — The code rule is not applicable to federal courts, as they are not controlled by state statutes. *Hughey v. Sullivan*, 80 Fed. Rep. 72.

Death by Wrongful Act. — Under the code rule a new trial cannot be granted for inadequate damages in an action for damages for death by wrongful act, as the action is in the nature of an action for personal injury and survives for the benefit of the heirs. *Gann v. Worman*, 69 Ind. 458; *Gentile v. Cincinnati St. R. Co.*, (Cinc. Super. Ct.) 4 Ohio N. P. 9, 6 Ohio Dec. 111.

The code rule does not apply in actions for death by wrongful act, but only to cases of injuries to the person and reputation. The legislature has attached no such proviso to the action for death by wrongful act. *Hughey v. Sullivan*, 80 Fed. Rep. 72.

2. *Shoff v. Wells*, 1 Neb. 168; *Sharpe v. O'Brien*, 39 Ind. 501, *overruling Sullivan v. Wilson*, 15 Ind. 246.

3. **Reasons for Code Rule.** — The reason for the rule that a new trial should not be granted on account of the smallness of the damages "where the damages equal the actual pecuniary injury sustained," is the difficulty of estimating such damages as should be allowed for pain and suffering. *Kinser v. Soap Creek Coal Co.*, 85 Iowa 26. Perhaps another reason is that a new

the rule does not apply where special damages are alleged and proved or where the items of damages can be estimated and it appears that the jury disregarded the evidence and awarded a sum less than the damages established by the evidence.¹

7. Verdict Not Sustained by the Evidence or Contrary to the Evidence — a. DEFINITIONS — Contrary to the Evidence — Not Sustained by the Evidence. — The sixth ground for a new trial is "that the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law."² Under this ground a verdict may be set aside when "against the weight of evidence"³ or "contrary to the evidence,"⁴ as well as where the evidence is insufficient as a matter of law, although such terms are not strictly synonymous.

b. DISCRETION AS TO SUFFICIENCY AND WEIGHT OF EVIDENCE. — It is clearly within the discretion of the trial court to grant a new trial because the verdict is against the weight of evidence, or is not sustained by sufficient evidence,⁵ because the

trial will not be granted for failure of the jury to award punitive or vindictive damages. *Hughey v. Sullivan*, 80 Fed. Rep. 72.

1. Damages Capable of Admeasurement. The code rule does not apply where the items of the damages are proved or are capable of being measured. In such cases a new trial should be granted if the jury returns a verdict for less than the sum of the items. *Ray v. Jeffries*, 86 Ky. 367; *Taylor v. Howser*, 12 Bush (Ky.) 465; *Laudneier v. Cincinnati St. R. Co.*, (C. Pl.) 4 Ohio Dec. 265.

Where Damages Can Be Estimated. — The code rule does not apply where the damages can be computed from the evidence. Where the jury awarded the plaintiff only fifty dollars, and the evidence showed that he had lost several months' wages and paid forty dollars for services of a surgeon, it was held that the verdict should be set aside as inadequate. It was said that the code rule was the "received doctrine, as generally, perhaps universally, applicable to actions for assault, libel, slander, and false imprisonment; but that it cannot be extended to those cases where the action is technically founded in tort, but the damages are to be measured by the amount of the actual expenses the party has incurred, the loss of his time, the duration of his disability, and other circumstances that can be estimated in a large measure by ordinary computation." *Baily v. Cincinnati*, 1 Handy (Ohio) 438.

2. This is substantially the provision of the Ohio and other similar codes.

The California and similar codes provide that a new trial may be granted for "insufficiency of the evidence to justify the verdict or other decision, or that it is against law."

3. *Metropolitan R. Co. v. Moore*, 121 U. S. 558 [overruling *Stewart v. Elliott*, 2 Mackey (D. C.) 307]. To the same effect, see *Rapp v. Washington, etc., R. Co.*, 26 Wash. L. Rep. (D. C.) 210; *Algeo v. Duncan*, 39 N. Y. 313; *McDonald v. Walter*, 40 N. Y. 551; *Weaver v. Columbus, etc., R. Co.*, 55 Ohio St. 491.

The term "not supported by the evidence" is the same as or equivalent to the term "against the weight of evidence." *Wilson v. Eau Claire*, 89 Wis. 47.

The term "insufficient evidence" to support the verdict is equivalent to the term "against the weight of evidence." *Slater v. Drescher*, 72 Hun (N. Y.) 425.

4. A verdict against the weight of evidence is "contrary to the evidence." *Krakower v. Davis*, 20 Misc. Rep. (N. Y. Supreme Ct.) 350.

Where the trial court in granting a new trial expresses the opinion that the jury either misunderstood the instructions or disregarded them, such language will be construed as equivalent to saying that the verdict was against the weight of evidence. *Averill v. Robinson*, (Vt. 1897) 40 Atl. Rep. 40.

5. *Arkansas*. — *Oliver v. State*, 34 Ark. 632.

California. — *Watson v. McClay*, 4 Cal. 288; *Weddle v. Stark*, 10 Cal. 301; *Burnett v. Whitesides*, 15 Cal. 36; *Quinn v. Kenyon*, 22 Cal. 82; *O'Brien*

motion on this ground is not governed by any well-defined rules,¹ and because the trial court has better facilities for determining the weight and sufficiency of the evidence than the appellate court.² In cases where the evidence discloses that a material fact is not established, the sufficiency of the evidence is ascertained by rules of law, and is not a matter resting in the discretion of the court.

c. DUTIES AND FUNCTIONS OF TRIAL COURT AS TO WEIGHT OF EVIDENCE — **Trial Court Must Weigh the Evidence.** — On a motion for a new trial on this ground it becomes the duty of the trial court to weigh the evidence,³ and if in its opinion the verdict is

v. Brady, 23 Cal. 243; *Hall v. The Bark Emily Banning*, 33 Cal. 523; *Harrison v. Peabody*, 34 Cal. 180; *Pierce v. Schaden*, 55 Cal. 407; *Bronner v. Wetzlar*, 55 Cal. 420; *Domico v. Cassassa*, 101 Cal. 411; *Potter v. Carney*, 8 Cal. 574; *Visher v. Webster*, 13 Cal. 60; *Lewis v. Covillaud*, 21 Cal. 178; *Oullahan v. Starbuck*, 21 Cal. 413; *Phelps v. Union Copper Min. Co.*, 39 Cal. 407; *Lorenzana v. Camarillo*, 41 Cal. 467; *Simpson v. Pacific Mut. L. Ins. Co.*, 44 Cal. 139; *Altschul v. Doyle*, 48 Cal. 535; *Marble v. Fay*, 49 Cal. 585; *Doherty v. Enterprise Min. Co.*, 50 Cal. 187; *Warner v. Thomas Parisian Dyeing, etc., Works*, 105 Cal. 409; *Cole v. Wilcox*, 99 Cal. 549; *Felton v. Le Breton*, 92 Cal. 457; *Breckenridge v. Crocker*, 68 Cal. 403; *Pico v. Cohn*, 67 Cal. 258; *Gerold v. J. M. Brunswick, etc., Co.*, 67 Cal. 124; *Bjorman v. Ft. Bragg Redwood Co.*, 92 Cal. 500; *Blum v. McHugh*, 92 Cal. 497; *Matter of Carriger*, 104 Cal. 81; *Jones v. Sanders*, 103 Cal. 678.

Connecticut. — *Bartholomew v. Clark*, 1 Conn. 472; *Zaleski v. Clark*, 45 Conn. 397.

Georgia. — *Allen v. State*, 91 Ga. 189; *Lamb v. State*, 91 Ga. 4; *Anderson v. Jenkins*, 99 Ga. 299.

Missouri. — *Dean v. Philadelphia F. Assoc.*, 65 Mo. App. 209; *Brunswick First Nat. Bank v. Wood*, 124 Mo. 76; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265.

Montana. — *Ray v. Cowan*, 18 Mont. 259; *Froman v. Patterson*, 10 Mont. 107; *McCauley v. Tyler*, 11 Mont. 51; *Bass v. Buker*, 6 Mont. 442.

New York. — *Kelly v. Frazier*, 27 Hun (N. Y.) 314.

Oregon. — *State v. Mackey*, 12 Oregon 154.

Utah. — *Pratt v. Gilbert*, 8 Utah 56; *Tousey v. Etzel*, 9 Utah 329; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206.

Vermont. — *Newton v. Brown*, 49 Vt. 16; *Averill v. Robinson*, (Vt. 1897) 40 Atl. Rep. 49.

Washington. — *Pederson v. Seattle Consol. St. R. Co.*, 6 Wash. 202.

Wisconsin. — *Heller v. Abbot*, 79 Wis. 409; *McLimans v. Lancaster*, 57 Wis. 297; *Seaman v. Burnham*, 57 Wis. 568; *Evans v. Rugee*, 63 Wis. 31; *Smith v. Champagne*, 72 Wis. 480; *Schraer v. Stefan*, 80 Wis. 653; *Schilling v. Verona*, 85 Wis. 595; *Farley v. Chicago, etc., R. Co.*, 89 Wis. 206.

United States. — *Felton v. Spiro*, 78 Fed. Rep. 576.

1. *Slater v. Drescher*, 72 Hun (N. Y.) 425.

"Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well-defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end." *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628, followed in *Kelly v. Frazier*, 27 Hun (N. Y.) 314.

2. See article APPEALS, vol. 2, p. 1.

3. **Duty of Trial Court.** — "The judge of the trial court does not sit as a mere moderator to record the will of the jury. He has other functions and duties to perform which he cannot lawfully escape or evade. He must confine the evidence within the issues, and when a verdict is returned unwarranted by the evidence he must set it aside and grant a new trial when asked for." *Rarick v. Ulmer*, 144 Ind. 25.

"The judge before whom the case is tried in the first instance has the same opportunity as the jury to form

contrary to the evidence or not sustained by the evidence it may in its discretion grant a new trial or it may in doubtful cases defer its opinion to that of the jury.¹ In this respect the functions of the trial court are different from those of the appellate court, as the latter does not weigh the evidence.² Where the trial judge expresses the opinion that the verdict is clearly against the weight of evidence it is his imperative duty to grant a new trial.³ In

an opinion with respect to the weight to be given to each witness; and one of the highest and most important functions of his office is the power to set aside a verdict whenever in the exercise of a sound discretion he considers that the jury, from any cause whatever, has returned an improper or unjust verdict." *Woods v. Richmond, etc., R. Co.*, 1 App. Cas. (D. C.) 169.

Court May Set Aside on Its Own Motion. — Where a trial court might properly direct a verdict, or where the verdict is so manifestly against the weight of evidence that it is apparent that the jurors either misapprehended the evidence or were influenced by passion or prejudice, the trial court may set aside the verdict on its own motion and grant a new trial without an actual motion, but in the presence of the attorneys. *Schmidt v. Brown*, 80 Hun (N. Y.) 183.

1. *Reeve v. Dennett*, 137 Mass. 315.

2. Functions of Trial Court. — The Supreme Court will not weigh conflicting evidence, but where there is a substantial conflict in the evidence it will not disturb the order of the lower court either granting or refusing a new trial on the ground that the verdict is against the weight of evidence. But this rule as to conflicting evidence does not apply to the trial court, whose duty it is to weigh the evidence although conflicting. *Dickey v. Davis*, 39 Cal. 569. See also cases cited *infra*, III. 7.

g. (5) Conflicting Evidence.

The rule of appellate courts that a verdict on conflicting evidence will not be set aside where there is any substantial evidence tending to support it does not apply to trial courts. It is "not only the right, but the duty, of Circuit Courts to supervise the verdicts of juries and grant new trials if the verdict is, in their opinion, against the weight of evidence." *Brunswick First Nat. Bank v. Wood*, 124 Mo. 72, quoted in *Dean v. Philadelphia F. Assoc.*, 65 Mo. App. 209.

"While the duty of correcting the mistakes of juries is one which ought

to be exercised with great care and wise judgment, it is, nevertheless, one in the performance of which trial courts should not be discouraged where the due administration of justice seems to require it." *Reid v. Young*, 7 N. Y. App. Div. 400.

Effect of View by Jury. — The fact that a jury may have acquired additional evidence by a view of the property or of the locality of the accident does not present an insuperable obstacle to granting a new trial on the ground that the verdict is against the weight of evidence. *Davis v. Jenney*, 1 Met. (Mass.) 221; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *McQueen v. Mechanics' Institute*, 107 Cal. 163. But see *Chicago, etc., R. Co. v. Hopkins*, 90 Ill. 316.

3. *California.* — *Dickey v. Davis*, 39 Cal. 565; *Mason v. Austin*, 46 Cal. 385; *Irving v. Cunningham*, 58 Cal. 306; *Hawkins v. Abbott*, 40 Cal. 639.

Indiana. — *Crossley v. O'Brien*, 24 Ind. 325.

Iowa. — *State v. Billings*, 81 Iowa 100.

Kansas. — *Williams v. Townsend*, 15 Kan. 564; *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 172; *Richolson v. Freeman*, 56 Kan. 463; *Chicago, etc., R. Co. v. Reardon*, 1 Kan. App. 114; *Kansas City, etc., R. Co. v. Ryan*, 49 Kan. 1; *Chicago, etc., R. Co. v. Guild*, 3 Kan. App. 736.

Missouri. — *Reid v. Piedmont, etc., L. Ins. Co.*, 58 Mo. 421; *Lockwood v. Atlantic Mut. Ins. Co.*, 47 Mo. 51.

Nevada. — *Phillipotts v. Blasdel*, 8 Nev. 61; *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 422.

Tennessee. — *Turner v. Turner*, 85 Tenn. 387; *England v. Burt*, 4 Humph. (Tenn.) 401.

Washington. — *Tacoma v. Tacoma Light, etc., Co.*, 16 Wash. 318.

England. — *Mountedgecombe v. Symons*, 1 Price 278.

Error Not Affecting Applicant for a New Trial. — Where a verdict is against two or more parties, a new trial will not be granted on the application of one party

such case he should not defer his opinion to that of the jury or render a judgment to ascertain the opinion of the appellate court. If he refuses to set aside the verdict a new trial will be granted by the appellate court for abuse of discretion.¹

All Evidence Weighed, Though Incompetent. — The court, in determining the sufficiency of evidence, cannot disregard any portion of the testimony admitted without objection and submitted to the jury.²

because the verdict is not sustained by sufficient evidence as to other parties not moving for a new trial. The applicant is not aggrieved by such verdict. *Flood v. Joyner*, 96 Ind. 459; *Long v. Clapp*, 15 Neb. 417; *Hoke v. Halverstadt*, 22 Neb. 421; *Real v. Hollister*, 17 Neb. 661; *Boldt v. Budwig*, 19 Neb. 739.

Against Evidence on One Material Issue. — A new trial should be granted where the judge is convinced that the verdict is contrary to the evidence on one of the material issues. *Tacoma v. Tacoma Light, etc., Co.*, 16 Wash. 317.

1. **If the Judge Is Convinced** that the verdict was not sustained by the weight of evidence, or was contrary to the weight of evidence, and such opinion appears of record, the appellate court will grant a new trial without hesitation. *State v. Billings*, 81 Iowa 100; *Tacoma v. Tacoma Light, etc., Co.*, 16 Wash. 317; *Chicago, etc., R. Co. v. Guild*, 3 Kan. App. 736; *Richolson v. Freeman*, 56 Kan. 463.

Contra—Must Be an Abuse of Discretion. — The above rule is, however, subject to the rule that the trial court may in doubtful cases defer to the opinion of the jury. In such case there is no abuse of discretion. *Reeve v. Dennett*, 137 Mass. 315, in which case the court said: "The contention of the defendant that he was entitled, as matter of law, to a new trial, upon the statement of the judge that he was of opinion that the verdict was against the weight of the evidence, cannot be sustained. A judge has a right to set aside a verdict which in his opinion is against the weight of the evidence, and in some cases it is his duty to do so; but whether he shall do so in any given case is a question addressed to his judicial discretion. To require him, as a matter of law, to set aside every verdict which is in his opinion against the weight of the evidence, would result practically in the trial of facts by the court instead of the jury."

Verdict Sustained in Deference to Jury.

— "The expression of the trial judge in ruling on the motion for a new trial, to the effect that he was not altogether satisfied with the answers of the jury to the special questions, or with the instructions given in the case, is no ground for a reversal of the order refusing a new trial. Many cases are tried in every court, concerning which the court may well have doubts, and perhaps would have doubts no matter how often tried. The business of courts is to decide between parties and resolve doubtful controversies. Mathematical accuracy is not attainable in judicial proceedings, and no process has ever yet been discovered by which all doubts as to the correctness of a verdict on matters of fact can be removed." *Middleton v. Drumm*, (Kan. 1897) 48 Pac. Rep. 579, 58 Kan. 813 (mem.). To the same effect, see *Johnson v. Leggett*, 28 Kan. 590; *Atchison, etc., R. Co. v. Matthews*, 58 Kan. 447.

2. **All the Evidence Must Be Considered.**

— *McCloud v. O'Neill*, 16 Cal. 392, in which case the court said: "As a matter of course, a verdict upon incompetent evidence may be set aside; but this cannot be done where the evidence was admitted without objection; nor can it be done even where the evidence was objected to upon the ground that effect was given to it by the jury. That which vitiates the verdict in such a case is the error of the court admitting the evidence; and if the party seeking to set aside the verdict is not in a position to take advantage of this error, he cannot be heard to object that the evidence was improperly admitted."

Failure to Object to Incompetent Evidence. — If evidence was admitted on the trial without objection, it is too late on a motion for a new trial to claim that it was incompetent. *Janson v. Brooks*, 29 Cal. 214; *Bliss v. Ellsworth*, 36 Cal. 310; *Rewrick v. Goldstone*, 48 Cal. 554; *Frink v. Alsip*, 49 Cal. 103.

But a new trial may be granted where the incompetent evidence was prejudicial.¹

d. PROVINCE OF COURT AND JURY—Conflict of Opinion.—It is the peculiar province of the jury to determine the credibility of witnesses and weigh the evidence,² and a verdict will not be set aside merely because the court, if trying the question of fact, would have found differently.³ A verdict must be manifestly and palpably wrong to justify a new trial.

Difference of Opinion.—A verdict will not be set aside on account of a difference of opinion of the trial judge and the jury on the merits of the case, unless it is clear to the court that the findings of the jury were not justified by the evidence.⁴

1. A new trial may be granted where the incompetent evidence admitted without objection might well have turned the scale. *Pulver v. Rochester German Ins. Co.*, 35 Ill. App. 24.

2. *Invading Province of Jury.*—The act of the trial court in weighing the evidence and granting a new trial because the verdict is contrary to the evidence is not invading the province of the jury, but merely referring the issues to another jury. 3 *Graham and Waterman on New Trials* 1211.

In *Kohne v. Insurance Co. of North America*, 1 Wash. (U. S.) 123, Washington, J., in delivering the opinion of the court, said: "I have always thought it most safe, most consistent with the privileges of the jury, and attended with less embarrassment, to leave the jury perfectly at liberty as to the weight of evidence, particularly if it be at all contradictory. But if I had supposed that by such a practice I surrendered the power of the court to set aside a verdict palpably contrary to evidence, I should certainly have adopted a practice of which I have never approved. But if it was duty, as I think it was, to leave the evidence to the jury, and if, in consequence of doing so, the verdict, though contrary to evidence, must stand, then it follows that a new trial can never be granted because the verdict is against evidence; a doctrine new in this country, as well as in that from which we have derived those rules and principles which guide our decisions. I certainly shall always respect the opinion of the jury, so far as not to set aside their verdict in a doubtful case because I might have drawn a conclusion different from what they have done. But if the verdict be plainly against evidence, or if, in a case of great consequence, as this cer-

tainly is, where some doubt might exist as to the correctness of the conclusion drawn by the jury, it would seem right that the case should be more deliberately argued and considered by another jury, it is certainly most consistent with the objects of justice to afford such an opportunity."

3. *Connecticut.*—*Palmer v. Hyde*, 4 Conn. 426; *Bacon v. Parker*, 12 Conn. 212; *Derwort v. Loomer*, 21 Conn. 252.

Illinois.—*Gilbert v. Bone*, 79 Ill. 341; *Chicago v. Smith*, 48 Ill. 107; *O'Reilly v. Fitzgerald*, 40 Ill. 310; *Sullivan v. Dollins*, 13 Ill. 85.

Maine.—*McNerney v. East Livermore*, 83 Me. 449.

Ohio.—*Webb v. Protection Ins. Co.*, 6 Ohio 456; *French v. Millard*, 2 Ohio St. 44; *McGatrick v. Wason*, 4 Ohio St. 566; *Dean v. King*, 22 Ohio St. 118.

Where different persons might reasonably draw different conclusions from the evidence, the verdict will be sustained. *Coffin v. Phenix Ins. Co.*, 15 Pick. (Mass.) 291; *Eich v. Taylor*, 17 Minn. 172; *Linn v. Rugg*, 19 Minn. 181.

4. *Rust v. Strickland*, 1 Colo. App. 215; *Daley v. Norwich, etc.*, R. Co., 26 Conn. 501; *Nash v. Somes*, (Me. 1887) 10 Atl. Rep. 447; *Reeve v. Dennett*, 137 Mass. 315; *Oregon Cascades R. Co. v. Oregon Steam Nav. Co.*, 3 Oregon 178; *State v. Tarrant*, 24 S. Car. 593; *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708; *Muskegon Nat. Bank v. Northwestern Mut. L. Ins. Co.*, 19 Fed. Rep. 405; *Gaither v. Kansas City, etc.*, R. Co., 27 Fed. Rep. 544; *Walker v. Smith*, 1 Wash. (U. S.) 152; *Stickney v. Atwood*, 6 Dane's Abr. 251.

Although a verdict on conflicting evidence was not subject to review on appeal at common law, the trial judge had power to grant a new trial if the

e. EFFECT OF CONCURRENT VERDICTS—*Number of New Trials Discretionary.*—After several concurrent verdicts have been set aside as against the weight of evidence the trial court will usually refuse a new trial on that ground.¹ But the prevailing rule is that the number of new trials which may be granted is discretionary,² and in extraordinary cases a third or fourth new trial has been granted.³

f. PROBABILITY THAT NEW TRIAL WILL CHANGE RESULT—*Substantial Justice Not Attained.*—It must appear on motions on this ground as well as on others, that substantial justice has not been attained, that the applicant is entitled to succeed, and that a new trial will probably change the result.⁴

g. GENERAL PRINCIPLES GOVERNING REVIEW OF EVIDENCE—*(1) Construction of Evidence.*—In determining the weight and sufficiency of evidence in civil cases the general rule is that the verdict must be sustained if warranted by any fair construction of the evidence.⁵ But where there is no hypothesis by which the

verdict was not sustained by the evidence. *Bishop v. Busse*, 69 Ill. 403.

1. *Taylor v. Randall*, 3 Colo. 401; *Jackson v. McMurray*, 4 Colo. 76; *Denver, etc., R. Co. v. Hodgson*, 18 Colo. 117; *Quimby v. Boyd*, 8 Colo. 209; *Todd v. Demerice*, 15 Colo. 88; *Doherty v. Morris*, 17 Colo. 105; *Osbiston v. Kaufman*, 1 Colo. App. 333; *Van Doren v. Wright*, 65 Minn. 80; *Nichols v. Tuttle*, (Supreme Ct.) 12 N. Y. Supp. 394; *East Tennessee, etc., R. Co. v. Mahoney*, 89 Tenn. 311; *Joyce v. Charleston Ice Mfg. Co.*, 50 Fed. Rep. 371. *Contra*, *Lewis v. Equitable Mortg. Co.*, 97 Ga. 336; *Dempsey v. Rome*, 99 Ga. 192.

2. See *infra*, XXIII. 1. *Number of New Trials.*

After two concurrent verdicts a new trial will not be granted even though in the opinion of the judge the verdict be against the weight of the evidence. *Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho 650.

Discretion as to Concurrent Verdicts.—“If a verdict were rendered upon a mere matter of fact, found clearly against the weight of the evidence, the court would send the cause to another jury, if the circumstances should, in the exercise of a sound legal discretion, require such a revision. * * * And if a second jury should confirm the verdict, this court would, as a general rule, be disposed to acquiesce in the second verdict, as it would be within the prescribed right of the jury to decide upon the mere matter of fact.

But after all, the granting of a new trial is a matter of legal discretion.

* * * The reasons must be collected from the whole evidence and from the nature of the case under all the circumstances.” *Bryant v. Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543, followed in *Rapp v. Washington, etc., R. Co.*, 26 Wash. L. Rep. (D. C.) 210.

3. *Bryant v. Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543.

4. *Slater v. Drescher*, 72 Hun (N. Y.) 425; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Ludlow v. Park*, 4 Ohio 15; *Hinton v. McNeil*, 5 Ohio 509.

If it clearly appears that substantial justice has been done, a new trial will not be granted on the ground that the verdict is not supported by sufficient evidence. *Christy v. Holmes*, 57 Ind. 314; *Kelsey v. Hanmer*, 18 Conn. 311.

5. *Chapin v. Goodell*, 2 Colo. 612.

Where the Proof Is Conflicting and of Doubtful Interpretation, if the verdict can be sustained on any correct theory applicable to the facts it should not be disturbed. *Hess v. Rosenthal*, 55 Ill. App. 324; *Carson v. Allen*, 6 Dana (Ky.) 395; *Autenrieth v. St. Louis, etc., R. Co.*, 36 Mo. App. 254; *Koser v. Sommer*, 64 Hun (N. Y.) 637, 19 N. Y. Supp. 449.

Jury Warranted in Inferring State of Case.—Where it can be seen that the jury was warranted in inferring a state of case that would admit of a verdict, the judgment should be upheld, although it seems to be against the pre-

verdict can be explained except a mistake in the amount or a compromise of the individual opinion of the jury, the verdict should be set aside.¹

Distinction Between Actions *ex contractu* and *ex delicto*. — A verdict against the weight of evidence will be more readily set aside as against the weight of evidence in actions *ex contractu*, where there can be more precise rules for weighing the evidence,² than in actions *ex delicto*.³

(2) **Number and Credibility of Witnesses — Number of Witnesses.** — The trial court must weigh the testimony of the witnesses, and may take into consideration the number of witnesses as to a material fact.⁴ But the preponderance of evidence is not to be

ponderance of evidence. The prevailing party is entitled to all inferences legitimately arising from the findings. *Bloomer v. Denman*, 12 Ill. 240.

When the Verdict Cannot Be Sustained by any impartial or intelligent consideration of the evidence, it should be set aside. *Albion Consol. Min. Co. v. Richmond Min. Co.*, 19 Nev. 225; *Friesz v. Fallon*, 24 Mo. App. 439; *Lake Shore, etc., R. Co. v. Kuhlman*, 18 Ill. App. 222; *Hickey v. Chicago, etc., R. Co.*, 64 Wis. 649; *Murray v. Wells*, 57 Iowa 26.

Theory Formulated in Instructions. — Where the evidence is sufficient to justify a verdict upon a theory that is formulated in the instructions a new trial will be refused. *Dixon Nat. Bank v. Spielman*, 43 Ill. App. 475.

Preponderance Against Verdict. — A verdict will not be set aside as against the weight of evidence where the evidence is conflicting and by fair and reasonable intendment warrants the finding, although there appears to be a preponderance against the verdict. *Lowry v. Orr*, 6 Ill. 70; *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338; *McKichan v. McBean*, 45 Ill. 228; *O'Brien v. Palmer*, 49 Ill. 72; *Illinois Cent. R. Co. v. Gillis*, 68 Ill. 317; *Shevalier v. Seager*, 121 Ill. 564.

Weight and Credibility. — If the evidence is conflicting and irreconcilable, it is for the jury to determine its weight and credibility. *Brown v. Berry*, 47 Ill. 175.

When an Appellate Court Is Asked to Set Aside the Verdict of a jury, all conflicts in evidence must be resolved in favor of the verdict. *Chicago, etc., R. Co. v. Sharp*, 63 Fed. Rep. 532, 27 U. S. App. 334; *Murphy v. Stell*, 43 Tex. 123.

1. *St. Louis Brewery Co. v. Bode-*

mann, 12 Mo. App. 573; *Todd v. Boone County*, 8 Mo. 431; *Ellsworth v. Central R. Co.*, 34 N. J. L. 93.

Compromise Verdicts. — Where the jury finds for the plaintiff in an action on a contract, a verdict for a less sum than the plaintiff is clearly entitled to will be set aside as a compromise verdict, and as against the evidence. *O'Shea v. McLearn*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 71; *Platz v. Cohoes*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 392; *Rowe v. Comley*, 11 Daly (N. Y.) 318.

Where under the evidence the jury must find for the plaintiff for the full amount claimed or find for the defendant, and it finds for the plaintiff and awards him less damages than the amount claimed, the verdict cannot be amended, but must be set aside as a compromise verdict. *Powers v. Gouraud*, 19 Misc. Rep. (N. Y. Supreme Ct.) 268.

Where it is clear that a verdict of a jury is based on a compromise of the differences of opinion of its individual members, and in disregard of the evidence, it is not error to set it aside. *Meyer v. Shamp*, 51 Neb. 424.

2. *Fish v. Roseberry*, 22 Ill. 288; *Dalton v. Clough*, 50 Ill. 47; *Bonnell v. Wilder*, 67 Ill. 327. Compare *Clark v. Hatfield*, 88 Ill. 440.

3. Verdicts in actions *ex delicto* will not be set aside unless grossly wrong or unless there was such a preponderance of evidence as to create a presumption of mistake or improper motives. *Ottawa v. Sweely*, 65 Ill. 434; *Smith v. Slocum*, 62 Ill. 354. See also *infra*, III. 7. g. (4) *Verdict Resulting from Mistake or Improper Motives*.

4. **Preponderance by Number of Witnesses.** — In *Welch v. Huckins*, 45 Ill. App. 53, a verdict was set aside as

determined solely from the number of the witnesses.¹

Credibility of Witnesses. — The jurors are exclusive judges of the credibility of the witnesses, where such question is involved.² But a jury cannot disregard the testimony of an uncontradicted

against the weight of evidence where it was sustained by the testimony of one party only as to the terms of a contract and was contradicted by the unimpeached testimony of three witnesses, two of them adverse parties and one their bookkeeper, all of whom were present when the contract was made.

The reviewing court will reverse a cause when the verdict rests on the testimony of the plaintiff, which is positively contradicted by the defendant, who is corroborated by disinterested witnesses. *Chicago, etc., R. Co. v. Herring*, 57 Ill. 59; *Peaslee v. Glass*, 61 Ill. 91; *Chicago, etc., R. Co. v. Means*, 48 Ill. App. 396; *Bryan v. Wilson*, (Supreme Ct.) 5 N. Y. St. Rep. 58; *Missouri Pac. R. Co. v. Somers*, 78 Tex. 439.

The verdict may be set aside where a witness to important facts, who suddenly appeared on the eve of trial, testifies to circumstances in such a way as to make his testimony incredible, there being but the testimony of the plaintiff to corroborate him, and the testimony of four or five witnesses the other way. *West Chicago St. R. Co. v. Loewe*, 58 Ill. App. 606.

A new trial may be granted where a verdict rests upon the uncorroborated testimony of the plaintiff, which is squarely contradicted by one witness, and there is corroborative testimony of another witness to a state of facts which, if true, would operate as an absolute bar to the action. *Illinois Cent. R. Co. v. Alexander*, 46 Ill. App. 505.

1. *Green v. Taney*, 7 Colo. 278; *Bishop v. Busse*, 69 Ill. 403; *Fitzgerald v. Richardson*, 30 Neb. 365.

On Appeal. — A verdict will not be set aside on appeal because based on the sole testimony of the successful party as against that of his adversary and two other witnesses. *Tanton v. Keller*, 59 Ill. App. 177; *Ohio, etc., R. Co. v. Hawkins*, 1 Ind. App. 213.

2. *May v. State*, 94 Ga. 76; *Dodge v. Dodge*, 86 Me. 393; *Beckwith v. New York Cent. R. Co.*, 64 Barb. (N. Y.) 299; *Morss v. Sherill*, 63 Barb. (N. Y.) 21; *Hayes v. Thompson*, 2 Hun (N. Y.) 518; *People v. McGuire*, 2 Hun (N.

Y.) 269; *Miller v. Insurance Co. of North America*, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 470; *Layman v. Anderson*, 4 N. Y. App. Div. 124. See, however, *Holden v. Pennsylvania R. Co.*, 7 Kulp (Pa.) 52; *Western, etc., R. Co. v. Evans*, 96 Ga. 481; *Clark v. New York Cent., etc., R. Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 113; *Meddaugh v. Bigelow*, 67 Barb. (N. Y.) 106.

One Witness Opposed to Another. — The court will not disturb a verdict on the ground merely that in deciding upon the credibility of two witnesses, whose testimony was exactly opposed, one was preferred to the other. *Neustadt v. Hall*, 58 Ill. 172; *Nelson v. Ravens*, 3 Ill. App. 565; *Roper v. Globe Pickle Co.*, 18 Ill. App. 644.

The court cannot say that the verdict is against the weight of the evidence, where there is a single witness on either side, and their testimony is exactly opposed. *McFerran v. Chambers*, 64 Ill. 118.

Where the case turns upon the testimony of a party on the one side and of an agent of a party on the other, and they differ upon important facts, a new trial cannot be granted because the jurors have credited the agent. *Newlan v. Lombard University*, 62 Ill. 195.

The rule that positive evidence must prevail over negative does not apply where one witness contradicts another as to the existence of an agreement. *Shekey v. Eldredge*, 71 Wis. 538.

Conflict in Testimony of Parties. — A new trial will not be granted where there is no evidence but the testimony of the two parties, and their testimony, each having the same opportunity to know the facts, and each having equal interest, is exactly opposed; the testimony of one may under the circumstances have more weight than that of the other. *Reynolds v. McCormick*, 62 Ill. 412; *McElhanev v. People*, 1 Ill. App. 550; *Bonnell v. Wilder*, 67 Ill. 327; *Haines v. People*, 82 Ill. 430; *Durant v. Rogers*, 87 Ill. 508; *Boylston v. Bain*, 90 Ill. 283; *Wilcox v. Wilcox*, 16 Ill. App. 580; *Lincoln v. Stowell*, 62 Ill. 84; *Crouse v. White-lake*, 15 Ill. App. 384.

or unimpeached witness¹ unless it is inconsistent, improbable, or incredible.²

(3) *Verdict Clearly Against the Weight of Evidence.* — When a verdict is clearly against the weight of evidence, it is the duty of the court to set it aside and order a new trial.³ This is an imper-

1. *Lomer v. Meeker*, 25 N. Y. 361; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *St. Louis, etc., R. Co. v. Stapp*, 53 Ill. App. 600; *Edler v. Uchtmann*, 10 Ill. App. 493; *Engmann v. Immel*, 59 Wis. 249.

Disregarding Testimony of Uncontradicted Witness. — "A jury is not bound to accept the testimony of a witness where it contains improbabilities such as to afford a reasonable basis for believing it to be untrue, or where there are reasonable grounds for believing it to be false; but where positive and direct testimony is wholly undisputed and uncontradicted, and the witness delivering it is not impeached or otherwise discredited, and there is no improbability or inconsistency apparent in it, or any disclosed by any facts or circumstances throughout the case, they cannot arbitrarily refuse to believe such testimony, and find a verdict directly contrary to it, and which finds no support whatsoever in the evidence. In such a case they should believe, for the purpose of the suit, the testimony of the unimpeached, uncontradicted witness, and it is the duty of a court to set aside a verdict founded upon a disbelief of such clear and uncontradicted evidence." *Boe v. Lynch*, 20 Mont. 80.

2. *Craft v. Northern Pac. R. Co.*, 62 Fed. Rep. 735; *State v. Cantlin*, 118 Mo. 100.

Where the only witness examined is a party to the suit and interested in the event, a new trial will not be granted because the jury did not rely upon his uncontradicted testimony. *Zust v. Linthicum*, 58 N. Y. Super. Ct. 478, 19 Civ. Pro. Rep. (N. Y.) 370; *McNulty v. Hurd*, 86 N. Y. 547.

A verdict will not be set aside, though against the testimony of unimpeached witnesses, where there are circumstances tending to lessen the probability that such testimony is true. *St. Louis, etc., R. Co. v. Chambliss*, 54 Ark. 214; *Wait v. M'Neil*, 7 Mass. 261; *Hall v. Huse*, 10 Mass. 39; *Harding v. Brooks*, 5 Pick. (Mass.) 244.

3. *Arkansas.* — *Gaster v. Hodgins*, 21 Ark. 468.

California. — *Irving v. Cunningham*, 58 Cal. 306; *Hill v. Smith*, 32 Cal. 166; *Bagley v. Eaton*, 8 Cal. 159.

Colorado. — *Green v. Taney*, 7 Colo. 278.

Connecticut. — *Lafin v. Pomeroy*, 11 Conn. 440; *Watson v. Watson*, 9 Conn. 140; *Beers v. Woodruff, etc.*, Iron Works, 30 Conn. 310; *Yale v. Yale*, 13 Conn. 189; *Clark v. Whitaker*, 19 Conn. 330; *Price v. Heubler*, 63 Conn. 376; *Allen v. Jarvis*, 20 Conn. 48; *Babcock v. Porter*, 20 Conn. 579; *Derwort v. Loomer*, 21 Conn. 252; *Trowbridge v. Chapin*, 23 Conn. 604.

Florida. — *Branch v. Wilson*, 12 Fla. 543; *Sanderson v. Hagan*, 7 Fla. 318; *Meinhard v. Lilienthal*, 17 Fla. 501; *Gaines v. Forcheimer*, 9 Fla. 265.

Georgia. — *Long v. Lewis*, 16 Ga. 154; *Cook v. Jones*, 28 Ga. 589; *Stancell v. Kenan*, 33 Ga. 56.

Idaho. — *Monarch G. & S. M. Co. v. McLaughlin*, 1 Idaho 617.

Illinois. — *Lake Shore, etc., R. Co. v. Kuhlman*, 18 Ill. App. 222; *Ohio, etc., R. Co. v. Schiebe*, 44 Ill. 460; *Gibson v. Webster*, 44 Ill. 483; *Boudreau v. Boudreau*, 45 Ill. 480; *Maynz v. Zeigler*, 49 Ill. 303; *Blake v. McMullen*, 91 Ill. 32; *Armour v. McFadden*, 9 Ill. App. 508; *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409.

Indiana. — *Crossley v. O'Brien*, 24 Ind. 325.

Iowa. — *State v. Elliott*, 15 Iowa 72.

Kansas. — *Chicago, etc., R. Co. v. Munice*, 56 Kan. 210; *Cherokee, etc., Coal, etc., Co. v. Stoop*, 56 Kan. 426; *Atchison, etc., R. Co. v. Hine*, 5 Kan. App. 748.

Louisiana. — *Dalferes v. Maurin*, 49 La. Ann. 333.

Maine. — *Wells v. Waterhouse*, 22 Me. 131; *Cummings v. Kennebec Mut. L. Ins. Co.*, 89 Me. 37.

Massachusetts. — *Wait v. M'Neil*, 7 Mass. 261; *Curtis v. Jackson*, 13 Mass. 507.

Minnesota. — *State v. Miller*, 10 Minn. 313.

Mississippi. — *Young v. Wilson*, 24 Miss. 694.

Missouri. — *Lockwood v. Atlantic Mut. Ins. Co.*, 47 Mo. 50; *Price v.*

ative duty, and cannot be evaded on the theory that the jurors are exclusive judges of questions of fact and that the evidence can be weighed on appeal.¹

Verdict Contrary to Admissions.—A new trial should be granted where the verdict is contrary to the admissions of the parties in the pleadings or evidence.²

(4) *Verdict Resulting from Mistake or Improper Motives.*—It is a rule of both trial and reviewing courts³ not to set aside a verdict unless it is so manifestly wrong or so clearly against the weight of evidence as to warrant the presumption that the jury misunderstood the evidence or misconceived its force and effect, or was influenced by malice, passion, prejudice, or other improper motives.⁴ But it is immaterial by what process the erroneous

Evans, 49 Mo. 396; McKay v. Underwood, 47 Mo. 185; Bybee v. Kinote, 6 Mo. 53; Clemens v. Lavielle, 4 Mo. 80; Hartt v. Leavenworth, 11 Mo. 629; Iron Mountain Bank v. Armstrong, 92 Mo. 265.

New Jersey.—Corlies v. Little, 14 N. J. L. 373; New Jersey Flax Cotton Wool Co. v. Mills, 26 N. J. L. 60.

New York.—Ferguson v. Gill, 74 Hun (N. Y.) 566; Dolsen v. Arnold, 10 How. Pr. (N. Y. Supreme Ct.) 528; Heritage v. Hall, 33 Barb. (N. Y.) 347; Smith v. Tiffany, 36 Barb. (N. Y.) 23.

Ohio.—Muhlenburg v. Florence, 5 Ohio 245; Cleveland, etc., R. Co. v. Sargent, 19 Ohio St. 438.

Texas.—Aspley v. Thomas, 17 Tex. 220; Willis v. Lewis, 28 Tex. 185.

Wisconsin.—Edmister v. Garrison, 18 Wis. 594.

Wyoming.—Granger v. Lewis, 2 Wyoming 237; Edwards v. O'Brien, 2 Wyoming 493.

United States.—Zantzing v. Weightman, 2 Cranch (C. C.) 478; Wilson v. James, 3 Blatchf. (U. S.) 227; Slocomb v. Lurty, Hempst. (U. S.) 431.

Where the only ground upon which a verdict could be based was squarely contradicted and completely disproved, a new trial should be granted. Goss, etc., Mfg. Co. v. Suelau, 35 Ill. App. 103.

1. Sullivan v. Cloud County, 5 Kan. App. 880, 47 Pac. Rep. 165; Cherokee, etc., Coal, etc., Co. v. Stoop, 56 Kan. 426; Myers v. Knabe, 4 Kan. App. 484; Pierson v. Thompson, 4 Kan. App. 173.

It is the duty of the trial court to determine whether the verdict is not sustained by sufficient evidence. Without such decision the evidence cannot be reviewed in the first instance on appeal, as the appellate court has no

original jurisdiction in such cases. Illinois Cent. R. Co. v. Brown, 96 Tenn. 559; East Tennessee, etc., R. Co. v. Lee, 95 Tenn. 339.

2. Jones v. Farmer, 84 Ga. 296; Holloway v. Johnson, 129 Ill. 367, reversing 23 Ill. App. 331; Stanton v. Dudley, 64 Ill. 325; Roth v. Smith, 41 Ill. 314; Shafer v. McGee, 52 Ind. 111; Palmer v. Pinkham, 33 Me. 32; Hughes v. Howard, 3 Har. & J. (Md.) 9; Foley v. Alkire, 52 Mo. 317; Holt v. Morton, 53 Mo. App. 187; Curtiss v. Driggs, 25 Mo. App. 175; Shultz v. Third Ave. R. Co., 15 Daly (N. Y.) 95; Gilbert v. Quinlan, 59 Hun (N. Y.) 508; Allen v. Brown, 11 Tex. 520; Preston v. Oley, 88 Va. 491.

3. See article APPEALS, vol. 2, p. 404.

4. *Arkansas.*—Howell v. Webb, 2 Ark. 360; Wandever v. Wilson, 5 Ark. 407; Hazen v. Henry, 6 Ark. 86; Lewis v. Read, 6 Ark. 428; Drennen v. Brown, 10 Ark. 138; State Bank v. Woody, 10 Ark. 638; Calvert v. Stone, 10 Ark. 491; Gatlin v. Wilcox, 26 Ark. 309; Little Rock, etc., R. Co. v. Barker, 39 Ark. 491.

California.—Knight v. Russ, 77 Cal. 410; Marriner v. Dennison, 91 Cal. 555.

Colorado.—Green v. Taney, 7 Colo. 278; Rankin v. Thompson, 7 Colo. 381; Leitensdorfer v. King, 7 Colo. 436; Kinney v. Wood, 10 Colo. 270; Coon v. Duckett, 13 Colo. 14; Hallack v. Stockdale, 14 Colo. 198; Caldwell v. Willey, 16 Colo. 169; Johnson v. Jones, 16 Colo. 138; Mackey v. Briggs, 16 Colo. 143; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; Hockaday v. Goodwin, 1 Colo. App. 90; Lindsay v. Lindsay, 1 Colo. App. 108; Mulvaney v. Gross, 1 Colo. App. 112; Wachsmuth v. Heil, 1 Colo. App. 196; Bush v. Koll, 2 Colo. App. 48; Denver,

result was reached.¹ Thus a new trial will be granted where the

etc., *R. Co. v. De Graff*, 2 Colo. App. 42; *Lawrence v. Weir*, 3 Colo. App. 401; *Ullman v. McCormic*, 12 Colo. 553; *Newell v. Giggey*, 13 Colo. 16; *Lamar Milling, etc., Co. v. Craddock*, 5 Colo. App. 203.

Dakota. — *Edwards v. Fargo, etc.*, R. Co., 4 Dakota 549.

Florida. — *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *McMurray v. Basnett*, 18 Fla. 609.

Georgia. — *Allen v. Jones*, 51 Ga. 436.

Illinois. — *Kincaid v. Turner*, 7 Ill. 618; *Boyle v. Levings*, 24 Ill. 223; *De Clerq v. Mungin*, 46 Ill. 112; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510; *Chapman v. Burt*, 77 Ill. 337; *Miller v. Balthasser*, 78 Ill. 302; *Stickle v. Otto*, 86 Ill. 161; *Graham v. People*, 115 Ill. 566; *Sanders v. People*, 124 Ill. 218; *Cohen v. Schick*, 6 Ill. App. 280; *Armour v. McFadden*, 9 Ill. App. 508; *Lowe v. Ravens*, 21 Ill. App. 630; *Louisville, etc., R. Co. v. Lewis*, 31 Ill. App. 281; *Shelton v. O'Riley*, 32 Ill. App. 640; *Robinson v. Parish*, 62 Ill. 130; *Welch v. Huckins*, 45 Ill. App. 53; *Chicago West. Div. R. Co. v. Conley*, 43 Ill. App. 347; *Peoria, etc., Union R. Co. v. Barton*, 38 Ill. App. 469; *Espenhain v. Fekete*, 40 Ill. App. 34; *Brown v. Reinholdt*, 41 Ill. App. 599; *Richardson v. O'Brien*, 44 Ill. App. 243; *McNeill v. Shober, etc., Lithographing Co.*, 44 Ill. App. 297; *Callcott v. Rowan*, 47 Ill. App. 299; *Hart v. Morgan*, 49 Ill. App. 516; *Colley v. Harding*, 49 Ill. App. 605; *Lake Shore, etc., R. Co. v. Kuhlman*, 18 Ill. App. 222; *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454; *Toledo, etc., R. Co. v. Cline*, 31 Ill. App. 563.

Indiana. — *Spencer v. Morgan*, 5 Ind. 146; *Christy v. Holmes*, 57 Ind. 314; *Bolton v. Howell*, 18 Ind. 181.

Iowa. — *Haskell v. Des Moines*, 74 Iowa 110; *Howes v. Axtell*, 74 Iowa 400; *Melhop v. Doan*, 36 Iowa 630; *Moore v. Moore*, 39 Iowa 461; *Iowa City First Nat. Bank v. Charter Oak Ins. Co.*, 40 Iowa 572; *Hall v. Ballou*, 58 Iowa 585; *Gibson v. Fischer*, 68 Iowa 29; *Woodward v. Squires*, 39 Iowa 435.

Kansas. — *Cavender v. Fair*, 40 Kan. 182.

Louisiana. — *Nelson v. Clark*, 45 La. Ann. 678.

Maine. — *Glidden v. Dunlap*, 28 Me. 379; *Gordon v. Gilman*, 48 Me. 473.

Minnesota. — *Woodbury v. Larned*, 5 Minn. 339.

Mississippi. — *Smokey v. Johnson*, (Miss. 1888) 4 So. Rep. 788.

Missouri. — *Moore v. Missouri Pac. R. Co.*, 73 Mo. 438; *Cannon v. Moore*, 17 Mo. App. 92; *Price v. Evans*, 49 Mo. 396.

Montana. — *Kennon v. Gilmer*, 5 Mont. 257; *Orr v. Haskell*, 2 Mont. 225.

Nebraska. — *Potvin v. Curran*, 13 Neb. 302; *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53; *Conway v. St. Joseph Iron Co.*, 33 Neb. 454.

New York. — *Smith v. Tiffany*, 36 Barb. (N. Y.) 23; *Morss v. Sherrill*, 63 Barb. (N. Y.) 21; *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Super. Ct. 189; *Bogue v. Newcomb*, 1 Thomp. & C. (N. Y.) 251; *Teller v. Sanders*, 2 Hun (N. Y.) 113.

Texas. — *Edrington v. Kiger*, 4 Tex. 89; *Texas, etc., R. Co. v. Ludtke*, 3 Tex. Civ. App. 308.

Wisconsin. — *Wausau Boom Co. v. Plumer*, 49 Wis. 118.

1. **Contrary to Either Law or Evidence.** — A verdict will be set aside where it must be either without support in the evidence or contrary to the instructions, although the nature of the jury's mistake cannot be determined. *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15; *McMillen v. Aitchison*, 3 N. Dak. 183; *Fuller v. Northern Pac. Elevator Co.*, 2 N. Dak. 220.

It makes no difference whether the erroneous result was reached through a failure to understand the evidence or a failure to apply it, or through passion or prejudice. *Peoria, etc., Union R. Co. v. Barton*, 38 Ill. App. 469.

Rule at Common Law. — In *Carstairs v. Stein*, 4 M. & S. 192, the court refused a new trial where the evidence was conflicting, not satisfactory, and contrary to the intimations of the trial judge. It was held that a verdict should be sustained "unless it appears clear that the jury have drawn an erroneous conclusion. The court in granting new trials does not interfere, unless to remedy some manifest abuse, or to correct some manifest error in law or fact."

Connecticut. — Pub. Acts 1893, c. 51, authorizing the Supreme Court of Errors to grant a new trial on the ground that the verdict is against the evidence, is not available unless manifest injustice has been done by the

jury arrived at the verdict by improper methods,¹ or relied upon a claim which had been completely disproved,² or gave credence to testimony which was false or improbable,³ or was influenced by passion, prejudice, or partiality,⁴ or overlooked or disregarded uncontradicted testimony,⁵ or drew inferences not warranted by

verdict, and the wrong is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles or as to justify the suspicion that the jurors or some of them were influenced by corruption, prejudice, or partiality. *Simsbury v. East Granby*, 69 Conn. 302; *Bissell v. Dickerson*, 64 Conn. 61; *Johnson v. Norton*, 64 Conn. 134. Said chapter applies to criminal as well as civil cases. *State v. Lea*, 65 Conn. 265.

Maine. — To justify a new trial in the Maine Supreme Judicial Court on the ground that the verdict is against the evidence, the verdict must be so clearly and palpably wrong that no jury of unprejudiced or impartial men could reach such a conclusion except by misapprehension and mistake. *Griswold v. Lambert*, 89 Me. 534; *York v. Maine Cent. R. Co.*, 84 Me. 117; *Pollard v. Maine Cent. R. Co.*, 87 Me. 61.

1. See article VERDICT.

Conjecture. — A verdict which appears to be the result of mere conjecture and is not founded on the evidence will be set aside. *Hickey v. Chicago, etc., R. Co.*, 61 Wis. 649.

For Quotient Verdicts, Verdict by Lot, and Compromise Verdicts, see article VERDICT.

2. Where the only ground for a verdict is a claim which is completely disproved a verdict for the plaintiff must be set aside. *Goss, etc., Mfg. Co. v. Suelau*, 35 Ill. App. 103.

Mistake of Witness as to a Material Fact. — A verdict will be set aside as contrary to the weight of evidence where it appears that it was based upon the testimony of a witness who was mistaken as to a material fact. *Wood River Bank v. Dodge*, 36 Neb. 708.

3. **Testimony Manifestly False.** — A verdict will be set aside where it rests upon testimony involving a physical impossibility. *Chesapeake, etc., R. Co. v. Anderson*, 93 Va. 650.

4. **Passion or Prejudice.** — As to when a new trial will be granted for passion and prejudice, see *supra*, III. 6. *Excessive or Inadequate Damages.*

Where there is an inherent improb-

bility in the theory of a new defense first propounded on the trial and positively contradicted by the plaintiff, a verdict for the defendant will be set aside as so contrary to the evidence as to indicate prejudice and partiality. *Mather v. Martin*, (Supreme Ct.) 21 N. Y. Supp. 1070.

5. **Disregarding Uncontradicted Testimony** — *Colorado.* — *Hunt v. Colorado Milling, etc., Co.*, 1 Colo. App. 120; *Newell v. Giggey*, 13 Colo. 16; *Rankin v. Thompson*, 7 Colo. 381.

Iowa. — *Pumphrey v. Walker*, 71 Iowa 383.

Kansas. — *Burton v. I. M. Yost Milling Co.*, 6 Kan. App. 921, 51 Pac. Rep. 67.

Michigan. — *Wood v. Barker*, 49 Mich. 295.

Missouri. — *Doty v. Steinberg*, 25 Mo. App. 328.

Nebraska. — *Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642.

New Jersey. — *New Jersey Flax Cotton Wool Co. v. Mills*, 26 N. J. L. 60.

New York. — *Lomer v. Meeker*, 25 N. Y. 361; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Smith v. Hayes*, 10 N. Y. App. Div. 245.

Texas. — *McAfee v. Robertson*, 41 Tex. 355.

Wisconsin. — *Engmann v. Immel*, 59 Wis. 249.

A Disregard of Impeached Testimony will require a new trial where such testimony is fully corroborated. *Yundt v. Hartrunft*, 41 Ill. 9; *Chittenden v. Evans*, 41 Ill. 251; *Huddle v. Martin*, 54 Ill. 258; *Crabtree v. Hagenbaugh*, 25 Ill. 233; *St. Louis, etc., R. Co. v. Stapp*, 53 Ill. App. 600.

A verdict founded on a disbelief of clear and undisputed evidence will be set aside. *Cunningham v. Gans*, 79 Hun (N. Y.) 434; *Eisenlord v. Eisenlord*, 49 Hun (N. Y.) 343.

Juries are not at liberty to reject the testimony of any witness from mere caprice, or because they may prefer the result which in that way becomes open to them. *Edler v. Uchtmann*, 10 Ill. App. 493.

Failure to Consider All Material Evidence. — A new trial must be granted

the evidence.¹

(5) *Conflicting Evidence — General Rule.* — As a general rule, where the evidence is conflicting a trial court will refuse a new trial, even though it may appear that there is a slight preponderance of evidence against the verdict.² In such case it is a matter of discretion with the trial court to refuse a new trial, and its order will not be disturbed unless it appears clearly that there was an abuse of discretion.³

Verdict Manifestly Against Weight of Conflicting Evidence. — But it is the duty of the trial court,⁴ though not of an appellate court, to

where it appears from an examination of the record that the jury did not consider all the material evidence, but acted independently of such evidence. *Probate Ct. v. Sprague*, 3 R. I. 205; *Fowler v. Burdett*, 20 Tex. 34; *St. Louis, etc., R. Co. v. Stapp*, 53 Ill. App. 600.

In *Getchell v. Hill*, 21 Minn. 464, a verdict in an action for malpractice was set aside as against the weight of evidence where it appeared that the jury disregarded expert testimony.

1. *Unwarranted Inference.* — If the jurors have drawn an inference from the evidence not warranted by law or sound reason, a new trial should be granted. *Banks v. Oden*, 1 A. K. Marsh. (Ky.) 548.

Error as to Proximate Cause. — Where the decision of a jury as to the question of the proximate cause of an injury is clearly and manifestly wrong it will be set aside. *Kitchen v. Carter*, 47 Neb. 776.

2. *Alabama.* — *Taylor v. Corley*, 113 Ala. 580.

Arkansas. — *Lindsay v. Wayland*, 17 Ark. 385.

California. — *People v. Simpson*, 50 Cal. 304.

District of Columbia. — *Murray v. Washington, etc., R. Co.*, 2 MacArthur (D. C.) 195.

Georgia. — *Treadwell v. Phinzy*, 41 Ga. 63; *Newton v. Price*, 41 Ga. 186; *Thompson v. State*, 55 Ga. 47; *Georgia R., etc., Co. v. Bohler*, 98 Ga. 184.

Illinois. — *Morgan v. Ryerson*, 20 Ill. 343; *Cross v. Carey*, 25 Ill. 562; *Robinson v. Parish*, 62 Ill. 130; *Clifford v. Lohring*, 69 Ill. 401; *Kightlinger v. Egan*, 75 Ill. 141; *Miller v. Balthasser*, 78 Ill. 302; *Lennon v. Goodspeed*, 89 Ill. 438; *Wallace v. Buckingham*, 34 Ill. App. 38; *Scharf v. People*, 34 Ill. App. 400; *Florsheim v. Dullaghan*, 58 Ill. App. 593.

Indiana. — *Hall v. Henline*, 9 Ind. 256.

Iowa. — *Hull v. Alexander*, 26 Iowa 569; *Crawford v. Wolf*, 29 Iowa 567; *Boggs v. Chicago, etc., R. Co.*, 29 Iowa 577.

Kentucky. — *Reese v. Lawless*, 1 A. K. Marsh. (Ky.) 58; *Sibley v. Eastin*, 1 A. K. Marsh. (Ky.) 551.

Maine. — *Milo v. Gardiner*, 41 Me. 549; *Hammond v. Phillips*, 89 Me. 70.

Mississippi. — *McAlexander v. Puryear*, 48 Miss. 420.

Missouri. — *Easley v. Elliott*, 43 Mo. 289; *Rennick v. Walton*, 7 Mo. 292; *Fulkerson v. Bollinger*, 9 Mo. 838; *Dollman v. Munson*, 90 Mo. 85.

Nebraska. — *Palmer v. People*, 4 Neb. 68; *Storz v. Riley*, 41 Neb. 822.

New York. — *Phillips v. Wilpers*, 2 Lans. (N. Y.) 389; *Morss v. Sherrill*, 63 Barb. (N. Y.) 21; *Cheney v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 415.

Texas. — *Texas, etc., R. Co. v. Barron*, 78 Tex. 421; *Branch v. Dever*, 18 Tex. 611.

West Virginia. — *State v. Maier*, 36 W. Va. 757.

United States. — *Plummer v. Granite Mountain Min. Co.*, 55 Fed. Rep. 755; *Nonce v. Richmond, etc., R. Co.*, 33 Fed. Rep. 429; *Pim v. Wait*, 32 Fed. Rep. 741.

3. See *infra*, XXI. *Review of Order.* See also *McGee v. Fox*, 107 N. Car. 766.

Where the oral testimony is of equal weight, the fact that there are some admissions in the defendant's answer which are against him does not create such a preponderance in favor of the plaintiff as to require a new trial, the issues having been fully presented to the jury and fairly argued. *Emery v. Whitaker*, 2 Cinc. Super. Ct. Rep. 36.

4. Whenever a trial judge is not satisfied with the evidence, or believes the verdict is contrary to the evidence, it is his duty to grant a new trial

weigh the evidence although it is conflicting,¹ and to set the verdict aside if manifestly against the weight of evidence.²

Mere Preponderance of Evidence — Court in Doubt. — The verdict will not be set aside as being contrary to the evidence where the preponderance of the evidence is slight³ or where the court is in doubt

although the evidence is conflicting. The rule as to conflicting evidence does not apply to trial courts. *Curtiss v. Starr*, 85 Cal. 376; *Sherman v. Mitchell*, 46 Cal. 576; *Wilson v. California Cent. R. Co.* 94 Cal. 166; *Bjorman v. Ft. Bragg Redwood Co.*, 92 Cal. 500; *Dewey v. Chicago, etc., R. Co.*, 31 Iowa 373.

It is the duty of the trial judge, and even of his successor who did not hear the evidence, to examine conflicting evidence and grant a new trial if dissatisfied with the verdict. *Jones v. Sanders*, 103 Cal. 678; *Hughley v. Wabasha*, 69 Minn. 245.

1. Difference in Review of Conflicting Evidence — Rule as to Trial Courts. —

"The [trial] court was not satisfied with the verdict, but refused to disturb it because there was some conflict in the evidence. This is not the correct rule. In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses and to decide upon their credibility. But this reason does not apply to the district judge, and though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not to be set aside as contrary to the weight of the evidence; nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of evidence. He must exercise a wholesome and discreet supervision over the jury, in this respect. The fact that there may have been evidence submitted to the jury on both sides of the points at issue does not exclude the exercise of this beneficial supervision. If it did, no matter how

weak the testimony on one side and how strong on the other, the judge would be restrained from interference, notwithstanding the verdict was manifestly against the weight of evidence. If such a rule was adopted, litigants would be sure to accommodate themselves to it by introducing mere formal (if they could command no other) evidence to oust the authority of the court. 3 *Graham and Waterman's New Trials* 1207. This reasoning appears to us conclusive; and whilst the court should be careful not to trench upon the province of the jury in deciding facts when the evidence is nearly balanced, it is equally true that it is its duty to set aside the verdict when plainly against the weight of evidence, even though there may have been some conflict in the testimony." *Dickey v. Davis*, 39 Cal. 569.

2. *Dickey v. Davis*, 39 Cal. 565; *People v. Baker*, 39 Cal. 686; *Hawkins v. Abbott*, 40 Cal. 641; *Bates v. Howard*, 105 Cal. 173; *Warner v. Thomas Parisian Dyeing, etc., Works*, 105 Cal. 409; *Bush v. Kindred*, 20 Ill. 93; *Dalferes v. Maurin*, 49 La. Ann. 333; *Hammond v. Wadhams*, 5 Mass. 353; *Phillipotts v. Blasdel*, 8 Nev. 61; *Suhrada v. Third Ave. R. Co.*, 14 N. Y. App. Div. 361; *Mulligan v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. Supp. 452.

Contra. — A verdict on conflicting evidence should be conclusive. *Amsby v. Dickhouse*, 4 Cal. 102.

If the finding of the jury plainly appears to be contrary to the evidence, or without sufficient evidence, or plainly against the decided and clear preponderance of evidence, it ought to be set aside, even though the evidence be conflicting. *Yeager v. Bluefield*, 40 W. Va. 484; *Johnson v. Burns*, 39 W. Va. 659; *State v. Zeigler*, 40 W. Va. 593; *Laidley v. Kanawha County Ct.*, (W. Va. 1898) 30 S. E. Rep. 109.

3. *Barth v. Jones*, 7 Colo. 464; *McMurray v. Basnett*, 18 Fla. 609; *Thompson v. Anthony*, 48 Ill. 468; *Cass v. Campbell*, 63 Ill. 259; *Chase v. Debolt*, 7 Ill. 371; *Waldo v. Beckwith*, 1 N. Mex. 97; *Cheney v. New York Cent., etc., R. Co.*, 16 Hun (N.

as to the weight of the evidence.¹

8. Verdict Contrary to Law—*a.* DEFINITION OF TERM "CONTRARY TO LAW."—A verdict is contrary to law when it is founded on insufficient evidence,² or is contrary to the instructions,³ or is not in the form required by law,⁴ or is arrived at by compromise, lot, or other irregular method.⁵

b. INSUFFICIENCY OF EVIDENCE.—A new trial will be granted where the evidence of one party is not sufficient to support the verdict,⁶ where there is no evidence to support

Y.) 415; *Redlein v. Long Island R. Co.*, 43 Hun (N. Y.) 639, 7 N. Y. St. Rep. 263; *Leszynsky v. Leszynsky*, 53 Hun (N. Y.) 637, 6 N. Y. Supp. 857, affirmed 127 N. Y. 652; *Bust v. Cornell Steam Boat Co.*, 24 Fed. Rep. 188; *Wakeman v. Hungerford*, 16 Fed. Rep. 741; *Davey v. Aetna L. Ins. Co.*, 20 Fed. Rep. 494.

1. *Jones v. Singer Mfg. Co.*, 38 W. Va. 147; *Swartout v. Willingham*, 6 Misc. Rep. (N. Y. Supreme Ct.) 179, 31 Abb. N. Cas. (N. Y.) 66.

In doubtful cases, where there is no appearance of mistake or partiality, and the jury has fairly considered conflicting evidence, the trial court may properly defer to the conclusion of the jury and approve the verdict, even though he would have reached the opposite result. *Atchison, etc., R. Co. v. Matthews*, 58 Kan. 447.

2. A verdict is contrary to law when the evidence is such that, conceding it to be true, it will not justify a verdict as a matter of law. *Richardson v. Van Voorhis*, (Supreme Ct.) 20 N. Y. St. Rep. 667, 3 N. Y. Supp. 599.

In *Swartout v. Willingham*, 31 Abb. N. Cas. (N. Y. Supreme Ct.) 66, it was held that the phrase "contrary to law" means "that the verdict is one which the law does not authorize the jury to render upon the evidence presented to them. The phrase refers to the act of the jury in drawing from the evidence a conclusion which is not justified by it, and for that reason may be said to be contrary to the law. It does not refer to any act of the court in giving to the jury directions upon which their verdict is to be based, for although such verdict may be contrary to the law in the sense that it is not authorized by the law, yet it is not an error for which the jury are responsible, but it is an error for which the court is responsible, but to be pointed out by an exception."

California.—Under the assignment

that the verdict is against law, the error that the verdict is not sustained by sufficient evidence cannot be urged, since the code requires such error to be specifically stated, and the particulars in which the evidence is insufficient must be specified. *Brumagim v. Bradshaw*, 39 Cal. 35.

3. A verdict in disobedience to the instructions of the court upon a point of law is a verdict "against law." *Emerson v. Santa Clara County*, 40 Cal. 543; *Declez v. Save*, 71 Cal. 552. See also *Bunten v. Orient Mut. Ins. Co.*, 4 Bosw. (N. Y.) 254.

The phrase "contrary to law" as used in the codes means contrary to the instructions. *Valerius v. Richard*, 57 Minn. 443.

A Verdict Contrary to Evidence and Instructions will be set aside. *Walker v. Smith*, 1 Wash. (U. S.) 152; *State v. Sims, Dudley* (Ga.) 213; *Dutton v. Wabash, etc., R. Co.*, 66 Iowa 352; *Griffith v. Burlington, etc., R. Co.*, 72 Iowa 645; *Hartt v. Leavenworth*, 11 Mo. 629; *Robbins v. Phillips*, 68 Mo. 100; *Hearne v. Keath*, 63 Mo. 84; *Moore v. Hutchinson*, 69 Mo. 429; *Mann v. Williamson*, 70 Mo. 661; *Charleston v. Hollenback*, 3 Strobb. L. (S. Car.) 355; *Yarborough v. Tate*, 14 Tex. 483.

4. Omission of Material Finding.—Where a verdict in replevin is in favor of a defendant claiming a specific lien, but does not contain a finding as to the amount due on his lien, it is so defective as to be contrary to law within the meaning of the code. *Search v. Miller*, 9 Neb. 26; *Creighton v. Haythorn*, 49 Neb. 526.

5. See article VERDICT.

6. Failure to Prove Sufficient Facts—Arkansas.—*Pope v. Latham*, 1 Ark. 66; *Hicks v. Maness*, 19 Ark. 701; *Bowen v. Cook*, 14 Ark. 202; *McCarroll v. Stafford*, 24 Ark. 224; *Oliver v. State*, 34 Ark. 632.

California.—*Cummins v. Scott*, 20 Cal. 83; *Easterling v. Power*, 12 Cal. 88;

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it,¹ or where the evidence is insufficient to establish a material

Fresno Land Co. v. McCarthy, 59 Cal. 309; *Newbill v. Whitfield*, 63 Cal. 81.

Dakota. — *Caulfield v. Bogle*, 2 Dakota 464; *Finney v. Northern Pac. R. Co.*, 3 Dakota 270.

Georgia. — *Hall v. Page*, 4 Ga. 428; *Field v. Reid*, 21 Ga. 314; *Hook v. Stovall*, 21 Ga. 69; *Pool v. Huff*, 20 Ga. 671; *Hampton v. Thomas*, 11 Ga. 317; *Sibley v. Haslam*, 75 Ga. 490; *East Tennessee, etc., R. Co. v. Herrman*, 92 Ga. 384.

Illinois. — *White v. Clayes*, 32 Ill. 325; *Southworth v. Hoag*, 42 Ill. 446.

Indiana. — *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Bevan v. Tomlinson*, 25 Ind. 253.

Iowa. — *Miller v. Chicago, etc., R. Co.*, 70 Iowa 302; *Wilson v. Hawkeye Ins. Co.*, 70 Iowa 91.

Kansas. — *Ermul v. Kullok*, 3 Kan. 490; *Atchison, etc., R. Co. v. Long*, 46 Kan. 260.

Kentucky. — *Pettis v. Smith*, 2 A. K. Marsh. (Ky.) 195; *Danville, etc., Turnpike Road Co. v. Stewart*, 2 Metc. (Ky.) 122.

Massachusetts. — *Brightman v. Eddy*, 97 Mass. 478.

Minnesota. — *Woodbury v. Larned*, 5 Minn. 339.

Mississippi. — *Drake v. Surget*, 36 Miss. 458.

Missouri. — *Swan v. Hyde*, 9 Mo. 849; *Morris v. Barnes*, 35 Mo. 412; *State v. Schneider*, 35 Mo. 533; *Howard v. Coshaw*, 33 Mo. 118.

Montana. — *Michaud v. Freischeimer*, 16 Mont. 472.

Nevada. — *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534.

New Mexico. — *Waldo v. Beckwith*, 1 N. Mex. 97.

New York. — *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Super. Ct. 189; *Smith v. Tiffany*, 36 Barb. (N. Y.) 23; *Schmidt v. Brown*, 80 Hun (N. Y.) 183.

South Carolina. — *Levingsworth v. Fox*, 2 Bay (S. Car.) 520; *Brassfield v. Brown*, 4 Rich. L. (S. Car.) 298; *Means v. Means*, 6 Rich. L. (S. Car.) 1; *McNair v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 284.

Wisconsin. — *Seymour v. Seymour*, 64 Wis. 16; *Hickey v. Chicago, etc., R. Co.*, 64 Wis. 649.

United States. — *Cruikshank v. Fourth Nat. Bank*, 26 Fed. Rep. 584; *Dow v. Wells*, 11 Fed. Rep. 132; *Pleasants v. Fant*, 22 Wall. (U. S.) 120.

Duty of Trial Judge to Determine Sufficiency. — In *Pleasants v. Fant*, 22 Wall.

(U. S.) 116, Miller, J., in defining the duties of a trial judge in protecting parties from unjust verdicts, said: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor — not whether, on all the evidence, the preponderating weight is in his favor (that is the business of the jury), but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial." Followed in *Southern Pac. R. Co. v. Hamilton*, 54 Fed. Rep. 468.

"While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict; in the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside." *People v. Knutte*, 111 Cal. 453. See also *People v. Lum Yit*, 83 Cal. 130.

1. No Evidence to Support Verdict —

Arkansas. — *Pogue v. Joyner*, 7 Ark. 462; *Russell v. Cady*, 15 Ark. 540; *Brooks v. Clifton*, 22 Ark. 54; *Mississippi, etc., R. Co. v. Cross*, 20 Ark. 443; *McCarroll v. Stafford*, 24 Ark. 224; *Smith v. Van Gilder*, 27 Ark. 592; *Gatlin v. Wilcox*, 26 Ark. 309.

California. — *Cummins v. Scott*, 20 Cal. 83; *Fresno Land Co. v. McCarthy*, 59 Cal. 309.

Colorado. — *Fidelity Invest. Co. v. Carico*, 1 Colo. App. 292; *Kent v. Abeel*, 12 Colo. 547; *Chicago Invest. Co. v. Harrison*, 1 Colo. App. 466; *Wachsmuth v. Heil*, 1 Colo. App. 196; *Blanchard v. John Mouat Lumber Co.*, 5 Colo. App. 64.

fact.¹ In such cases the evidence is reviewed in the same manner by both trial and appellate courts, as it is clear that the jury has disregarded the evidence or instructions.

- Florida*. — Bucki v. Seitz, 39 Fla. 55.
Illinois. — Jansen v. Varnum, 89 Ill. 100; Chicago, etc., R. Co. v. Lee, 87 Ill. 454; Chicago, etc., R. Co. v. Rice, 71 Ill. 567; Reynolds v. Lambert, 69 Ill. 495; Stenger v. Swartwout, 62 Ill. 257; Withers v. Kinser, 53 Ill. App. 87; Chicago, etc., R. Co. v. Fox, 41 Ill. 106; Southworth v. Hoag, 42 Ill. 446; Chester v. Porter, 47 Ill. 66; Chicago, etc., R. Co. v. Gregory, 58 Ill. 272; Knott v. Skinner, 63 Ill. 239; Dobbins v. Hanchett, 20 Ill. App. 396; Corey v. McDaniel, 42 Ill. 512; Advance Elevator, etc., Co. v. Eddy, 16 Ill. App. 263; Stahl v. Ansley, 7 Ill. 32; McCormick Harvesting Mach. Co. v. Dirreen, 38 Ill. App. 203; Moore v. Shoaff, 51 Ill. App. 76.
Indiana. — Stringer v. Northwestern Mut. L. Ins. Co., 82 Ind. 100; Hunter v. Cronkhite, 9 Ind. App. 470.
Iowa. — Carlin v. Chicago, etc., R. Co., 37 Iowa 316.
Kansas. — Johnson v. Burns, 29 Kan. 81; State v. Spidle, 44 Kan. 439.
Missouri. — State v. Burnside, 37 Mo. 348.
Nebraska. — Hardin v. Sheney, 40 Neb. 623; Hawland v. Sharp, 48 Neb. 131.
Virginia. — Blosser v. Harshbarger, 21 Gratt. (Va.) 214.
West Virginia. — Beall v. Pittsburgh, etc., R. Co., 38 W. Va. 525.
Wisconsin. — Whalon v. Blackburn, 14 Wis. 434.
1. Evidence Insufficient to Establish a Material Fact — *Arkansas*. — Johnson v. McDaniels, 15 Ark. 109; Field v. Ringo, 7 Ark. 435; Miller v. Ratliff, 14 Ark. 419; Watkins v. Rogers, 21 Ark. 298; Pope v. Latham, 1 Ark. 66.
California. — Wetzlar v. North-West Ice Co., 9 Cal. 176; Gyle v. Shoenbar, 23 Cal. 538.
Georgia. — Holland v. Chambers, 22 Ga. 193.
Illinois. — Peoria Bridge Assoc. v. Loomis, 20 Ill. 235; Lassen v. Mitchell, 41 Ill. 101; St. Louis Bridge Co. v. Fellows, 39 Ill. App. 456; Starne Coal Co. v. Ryan, 48 Ill. App. 216.
Indiana. — Spicely v. True, 14 Ind. 437; Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539; Standard Oil Co. v. Bowker, 141 Ind. 12; Simons v. Beaver, 16 Ind. App. 492.
Iowa. — Ressler v. Baxley, 81 Iowa 750.
Kansas. — Johnson v. Burns, 29 Kan. 81; Backus v. Clark, 1 Kan. 303; Hale v. Hitchcock, 3 Kan. App. 23.
Kentucky. — McGrath v. Herndon, 4 T. B. Mon. (Ky.) 480.
Maine. — Warren v. Gilman, 15 Me. 70; Dyer v. Haley, 29 Me. 277; Eaton v. Jacobs, 49 Me. 559.
Minnesota. — Osborne v. Huntington, 37 Minn. 275.
Mississippi. — Parr v. Gibbons, 27 Miss. 375.
Missouri. — Stocke v. Albert, 8 Mo. App. 578; Kendrick v. Chicago, etc., R. Co., 81 Mo. 521.
Nebraska. — Hiatt v. Kinkaid, 28 Neb. 721; Hardin v. Sheney, 43 Neb. 806, affirming 40 Neb. 623.
New Mexico. — Waldo v. Beckwith, 1 N. Mex. 97.
North Carolina. — Pollock v. Kitrell, Term (N. Car.) 153.
South Carolina. — Ryan v. Copes, 11 Rich. L. (S. Car.) 217; Hall v. Wright, 9 Rich. L. (S. Car.) 392.
Wisconsin. — Wells v. American Express Co., 44 Wis. 342; Sherwood Forest v. Benedict, 48 Wis. 541.
United States. — Vallance v. Boston, etc., R. Co., 55 Fed. Rep. 364.
 In a replevin suit a general verdict for the defendant will be set aside and a new trial granted if some of the articles sued for were clearly proved to belong to the plaintiff. *Moak v. Bourne*, 13 Wis. 514.
 A new trial on the ground of insufficiency of the evidence is properly denied where there is some evidence tending to support the verdict on every material issue. *Pittsburgh, etc., R. Co. v. Harper*, 11 Ind. App. 481.
No Evidence to Support Finding. — If there be no evidence to support a special finding on material points, both the general and the special verdict will be set aside. *McCarty v. James*, 62 Iowa 257.
 A new trial may be awarded on the ground that a special finding is not sustained by the evidence; such a finding is no more a finality than is a general verdict. *Egmann v. East St. Louis Connecting R. Co.*, 65 Ill. App. 345.
 When a special finding is not supported by the evidence, and the fact so

c. WHERE A NONSUIT COULD HAVE BEEN GRANTED. — Where the evidence was such that a verdict might have been directed or a nonsuit granted, a new trial should be granted.¹ But a new trial may be granted in cases where a nonsuit would have been improper.²

d. MOTION FOR NONSUIT — WHEN A CONDITION PRECEDENT. — It would seem that a motion for a nonsuit or a motion to direct a verdict for the defendant need not be a condition precedent to the right to a new trial, as the statute provides the remedy, where the verdict is contrary to the evidence.³ But it is held that such motions are necessary to the right to a new trial

found is material though not necessarily of a determinative character, a new trial must be granted. *Peck v. Hutchinson*, 88 Iowa 320; *Heath v. Whitebreast Coal, etc., Co.*, 65 Iowa 737; *Jeffrey v. Keokuk, etc., R. Co.*, 51 Iowa 439; *Baldwin v. St. Louis, etc., R. Co.*, 63 Iowa 210.

1. *Schmidt v. Brown*, 80 Hun (N. Y.) 183; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159.

2. *Suhrada v. Third Ave. R. Co.*, 14 N. Y. App. Div. 361; *Denver Tramway Co. v. Owens*, 20 Colo. 107. See the distinction stated in *Mt. Adams, etc., Inclined R. Co. v. Lowery*, 74 Fed. Rep. 476; *Wright v. Southern Express Co.*, 80 Fed. Rep. 85.

Although there was some evidence in favor of the plaintiff, it is not an abuse of discretion to grant a new trial, as the court is not limited to cases where a nonsuit or verdict for the defendant would have been proper. *Jones v. Chicago, etc., R. Co.*, 49 Wis. 352; *Mulligan v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. Supp. 452.

After Refusing to Direct Verdict. — The failure to direct a verdict for the defendant is never a bar to setting aside the verdict as against the evidence. *Clark v. Jenkins*, 162 Mass. 397.

3. *Kelly v. Frazier*, 27 Hun (N. Y.) 314, *criticising* *Peake v. Bell*, 7 Hun (N. Y.) 454.

Motion for Verdict or Nonsuit. — Where the evidence is insufficient to support the allegations of the petition, a defendant may move for a nonsuit or for a direction of a verdict. But such applications are not conditions precedent to the right to move for a new trial on the ground that the verdict is contrary to the evidence. *Picard v. Lang*, 3 N. Y. App. Div. 51; *Mitchell v. Rouse*, 19 N. Y. App. Div. 561; *Shearman v. Henderson*, 12 Hun (N. Y.) 170; *Lucas*

v. McEnerna, 19 Hun (N. Y.) 16; *Slater v. Drescher*, 72 Hun (N. Y.) 425; *Brigden v. Osmun*, 11 Misc. Rep. (N. Y. Supreme Ct.) 232; *Haist v. Bell*, 24 N. Y. App. Div. 252.

Distinction Between Verdicts Not Supported by Sufficient Evidence and Verdicts Against the Weight of Evidence. — In *Slater v. Drescher*, 72 Hun (N. Y.) 425, the following distinction is made: "It is quite possible that such is the rule where the new trial is asked for upon the ground that there was no evidence to support the verdict. In such a case the ruling is upon a question of law, and may be followed by an exception. *Peake v. Bell*, 7 Hun (N. Y.) 454; *Mortimer v. Doelger*, (Super. Ct.) 11 N. Y. Supp. 583; *Keeler v. Barrett's, etc., Dyeing Establishment*, 54 N. Y. Super. Ct. 369. But this is not the rule where the new trial is asked for upon the ground that the verdict is against the weight of evidence. Such a motion is authorized by the code, and a verdict cannot be directed by the court upon the ground that the evidence of one party predominates over that of the other. *Allgro v. Duncan*, 24 How. Pr. (N. Y. Supreme Ct.) 210, *affirmed sub nom.* *Algeo v. Duncan*, 39 N. Y. 313; *McDonald v. Walter*, 40 N. Y. 551; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628. In *Shearman v. Henderson*, 12 Hun (N. Y.) 170, *Talcott, J.*, *criticised* *Peake v. Bell*, 7 Hun (N. Y.) 454, and refused to follow it. The criticism is just, provided the motion in that case was made upon the ground that the verdict was against the weight of evidence, or on account of insufficient evidence, which means the same thing. But as we understand that decision is placed upon the ground that there was no evidence to sustain the verdict. The trial court, in determining whether a verdict should be set aside as against

not only where the evidence is insufficient, but also where the verdict is against the weight of evidence.¹

6. VERDICT CONTRARY TO INSTRUCTIONS. — Since the jury is bound to follow the law as laid down by the court,² a verdict will be set aside if it is clearly contrary to the instructions,³ regardless of whether the error of the jury is due to mistake or wilful dis-

the weight of evidence, must be controlled largely by the circumstances surrounding each case. There is no well-defined rule by which the judge must be governed. The motion is addressed to his sound discretion, and he should inquire as to whether or not substantial justice has been done."

1. Verdict Against the Evidence. — The failure of a defendant to move for a nonsuit, or to ask the court to direct a verdict for the defendant, is an admission that there is sufficient evidence to go to a jury, and the defendant is thereby precluded from moving to set aside the verdict as against the evidence. *Peake v. Bell*, 7 Hun (N. Y.) 454, followed in *Clement v. Congress Spring Co.*, 91 Hun (N. Y.) 636, 35 N. Y. Supp. 1004; *Steinau v. Scheuer*, 15 N. Y. App. Div. 5. To the same effect, see *Halsted v. Manhattan R. Co.*, 2 Misc. Rep. (N. Y. Super. Ct.) 498.

2. Jury Cannot Disregard Instructions. — The reason why juries cannot disregard the law as stated in the instructions is clearly stated by Shaw, C. J., in *Cunningham v. Magoun*, 18 Pick. (Mass.) 13, as follows: "But by the prevailing use, in modern practice, of general declarations and general issues, the jury is in most cases left to find a general verdict, which necessarily embraces the whole matter of law and fact. The mode of trial therefore necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant as they shall find certain facts proved to their satisfaction or otherwise by the evidence. The consequence obviously is that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact; and therefore, as they may mistake the instructions of the court, or may take the law into their own hands, imagining it to be severe or inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of

trial safe and tolerable there must exist a power somewhere to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain, and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent that the jury have either unintentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust." See article INSTRUCTIONS, vol. 11, p. 60.

3. California. — *Emerson v. Santa Clara County*, 40 Cal. 543; *Minturn v. Burr*, 20 Cal. 48.

Georgia. — *Pace v. Mealing*, 21 Ga. 464.

Illinois. — *Gordon v. Crooks*, 11 Ill. 142.

Iowa. — *Farley v. Budd*, 14 Iowa 289; *Sullivan v. Otis*, 39 Iowa 328; *Morss v. Johnson*, 38 Iowa 430; *Limburg v. German F. Ins. Co.*, 90 Iowa 709; *Browne v. Hickie*, 68 Iowa 330; *Evans v. St. Paul Harvesting Works*, 63 Iowa 264; *Morlan v. Russell*, 71 Iowa 214; *State v. Moore*, 81 Iowa 578; *Davis v. Chicago, etc., R. Co.*, 83 Iowa 744.

Massachusetts. — *Dillingham v. Snow*, 5 Mass. 547.

Mississippi. — *Garvin v. Lowry*, 7 Smed. & M. (Miss.) 24.

Missouri. — *Todd v. Boone County*, 8 Mo. 431; *Fulkerson v. Bollinger*, 9 Mo. 838; *Rose v. St. Charles*, 49 Mo. 509.

Nebraska. — *Omaha, etc., R. Co. v. Hall*, 33 Neb. 229; *Aultman v. Reams*, 9 Neb. 489.

New York. — *Sweetman v. Prince*, 62 Barb. (N. Y.) 256; *Morad v. Bogert*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 303; *Powers v. Gouraud*, 19 Misc. Rep. (N. Y. Supreme Ct.) 268; *Bigelow v. Garwitz*, 61 Hun (N. Y.) 624, 15 N. Y.

regard of the law.¹ But on a motion for a new trial, if the trial court finds the verdict correct on the merits it may approve it and refuse a new trial although the jury has disregarded some instruction which on reconsideration is found to be erroneous.² There are, however, numerous decisions to the contrary.³

Supp. 940; *H. B. Smith Co. v. Chapin*, (City Ct.) 13 N. Y. Supp. 799; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89.

Pennsylvania. — *Mitchel v. De Roche*, 1 Yeates (Pa.) 12; *Howard Express Co. v. Wile*, 64 Pa. St. 201.

South Carolina. — *Dent v. Bryce*, 16 S. Car. 14; *Thompson v. Lee*, 19 S. Car. 489.

Wisconsin. — *Hayward v. Ormsbee*, 7 Wis. 111.

England. — *Levi v. Milne*, 4 Bing. 195, 13 E. C. L. 396; *Gainsford v. Blachford*, 6 Price 36; *Freeman v. Price*, 1 Y. & J. 402.

1. See reasoning in *Cunningham v. Magoun*, 18 Pick. (Mass.) 13, *supra*.

Misunderstanding Instructions. — A verdict ought not to be set aside because remarks, apparently by a juror, found attached to one of the written instructions, suggest that such instruction was not understood. *Cooper v. Mills County*, 69 Iowa 350.

If it appears that the jury acted under a misapprehension of the law, the verdict may be set aside, in the discretion of the court, although against neither the law nor the evidence. *Todd v. Boone County*, 8 Mo. 431; *State v. Ross*, 26 N. J. L. 224. See also *Higgins v. Lec*, 16 Ill. 495.

2. **A Verdict Correct but Contrary to Instructions** may be approved by the trial court.

Georgia. — *Brock v. Garrett*, 16 Ga. 487; *Peck v. Land*, 2 Ga. 1; *Wellborn v. Weaver*, 17 Ga. 267; *Keller v. Dillon*, 26 Ga. 701.

Illinois. — *Hammill F. Escape Co. v. Davis*, 64 Ill. App. 555; *Koerper v. Jung*, 33 Ill. App. 144; *Taylor v. Danville*, etc., *River R. Co.*, 10 Ill. App. 311.

Kentucky. — *Armstrong v. Keith*, 3 J. J. Marsh. (Ky.) 153.

Mississippi. — *Van Vacter v. Brewster*, 1 Smed. & M. (Miss.) 400.

Missouri. — *Homuth v. Metropolitan St. R. Co.*, 129 Mo. 629.

Court May Disregard Harmless Error. — While an instruction given is binding on the jury without regard to its correctness, yet it is not binding upon the court, and the court may, in ruling

upon a motion for judgment upon a special finding or upon the pleadings, disregard instructions which have been binding upon the jury, and which it considers erroneous. *Baird v. Chicago*, etc., *R. Co.*, 61 Iowa 359; *Haldane v. Arcadia*, 70 Iowa 462.

Although the instructions of the court are binding upon the jury, yet where the court, by clerical error, used the word "defendants" where "plaintiff" was meant, and the error and intent were manifest, and the jury followed the intent and not the language, it was held that the verdict should not be set aside on the ground that the verdict was contrary to the instruction. *Eldredge v. Bell*, 64 Iowa 125.

If the instructions which are disregarded by the jury are not pertinent to the issues presented by the pleadings, an order of the trial court overruling a motion for a new trial on the ground that the verdict is opposed to the evidence and the instructions will not be reversed. *Scott v. Morse*, 54 Iowa 732. But see *Bowman v. Brown*, 52 Iowa 437.

3. A verdict in violation of instructions must be set aside even if the instructions were clearly erroneous.

California. — *Emerson v. Santa Clara County*, 40 Cal. 543; *Aguirre v. Alexander*, 58 Cal. 30; *Loveland v. Gardner*, 79 Cal. 321; *Lind v. Closs*, 88 Cal. 11.

Iowa. — *Savery v. Busick*, 11 Iowa 487; *Taylor v. Cook*, 14 Iowa 501; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Baird v. Chicago*, etc., *R. Co.*, 55 Iowa 121; *Sullivan v. Otis*, 39 Iowa 328; *Crane v. Chicago*, etc., *R. Co.*, 74 Iowa 330; *Caffery v. Groome*, 10 Iowa 548; *Jewett v. Smart*, 11 Iowa 505; *Farley v. Budd*, 14 Iowa 289; *Porter v. Thomson*, 22 Iowa 391; *Beal v. Stone*, 22 Iowa 447; *Morss v. Johnson*, 38 Iowa 430; *Howell v. Snyder*, 39 Iowa 610; *Petersen v. Ochs*, 40 Iowa 530; *Musser v. Maynard*, 59 Iowa 11; *Griffith v. Parton*, 59 Iowa 31; *Graham v. McGeoch*, 61 Iowa 51; *Browne v. Hickie*, 68 Iowa 330; *Way v. Chicago*, etc., *R. Co.*, 73 Iowa 463.

Montana. — *Murray v. Heinze*, 17 Mont. 353.

f. OBJECTIONS TO FORM OF VERDICT. — See article VERDICT.

g. VERDICT IRREGULARLY FOUND — COMPROMISE AND QUOTIENT VERDICTS. — See article VERDICT.

9. Decision Not Sustained by the Evidence or Contrary to the Evidence — Trial to Court Without a Jury. — Not only the verdict, but the findings or decision¹ of the court in a cause tried without a jury, may be set aside when contrary to the weight of evidence or when not sustained by sufficient evidence.² The sufficiency of the evidence when challenged on this ground is not governed by the rules relating to a verdict, since the court and not the jury must determine the weight and credibility of the evidence. Where a trial judge sets aside his findings as being contrary to the weight of conflicting evidence or contrary to just inferences from uncontradicted probative facts, it seems that an appellate court will not and cannot interfere, as a reviewing court cannot weigh the evidence.³

New York. — *Rogers v. Murray*, 3 Bosw. (N. Y.) 357.

Pennsylvania. — *Paul v. Casselberry*, 12 Phila. (Pa.) 313, 35 Leg. Int. (Pa.) 162.

South Carolina. — *Brown v. Wilson*, 45 S. Car. 519; *Dent v. Bryce*, 16 S. Car. 1; *Thompson v. Lee*, 19 S. Car. 489.

As to whether a judgment should be reversed for a violation of erroneous instruction, see article INSTRUCTIONS, vol. II, p. 60.

Violating Instruction as to Negotiable Instruments. — Although a verdict contrary to instructions may be approved where the justice of the case has been attained, yet such rule cannot be applied to the law of commercial paper, as in such case the court knows of no distinction between the justice of the case and the law of the case. *Marr v. Johnson*, 9 Yerg. (Tenn.) 1, citing *Gregory v. Allen*, Mart. & Y. (Tenn.) 77.

Verdict Consistent with Instructions. — A verdict consistent with the evidence and instructions is not contrary to law merely because it is inconsistent with the theory of the unsuccessful party in regard to a question of fact. *Northern R. Co. v. Jordan*, 87 Cal. 23.

Discretion of Trial Court. — On appeal the order granting a new trial on account of error in disregarding instructions will not be disturbed unless there has been an abuse of discretion. *Howell v. Pugh*, 25 Kan. 96; *Allen v. Wheeler*, 54 Iowa 628. But see *Nicholls v. Chicago*, etc., R. Co., 69 Iowa 154.

1. The word "decision" as employed in the statutes means "finding" where

the cause is tried to the court. *Rodefer v. Fletcher*, 89 Ind. 563; *Christy v. Smith*, 80 Ind. 573; *Wilson v. Vance*, 55 Ind. 394; *Weston v. Johnson*, 48 Ind. 1; *Weaver v. Apple*, 147 Ind. 304. See also articles DECISIONS, vol. 5, p. 936; FINDINGS OF COURT, vol. 8, p. 931.

2. Dismissal of Action. — An order dismissing an action for insufficiency of the evidence may be a ground for a new trial, as a decision not justified by the evidence and contrary to law. *McCormick v. Miller*, 19 Minn. 443; *Thompson v. Myrick*, 24 Minn. 4; *Volmer v. Stagerman*, 25 Minn. 234; *Weaver v. Columbus*, etc., R. Co., 55 Ohio St. 491.

Where Some Material Findings Are Not Supported by any evidence a new trial should be granted. *Smith v. Athera*, 34 Cal. 506; *Felton v. Le Breton*, 92 Cal. 457.

Re-examination of Evidence. — If upon re-examination of the evidence the trial court is convinced that a certain material fact has not been proved, a new trial should be granted. *Hawkins v. Reichert*, 28 Cal. 534.

Motion to Correct Findings Improper. — Where the court has found and stated facts contrary to the evidence, the proper remedy is by motion for a new trial, and not by a motion to correct the findings. *North British Mercantile Ins. Co. v. Koontz*, 17 Ind. App. 625; *Radabaugh v. Silvers*, 135 Ind. 605.

3. Cauhape v. Security Savings Bank, 118 Cal. 82.

Where a judge grants a new trial in a case tried by him without a jury, on the ground that the evidence is not

10. Decision Contrary to Law. — The findings are contrary to law when material facts justified by the evidence are not found,¹ or when the findings are not responsive to the issues,² or are contradictory.³ If the findings are correct and the court has erred in the conclusions of law therefrom, the remedy is not by motion for a new trial on the ground that the findings are contrary to law,⁴ but by exception and appeal or motion to correct the

sufficient to sustain one of his findings, on appeal from the order granting a new trial the findings will not be sustained merely because there is evidence to support them, as such rule does not apply where a trial judge has weighed the evidence. *McCauley v. Tyler*, 11 Mont. 51.

1. Omission of Finding as to Material Fact. — *Knight v. Roche*, 56 Cal. 17; *Spotts v. Hanley*, 85 Cal. 168; *Lamb v. Harbaugh*, 105 Cal. 680; *Haight v. Tryon*, 112 Cal. 5; *Gray v. Taylor*, 2 Ind. App. 155; *Ex p. Walls*, 73 Ind. 95; *Robinson v. Snyder*, 74 Ind. 110; *Bertelson v. Bower*, 81 Ind. 512; *Spraker v. Armstrong*, 79 Ind. 577; *Galentine v. Brubaker*, 147 Ind. 458. See also article FINDINGS OF COURT, vol. 8, p. 931.

"It is the duty of the court to find upon all the material issues, regardless of any request of the parties, and a failure in that respect is ground for a new trial to the party aggrieved as 'a decision against law.'" *Haight v. Tryon*, 112 Cal. 4.

Failure to Find Immaterial Facts. — Where sufficient material facts are found, the failure or refusal to find additional or immaterial facts is not a ground for reversal.

California. — *Thompson v. Lyon*, 14 Cal. 39; *Hutchings v. Castle*, 48 Cal. 152; *Murphy v. Bennett*, 68 Cal. 528; *Girdner v. Beswick*, 69 Cal. 112; *Daly v. Sorocco*, 80 Cal. 367; *Spaulding v. Bradley*, 79 Cal. 449; *Spotts v. Hanley*, 85 Cal. 155; *Bradley v. Parker*, (Cal. 1893) 34 Pac. Rep. 234; *Roberts v. Ball*, (Cal. 1894) 38 Pac. Rep. 949.

Connecticut. — *Holabird v. Burr*, 17 Conn. 556.

Michigan. — *Slocomb v. Thatcher*, 20 Mich. 52.

New York. — *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267; *Alger v. Raymond*, 7 Bosw. (N. Y.) 418; *Callanan v. Gilman*, 107 N. Y. 360; *Morris v. Wells*, 54 Hun (N. Y.) 634, 7 N. Y. Supp. 61; *Baldwin v. Doying*, 114 N. Y. 452; *Livingston v. Manhattan R. Co.*, 27 Abb.

N. Cas. (N. Y. Super. Ct.) 411, 21 Civ. Pro. Rep. (N. Y.) 309, 60 N. Y. Super. Ct. 31; *Crim. v. Starkweather*, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 791; *Thompson v. Vroman*, 66 Hun (N. Y.) 245; *Kerr v. Joslin*, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 929; *Henry McShane Co. v. Padian*, 1 Misc. Rep. (N. Y. C. Pl.) 332; *Morison v. New York El. R. Co.*, (Supreme Ct.) 26 N. Y. Supp. 640.

North Dakota. — *Joslyn v. Smith*, 2 N. Dak. 53.

South Dakota. — *Adams, etc., Co. v. Deyette*, 5 S. Dak. 418.

Texas. — *Texas, etc., R. Co. v. Pearl*, 3 Tex. App. Civ. Cas., § 5; *Ikard v. Thompson*, 81 Tex. 285; *Umscheid v. Scholz*, 84 Tex. 265.

Harmless Error in Findings. — The failure to find on a material issue does not require a reversal of the judgment if the findings omitted must have been adverse to the party complaining. *People v. Center*, 66 Cal. 551. A new trial will not be granted because the court made an erroneous finding on an immaterial point. *Lovell v. Frost*, 44 Cal. 471. An erroneous conclusion of law is immaterial where the judgment is correct upon the findings taken as a whole. *McCormick v. Sutton*, 78 Cal. 245. See also article FINDINGS OF COURT, vol. 8, p. 931.

2. Finding Not Responsive to Issues. — A decision is contrary to law when the finding on which it is based is not responsive to the issues made by the pleadings. *Wilson v. City Nat. Bank*, 51 Neb. 87. See also article FINDINGS OF COURT, vol. 8, p. 941.

3. Contradictory Findings. — Where the findings are contradictory the issues have not been properly determined, and a new trial must be granted as the decision is against law. *Langan v. Langan*, 89 Cal. 195.

4. Conclusions of Law Not Justified by Findings. — An error of the trial court in rendering conclusions of law not supported by the findings is an error which can only be reviewed by appeal, as it is

conclusions of law.¹

11. Newly Discovered Evidence—*a. GENERAL PRINCIPLES*—**Ground for New Trial.**—The unsuccessful party is entitled to a new trial where he discovers after trial new evidence of such character as to convince the court that an injustice has been done and that a new trial will change the result. This was a ground for a new trial at common law,² and is now a ground in civil and criminal cases in nearly all the states. A new trial for this cause will often promote justice and relieve a party from a verdict contrary to the real merits of the case.

The Application Is, However, Regarded with Suspicion and examined with caution,³ the applicant being required to rebut the presumptions

not a decision "against law" for which a new trial should be granted. *Shanklin v. Hall*, 100 Cal. 26; *Matter of Doyle*, 73 Cal. 564, *distinguishing* *Simmons v. Hamilton*, 56 Cal. 493.

If the conclusions of law are erroneous the remedy is by motion to correct them or by exception. A motion for a new trial on the ground that the decision is contrary to law is not the proper remedy, since the error would not be corrected by a new trial as to issues of fact. *Rose v. Duncan*, 43 Ind. 512; *Welch v. Bennett*, 39 Ind. 139; *Bundy v. McClarnon*, 118 Ind. 165.

Errors in the conclusions of law do not constitute "errors of law occurring at the trial" within the meaning of the codes. *McKenzie v. Bismarck Water Co.*, 6 N. Dak. 361.

1. Motion to Correct Conclusions of Law.—The correct practice in such cases is thus stated in *Farnham v. Thompson*, 34 Minn. 330: "When it is claimed that the conclusions are not justified by the facts, the proper practice (if the party wishes the court below to consider the question) is to move that court to modify or correct them. But we understand it to be a common practice in the district courts for the party to make, and the court to pass on the point on a motion for a new trial, and in at least two cases this court, on an appeal from an order refusing a new trial, has considered the point, and directed the court below to modify its conclusions. See *Ames v. Richardson*, 29 Minn. 330; *Coolbaugh v. Roemer*, 32 Minn. 445. The practice, though not logical, is convenient, and, as it has become to some extent settled, we sanction it. Of course the court below could not grant a new trial merely on the ground that its conclusions of law were wrong, but on a motion for a new

trial it ought, if they are wrong, to correct them."

2. At Common Law new trials were at first granted only for matters appearing in the record. But the courts gradually began to grant new trials for other causes, it being conceded that the courts were free to exercise discretion in setting aside verdicts where injustice had been done. At length new trials were granted for newly discovered evidence in extreme cases. *Broadhead v. Marshall*, 2 W. Bl. 955; *Lister v. Mundell*, 1 B. & P. 427; *Thurtell v. Beaumont*, 8 Moo. 612, 1 Bing. 339, 8 E. C. L. 538; *Weak v. Callaway*, 7 Price 677. See also *Moore v. Coates*, 35 Ohio St. 177.

3. California.—*People v. Sutton*, 73 Cal. 243; *Spottiswood v. Weir*, 80 Cal. 448; *Baker v. Joseph*, 16 Cal. 173; *Arnold v. Skaggs*, 35 Cal. 684.

Georgia.—*Wallace v. Tumlin*, 42 Ga. 462.

Missouri.—*Mills v. Sampsel*, 53 Mo. 364; *State v. McLaughlin*, 27 Mo. 111; *Callahan v. Caffarata*, 39 Mo. 136.

North Dakota.—*Braithwaite v. Aiken*, 2 N. Dak. 65.

Pennsylvania.—*Moore v. Philadelphia Bank*, 5 S. & R. (Pa.) 41.

South Dakota.—*Gaines v. White*, 1 S. Dak. 434.

Virginia.—*Wynne v. Newman*, 75 Va. 811.

West Virginia.—*Varner v. Core*, 20 W. Va. 472.

Wisconsin.—*Edmister v. Garrison*, 18 Wis. 594.

Reasons for Caution.—"The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it,

that the verdict is correct and that he has not exercised due diligence in preparing for the trial.¹

Restrictions — Sufficiency of New Evidence. — A new trial will not be granted on a mere showing that new evidence has been discovered. Newly discovered evidence, in order to be sufficient, must fulfil all the following requirements: (1) It must be such as will probably change the result if a new trial is granted. (2) It must have been discovered since the trial. (3) It must be such as could not have been discovered before the trial by the exercise of due diligence. (4) It must be material to the issue. (5) It must not be merely cumulative to the former evidence. (6) It must not be merely impeaching or contradicting the former evidence.²

so suspicious, that courts require the very strictest showing to be made of diligence and all other facts necessary to give effect to the claim." *Baker v. Joseph*, 16 Cal. 173.

"Motions of this kind ought to be received with great caution, because there are few cases tried in which something new may not be hunted up, and because it tends very much to the introduction of perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering the points both of his adversary's strength and his own weakness." *Moore v. Philadelphia Bank*, 5 S. & R. (Pa.) 41, quoted in *Gaines v. White*, 1 S. Dak. 434.

"Stringent rules are applied by the courts to prevent the almost endless mischief which a different course would produce. Careless preparation, tampering with witnesses, repeated and fruitless trials, and immense expense in litigation would be a few of the many evils attendant upon a loose practice in this respect." *Mackin v. People's St. R., etc., Co.*, 45 Mo. App. 82.

1. *Edmister v. Garrison*, 18 Wis. 594.

2. **Sufficiency of Newly Discovered Evidence.** — The above proposition was first formulated in *Berry v. State*, 10 Ga. 511, and has been followed in nearly every state, and in some instances incorporated into the statutes and codes of procedure. In addition to the cases listed below, see the following subdivisions of this section.

Arkansas. — *White v. State*, 17 Ark. 404; *Robins v. Fowler*, 2 Ark. 133; *Holeman v. State*, 13 Ark. 105; *Bourland v. Skimnee*, 11 Ark. 671.

California. — *Brooks v. Lyon*, 3 Cal. 113; *Bartlett v. Hogden*, 3 Cal. 55; *Arnold v. Skaggs*, 35 Cal. 684.

Connecticut. — *Parsons v. Platt*, 37 Conn. 563.

Georgia. — *Glover v. Woodsey, Dudley* (Ga.) 85; *Giles v. State*, 6 Ga. 276; *Clark v. Carter*, 12 Ga. 500; *Moore v. Ulm*, 34 Ga. 565; *Bryan v. Walton*, 33 Ga. Supp. 11; *Wingfield v. Rhea*, 77 Ga. 84; *O'Barr v. Alexander*, 37 Ga. 195; *Barrow v. State*, 80 Ga. 191; *Wright v. Central R., etc., Co.*, 21 Ga. 345; *Robinson v. Veal*, 79 Ga. 533; *Sharp v. Loyless*, 39 Ga. 678.

Illinois. — *Smith v. Shultz*, 2 Ill. 491; *Schlencker v. Risley*, 4 Ill. 487; *Crozier v. Cooper*, 14 Ill. 139; *Hupp v. McInturp*, 4 Ill. App. 449.

Indiana. — *Simpson v. Wilson*, 6 Ind. 474; *Swift v. Wakeman*, 9 Ind. 552; *Bronson v. Hickman*, 10 Ind. 3; *Ruger v. Bungan*, 10 Ind. 451; *Beard v. First Presbyterian Church*, 10 Ind. 568; *State v. Clark*, 16 Ind. 97; *Martin v. Garver*, 40 Ind. 351; *Hines v. Driver*, 100 Ind. 319.

Iowa. — *Pelamourges v. Clank*, 9 Iowa 1; *Lisher v. Pratt*, 9 Iowa 59; *Millard v. Singer*, 2 Greene (Iowa) 144; *Reeves v. Royal*, 2 Greene (Iowa) 451; *Richards v. Nuckolls*, 19 Iowa 555; *Boot v. Brewster*, 75 Iowa 631.

Kansas. — *Sexton v. Lamb*, 27 Kan. 432.

Kentucky. — *Price v. Thompson*, 84 Ky. 219.

Louisiana. — *Stone v. Clifford*, 5 La. 11; *State v. Adams*, 38 La. Ann. 238; *State v. Hanks*, 39 La. Ann. 234.

Maine. — *Ham v. Ham*, 39 Me. 263; *Marden v. Jordan*, 65 Me. 9; *Blake v. Madigan*, 65 Me. 522.

Massachusetts. — *Bond v. Cutler*, 7 Mass. 205; *Gardner v. Gardner*, 2 Gray (Mass.) 434.

Missouri. — *State v. Locke*, 26 Mo. 603; *Goff v. Mulholland*, 33 Mo. 203;

The Application Must Be Prompt. — The application for a new trial on the ground of newly discovered evidence must be made promptly after the discovery of the new evidence. The unsuccessful party will not be allowed to lie quiet and speculate upon his chances of a more favorable verdict. When the new evidence is discovered it should be brought promptly to the attention of the court.¹

b. PROBABILITY THAT NEW EVIDENCE WILL CHANGE RESULT — Sufficiency of New Evidence. — The invariable rule is that the newly discovered evidence must be of such character that it

Smith v. Matthews, 6 Mo. 600; *State v. Ray*, 53 Mo. 345.

Nevada. — *Howard v. Winters*, 3 Nev. 539.

New Hampshire. — *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44.

New Jersey. — *Den v. Wintermute*, 13 N. J. L. 177.

New York. — *People v. Superior Ct.*, 10 Wend. (N. Y.) 291; *Jackson v. Kinney*, 14 Johns. (N. Y.) 186; *Pike v. Evans*, 15 Johns. (N. Y.) 210; *Guyot v. Butts*, 4 Wend. (N. Y.) 579; *Plattsburgh First Nat. Bank v. Heaton*, 6 Thomp. & C. (N. Y.) 37; *Geneva, etc., R. Co. v. Sage*, 35 Hun (N. Y.) 95; *Raphaelsky v. Lynch*, 34 N. Y. Super. Ct. 31; *Oakley v. Sears*, 7 Robt. (N. Y.) 111; *People v. Mack*, 2 Park. Cr. Rep. (N. Y.) 673; *Gautier v. Douglass Mfg. Co.*, 52 How. Pr. (N. Y. Supreme Ct.) 325.

North Carolina. — *Jones v. Zollicoffer*, 2 Hawks (N. Car.) 492.

Oregon. — *Cutler v. Steamer Columbia*, 1 Oregon 101.

Pennsylvania. — *Moore v. Philadelphia Bank*, 5 S. & R. (Pa.) 41; *Knox v. Work*, 2 Binn. (Pa.) 582; *Turnbull v. O'Hara*, 4 Yeates (Pa.) 446; *Waln v. Wilkins*, 4 Yeates (Pa.) 461; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *Com. v. Williams*, 2 Ashm. (Pa.) 60; *Com. v. Schoeppe*, 1 Leg. Gaz. (Pa.) 450; *Aubel v. Ealer*, 2 Binn. (Pa.) 582, note a.

South Carolina. — *Evans v. Rogers*, 2 Nott & M. (S. Car.) 563; *Drayton v. Thompson*, 1 Bay (S. Car.) 263; *Tillman v. Hatcher*, 1 Rice L. (S. Car.) 271.

Texas. — *Madden v. Shapard*, 3 Tex. 49; *Goins v. State*, 41 Tex. 334; *Griffith v. Eliot*, 60 Tex. 334; *Watts v. Johnson*, 4 Tex. 311; *Shaw v. State*, 27 Tex. 750; *Washington v. State*, 35 Tex. Crim. Rep. 156; *Porter v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 695; *Henderson v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 605; *Durnett v. Gulf City R., etc., Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 336.

Vermont. — *Kirby v. Waterford*, 14 Vt. 414.

Virginia. — *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Norfolk v. Johnakin*, 94 Va. 285.

West Virginia. — *State v. Betsall*, 11 W. Va. 703; *Varner v. Core*, 20 W. Va. 473; *Dower v. Church*, 21 W. Va. 23; *Swisher v. Malone*, 31 W. Va. 442; *Halstead v. Horton*, 38 W. Va. 727.

Wisconsin. — *Wilson v. Plank*, 41 Wis. 94.

United States. — *Aiken v. Bemis*, 3 Woodb. & M. (U. S.) 348; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193; *Palmer v. Fiske*, 2 Curt. (U. S.) 14.

I. Sheldon v. Stryker, 42 Barb. (N. Y.) 284; *Smith v. Matthews*, 21 Misc. Rep. (N. Y. Supreme Ct.) 150; *Davis v. Grand Rapids F. Ins. Co.*, 7 N. Y. App. Div. 403; *Peck v. Hiler*, 30 Barb. (N. Y.) 655; *Nash v. Wetmore*, 33 Barb. (N. Y.) 155; *Kepner v. Betz*, 51 N. Y. Super. Ct. 18; *Fisher v. Corwin*, 35 Hun (N. Y.) 253; *Evans v. U. S. Life Ins. Co.*, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 315, 3 N. Y. Supp. 298; *Anderson v. Sherwood*, (Supreme Ct.) 9 N. Y. St. Rep. 636.

Laches. — Where the applicant delayed his motion for eight months from the discovery of the new evidence, and until he had introduced the same evidence in two similar suits, in but one of which he was successful, and had moved for a new trial on other grounds and appealed from an order refusing a new trial, his application was refused on the ground of his delay in bringing his motion to a hearing. *Davis v. Grand Rapids F. Ins. Co.*, 7 N. Y. App. Div. 403.

Where the applicant made an affidavit of the newly discovered evidence, but did not introduce the same on his first motion for a new trial, his second motion, made nine months later on the ground of the same evidence as being newly discovered, was denied on

will probably change the result if a new trial is granted.¹ In determining the sufficiency of the new evidence the court must weigh it with the evidence received at the trial. Usually the

account of unreasonable delay. *Lathrop v. Dearing*, 59 Minn. 234.

1. *Arizona*. — *Hayden Milling Co. v. Lewis*, (Arizona 1891) 32 Pac. Rep. 263.

Arkansas. — *Bixby v. State*, 15 Ark. 395; *Merrick v. Britton*, 26 Ark. 496.

California. — *Levitsky v. Johnson*, 35 Cal. 41; *McCormick v. Central R. Co.*, 75 Cal. 506; *Byrne v. Reed*, 75 Cal. 277; *Crystal Lake Ice Co. v. McAulay*, 75 Cal. 631; *People v. Howard*, 74 Cal. 547; *People v. Sutton*, 73 Cal. 243; *Kuhlman v. Burns*, 117 Cal. 469; *Von Glahn v. Brennan*, 81 Cal. 261; *Spottiswood v. Weir*, 80 Cal. 448; *Childs v. Lauterman*, 95 Cal. 369; *People v. Urquidas*, 96 Cal. 239.

Colorado. — *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106.

Connecticut. — *Parsons v. Platt*, 37 Conn. 563; *Norwich, etc., R. Co. v. Cahill*, 18 Conn. 484; *Hart v. Brainerd*, 68 Conn. 50; *Husted v. Mead*, 58 Conn. 55; *Gilpin v. Ansonia*, 68 Conn. 72.

Georgia. — *Oneal v. State*, 47 Ga. 229; *Patterson v. Collier*, 77 Ga. 292; *Teal v. State*, 22 Ga. 75; *Bryan v. Walton*, 33 Ga. Supp. 11; *Roach v. State*, 34 Ga. 78; *Carr v. State*, 14 Ga. 358; *Carlisle v. Tidwell*, 16 Ga. 33; *Georgia R. Co. v. Kicklighter*, 63 Ga. 708; *Young v. State*, 56 Ga. 403; *Hoye v. State*, 39 Ga. 718; *Schaefer v. State*, 93 Ga. 177; *McCardle v. Kennedy*, 92 Ga. 198; *McMahan v. Mitchell*, 92 Ga. 539; *Cohen v. La Roche*, 95 Ga. 562; *McDaniel v. Mitchell*, 95 Ga. 40; *Russell v. State*, 94 Ga. 594; *Harris v. State*, 97 Ga. 408; *Hanye v. Candler*, 99 Ga. 214.

Illinois. — *Fay v. Richards*, 30 Ill. App. 477; *Martin v. Ehrenfels*, 24 Ill. 187; *Petifish v. Watkins*, 124 Ill. 384; *Edgmon v. Ashelby*, 76 Ill. 161; *Paris v. Morrell*, 52 Ill. App. 121; *Moudy v. Snider*, 64 Ill. App. 65; *Reid v. Flanders*, 62 Ill. App. 106; *Dugan v. Daniels*, 64 Ill. App. 90; *Chandler v. Smith*, 70 Ill. App. 658; *Paris v. Morrell*, 52 Ill. App. 121; *Monroe v. Snow*, 131 Ill. 126; *Chicago v. Edson*, 43 Ill. App. 417; *Reichmann v. Baier*, 46 Ill. App. 346; *Illinois Cent. R. Co. v. Truesdell*, 68 Ill. App. 324.

Indiana. — *Rainey v. State*, 53 Ind. 278; *Hines v. Driver*, 100 Ind. 319; *Humphreys v. State*, 75 Ind. 469;

Jackson v. Swope, 134 Ind. 111; *Russell v. State*, (Ind. 1895) 40 N. E. Rep. 666; *Smith v. State*, 143 Ind. 685; *Oldfather v. Zent*, 14 Ind. App. 89; *Freeman v. Hutchinson*, 15 Ind. App. 639; *Fleming v. McClafflin*, 1 Ind. App. 537.

Iowa. — *State v. Burge*, 7 Iowa 255; *Oberholtzer v. Hazen*, 92 Iowa 602; *Lundon v. Waddick*, 98 Iowa 478.

Kansas. — *Harris v. Thompson*, 23 Kan. 372; *Morgan v. Bell*, 41 Kan. 345; *Sexton v. Lamb*, 27 Kan. 432; *Board of Regents v. Linscott*, 30 Kan. 240.

Kentucky. — *Allen v. Perry*, 6 Bush (Ky.) 85; *Mercer v. Mercer*, 87 Ky. 21; *Smith v. Com.*, 13 Ky. L. Rep. 612, (Ky. 1891) 17 S. W. Rep. 868; *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790.

Louisiana. — *State v. Casey*, 44 La. Ann. 969; *State v. Hendrix*, 45 La. Ann. 500.

Maine. — *State v. Stain*, 82 Me. 472; *Trask v. Unity*, 74 Me. 208; *Linscott v. Orient Ins. Co.*, 88 Me. 497.

Michigan. — *People v. Sackett*, 14 Mich. 320; *Morris v. Hadley*, 9 Mich. 278.

Missouri. — *Payne v. Weems*, 36 Mo. App. 54; *Culbertson v. Hill*, 87 Mo. 553; *Terry v. Greer*, 55 Mo. App. 507; *Cropper v. Mexico*, 52 Mo. App. 385.

Montana. — *Leyson v. Davis*, 17 Mont. 220.

Nebraska. — *Keiser v. Decker*, 29 Neb. 92; *McDonald v. Early*, 24 Neb. 818; *Flannagan v. Heath*, 31 Neb. 776; *Smith v. Hitchcock*, 38 Neb. 104; *Smith v. Mount*, 38 Neb. 111; *Grau v. Houston*, 45 Neb. 813; *Omaha, etc., R. Co. v. O'Donnell*, 24 Neb. 753; *Davis v. State*, 51 Neb. 301.

Nevada. — *McClusky v. Gerhauser*, 2 Nev. 47.

New Jersey. — *Miller v. Ross*, 43 N. J. L. 552; *Mechanics' F. Ins. Co. v. Nichols*, 16 N. J. L. 410.

New Mexico. — *U. S. v. Biena*, 8 N. Mex. 99; *Faulkner v. Territory*, 6 N. Mex. 488; *Lamy v. Remuson*, 2 N. Mex. 245; *Ruhe v. Abren*, 1 N. Mex. 247.

New York. — *In re Ramsdell's Will*, (Supreme Ct.) 3 N. Y. Supp. 499; *Rich v. Mayer*, (City Ct.) 7 N. Y. Supp. 69; *affirmed* (C. Pl.) 8 N. Y. Supp. 952;

court must determine in advance the weight, credibility, and probable effect of the new evidence; but in cases of conflicting evidence, involving the credibility of numerous witnesses, the

Gallup v. Henderson, (Supreme Ct.) 6 N. Y. Supp. 914, 53 Hun (N. Y.) 633, 127 N. Y. 667; Cole v. Cole, 50 How. Pr. (N. Y. Supreme Ct.) 59; Sistare v. Olcott, (Supreme Ct.) 6 N. Y. Supp. 114, 52 Hun (N. Y.) 610; Sternfield v. Western Ins. Co., (Supreme Ct.) 19 N. Y. St. Rep. 460; Starin v. Kelly, 47 N. Y. Super. Ct. 288; Kepner v. Betz, 51 N. Y. Super. Ct. 18; Anderson v. Market Nat. Bank, 66 How. Pr. (N. Y. Supreme Ct.) 8; Schultz v. Third Ave. R. Co., 47 N. Y. Super. Ct. 285; Hicks v. British America Assur. Co., 13 N. Y. App. Div. 444; Page v. New York, 57 Hun (N. Y.) 123; Helmke v. Stetler, 69 Hun (N. Y.) 109; Powell v. Jones, 42 Barb. (N. Y.) 24; Ritter v. Phillips, 34 N. Y. Super. Ct. 289; People v. McGuire, 2 Hun (N. Y.) 269; Darbee v. Elwood, 67 Barb. (N. Y.) 359; Fowler v. Kelly, 43 N. Y. Super. Ct. 380; People v. Hovey, 30 Hun (N. Y.) 354; Smith v. Clews, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 465, 124 N. Y. 664; Brady v. New York, 54 N. Y. Super. Ct. 457, 107 N. Y. 673; Luthy v. Regan, 61 Hun (N. Y.) 626, 16 N. Y. Supp. 400; Alliger v. Mail Printing Assoc., (Supreme Ct.) 47 N. Y. St. Rep. 205, 19 N. Y. Supp. 584; Kanter v. Rubin, (City Ct.) 45 N. Y. St. Rep. 277, 18 N. Y. Supp. 168; Swartout v. Willingham, 31 Abb. N. Cas. (N. Y. Supreme Ct.) 66, 6 Misc. Rep. (N. Y.) 179; Brady v. Industrial Ben. Assoc., 79 Hun (N. Y.) 156; Perkins v. Brainard Quarry Co., 11 Misc. Rep. (N. Y. C. Pl.) 328, 65 N. Y. St. Rep. 410; O'Harra v. New York Cent., etc., R. Co., 92 Hun (N. Y.) 56; *In re* Ramsdell, 51 Hun (N. Y.) 636, 3 N. Y. Supp. 499, *affirmed* 117 N. Y. 636; Chester v. Jumel, 56 Hun (N. Y.) 640, 10 N. Y. Supp. 57; Bulkin v. Ehret, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62; Finelite v. Finelite, 68 Hun (N. Y.) 82; Pawling v. Pawling, 13 N. Y. App. Div. 5; Todd v. Eighmie, 10 N. Y. App. Div. 142; American Surety Co. v. Crow, 17 N. Y. App. Div. 634, 45 N. Y. Supp. 279.

North Carolina. — Tull v. Pope, 69 N. Car. 183.

North Dakota. — Braithwaite v. Aiken, 2 N. Dak. 57.

Pennsylvania. — Wolfinger v. Fenton, 2 Phila. (Pa.) 19, 13 Leg. Int. (Pa.) 12;

Fiss v. Smith, 1 Browne (Pa.) appendix lxxi; Moore v. Philadelphia Bank, 5 S. & R. (Pa.) 41.

Rhode Island. — Windham County Bank v. Kendall, 7 R. I. 77; State v. O'Brien, 7 R. I. 336; Heaton v. Manhattan F. Ins. Co., 7 R. I. 502; Potter v. Padelford, 3 R. I. 162; Whipple v. New York, etc., R. Co., 19 R. I. 587; Jones v. New York, etc., R. Co., 20 R. I. (pt. 1.) 212.

Tennessee. — Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430.

Texas. — Stewart v. Hamilton, 19 Tex. 96; Watts v. Johnson, 4 Tex. 311; Robinson v. Martel, 11 Tex. 149; Jones v. State, 23 Tex. App. 501; Gibbs v. State, 1 Tex. App. 12; Eddy v. Newton, (Tex. Civ. App. 1893) 22 S. W. Rep. 533; Smith v. State, 28 Tex. App. 309; Wilson v. State, (Tex. Crim. App. 1893) 21 S. W. Rep. 361; Hickman v. State, (Tex. Crim. App. 1894) 25 S. W. Rep. 126; Burgess v. State, 33 Tex. Crim. Rep. 9; Kirby v. State, (Tex. Crim. App. 1896) 38 S. W. Rep. 180; Gowen v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 123; Wade v. State, 35 Tex. Crim. Rep. 170; Huey v. Crothers, (Tex. Civ. App. 1895) 32 S. W. Rep. 424; Missouri, etc., R. Co. v. Gordon, 11 Tex. Civ. App. 672.

Utah. — Turner v. Stevens, 8 Utah 75; Baumgarten v. Hoffman, 9 Utah 338.

Vermont. — Briggs v. Gleason, 27 Vt. 114; Middletown v. Adams, 13 Vt. 285; Burr v. Palmer, 23 Vt. 244.

Virginia. — Traveler's Ins. Co. v. Harvey, 82 Va. 949; Bennet v. Com., 8 Leigh (Va.) 745.

Washington. — Leschi v. Territory, 1 Wash. Ter. 23.

West Virginia. — Lewis v. McMullin, 5 W. Va. 582; Hall v. Lyons, 29 W. Va. 410; Sayre v. King, 17 W. Va. 562; Dower v. Church, 21 W. Va. 23; Halstead v. Horton, 38 W. Va. 727; Grogan v. Chesapeake, etc., R. Co., 39 W. Va. 415.

Wisconsin. — Grace v. McArthur, 76 Wis. 641; Conradt v. Sixbee, 21 Wis. 383; Humphrey v. State, 78 Wis. 569.

Wyoming. — Link v. Union Pac. R. Co., 3 Wyoming 680.

United States. — Flint, etc., R. Co. v. Marine Ins. Co., 71 Fed. Rep. 212.

court will not assume the functions of a jury, but will grant a new trial.¹ If it is clear that the new evidence would have no effect on another trial the motion should be denied; but if it is doubtful as to how the new evidence would affect the result the motion should be sustained.²

Credibility. — To determine the probable effect of a new trial the court may examine the new evidence, and will deny a new trial if such evidence is incredible³ or so inconsistent with the former evidence as to be manifestly false.⁴

Sufficiency of New Evidence. — A new trial will not be granted unless the new evidence is of such importance that it would probably overcome all the evidence given upon the trial inconsistent with the new evidence. *O'Hara v. New York Cent., etc., R. Co.*, 92 Hun (N. Y.) 56.

New evidence which does not negate the fact of a personal injury, but merely discloses that the injury was probably inflicted in a somewhat different manner from that testified to on the trial, is insufficient to justify a new trial. *Omaha, etc., R. Co. v. O'Donnell*, 24 Neb. 753.

Where the testimony of a witness was strongly corroborated, a new trial will not be granted to permit him to retract such testimony, as such newly discovered evidence will probably be insufficient to change the result. *People v. Mayhew*, 19 Misc. Rep. (N. Y. Supreme Ct.) 313.

If the new evidence is not inconsistent with the evidence introduced at the trial, and may be reconciled with the latter, a new trial will be refused. *Wallace v. Tumlin*, 42 Ga. 462.

Newly discovered evidence that the footings of an account book showing daily cash balances were erroneous and had been offered in evidence before the jury as accurate additions is sufficient ground for a new trial where it would probably change the result. *Butterworth v. Worth*, 4 Bosw. (N. Y.) 624.

1. *Peyser v. Coney Island, etc., R. Co.*, 81 Hun (N. Y.) 70; *Upington v. Keenan*, (Supreme Ct.) 50 N. Y. St. Rep. 474. 21 N. Y. Supp. 699; *Phelps v. Delmore*, 4 Misc. Rep. (N. Y. Supreme Ct.) 508. See also *Lindley v. State*, 11 Tex. App. 283.

2. *Mackin v. People's St. R., etc., Co.*, 45 Mo. App. 82.

In a case involving the credibility of witnesses, it was said: "What the effect of the testimony of these wit-

nesses might be upon another trial of the action cannot certainly now be determined. It presents a controverted case in which the jury might adopt either view. There is a probability, certainly, that they would consider the case of the plaintiff made out rather than that the defense of the defendant was proved. And in this state of the evidence it will be a matter of propriety and justice to submit the case to the hearing and decision of another jury." *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54, followed in *Holmes v. Roper*, (Supreme Ct.) 32 N. Y. St. Rep. 470.

3. *Greenleaf v. Grounder*, 84 Me. 50; *Lundon v. Waddick*, 98 Iowa 478; *Butte, etc., Min. Co. v. Sloan*, 16 Mont. 97; *Taylor v. State*, 32 Tex. Crim. Rep. 110; *Harroway v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 262.

The New Witness May Be Impeached on the hearing and a new trial refused if the proposed evidence is incredible. *Greenleaf v. Grounder*, 84 Me. 50; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Wherry v. Duluth, etc., R. Co.*, 64 Minn. 415; *Ramos v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 378.

4. *State v. Beard*, 126 Mo. 548; *Norton v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 578; *Blinn v. McDonald*, (Tex. Civ. App. 1896) 38 S. W. Rep. 384; *People v. Shea*, 16 Misc. Rep. (N. Y. Supreme Ct.) 111.

A new trial will not be granted for newly discovered evidence in that a corner-stone has been found on a disputed division line, where there is evidence that such stone has been freshly cut and located. Such evidence is not sufficiently trustworthy and credible. *Nail v. Lancaster*, (Ky. 1897) 40 S. W. Rep. 242.

In *Patterson v. Collier*, 77 Ga. 292, a newly discovered deed having the appearance of a forgery and purporting to have been dated in 1838 was held

Where Applicant Cannot Succeed. — A new trial will be refused where it appears from the pleadings and evidence that the applicant has not a sufficient cause of action or defense or could not succeed in any event.¹

c. MUST HAVE BEEN DISCOVERED SINCE TRIAL. — The testimony upon which a new trial is asked must have been discovered since the trial.²

If the Testimony Was Discovered Before the Close of the Trial, and even after argument, but before submission to the jury, it will not constitute newly discovered evidence, since the applicant could have informed the court and offered such testimony at that time, or, if the witnesses were not at hand, could have obtained a continuance.³

Belief that New Evidence Exists. — The mere belief formed at the

not to justify a new trial where it appeared that a water mark on the deed was dated 1840 and the attest was by a justice of the peace not commissioned until 1841.

Where the testimony of a new witness is shown by facts disclosed therein to be unworthy of credit, a new trial will be refused. *Jernigan v. Wainer*, 12 Tex. 189.

1. *Robinson v. Martel*, 11 Tex. 149.

2. *Arkansas*. — *Holeman v. State*, 13 Ark. 105.

California. — *People v. Freeman*, 92 Cal. 359.

Georgia. — *O'Barr v. Alexander*, 37 Ga. 195; *Barrow v. State*, 80 Ga. 191; *Wright v. Central R., etc., Co.*, 21 Ga. 345.

Iowa. — *Boot v. Brewster*, 75 Iowa 631.

Kansas. — *Comstock Castle Stove Co. v. Galland*, 6 Kan. App. 833; *Sexton v. Lamb*, 27 Kan. 432.

Louisiana. — *State v. Adams*, 39 La. Ann. 238.

Maine. — *Marden v. Jordan*, 65 Me. 9; *Hara v. Ham*, 39 Me. 263.

New Jersey. — *Den v. Wintermute*, 13 N. J. L. 177.

New York. — *Gautier v. Douglas Mfg. Co.*, 52 How. Pr. (N. Y. Supreme Ct.) 325; *Mills v. Husson*, (Supreme Ct.) 45 N. Y. St. Rep. 802, 18 N. Y. Supp. 519.

Oklahoma. — *Watkins v. U. S.*, 5 Okla. 729.

Texas. — *Watts v. Johnson*, 4 Tex. 311; *Shaw v. State*, 27 Tex. 750; *Griffith v. Eliot*, 60 Tex. 336; *Texas*, etc., *R. Co. v. Barron*, 78 Tex. 421; *Curry v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 516.

Wisconsin. — *Dingman v. State*, 48 Wis. 486.

United States. — *Palmer v. Fiske*, 2 Curt. (U. S.) 14.

Witness Becoming Competent Since Trial. — If the testimony of the new witness was incompetent at the trial, such testimony will not be regarded as newly discovered merely because the witness has since become competent. *Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

Physical Examination. — Where after trial a statute was enacted permitting courts to compel a plaintiff in a personal-injury case to submit to a physical examination, a new trial will not be granted to obtain such evidence, as it is not newly discovered evidence. *Cole v. Fall Brook Coal Co.*, 87 Hun (N. Y.) 584.

Decision on Same Facts in Another Case.

— The fact that a decision of the same facts in another case was reversed on a rehearing, and if followed would require a different finding of fact in the pending case, does not render the decision newly discovered evidence or justify a new trial. *Forstman v. Schulting*, 38 Hun (N. Y.) 482.

3. *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; *Higden v. Higden*, 2 A. K. Marsh. (Ky.) 42; *Bailey v. Landingham*, 52 Iowa 415; *U. S. v. Gibert*, 2 Sumn. (U. S.) 19; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *Berry v. Metzler*, 7 Cal. 418; *Jackson v. Malin*, 15 Johns. (N. Y.) 293.

Evidence Discovered Before the Submission of the case to the jury is not newly discovered evidence on account of which a new trial will be granted at special term. *Dodge v. New York, etc., Steamship Co.*, 6 Abb. Pr. N. S.

trial that new evidence exists is not in effect a discovery.¹

Evidence Known to Party but Not to Attorney. — Nor is evidence newly discovered which at the time of the trial was known to a party, but not to his attorney, or *vice versa*.²

The Discovery of the Materiality³ or importance⁴ of the proposed evidence does not render it newly discovered.

Omission in Testimony of Witness. — The discovery that a witness who was examined at the trial can testify to material facts, omitted in his testimony, may constitute newly discovered evidence, but this involves a question of diligence, which will be considered hereafter.⁵

Discovery of Lost Instruments. — In some cases the discovery of a lost instrument will be sufficient new evidence, especially where the applicant has failed for want of such proof.⁶ If the

(N. Y. Super. Ct.) 451, 37 How. Pr. (N. Y.) 524.

1. *Alger v. Merritt*, 16 Iowa 121.

A new trial will not be granted because a man declares at the trial that he knows more of the matter than all the witnesses examined, and then leaves the court before a subpoena can be served upon him. *Lester v. Goode*, 2 Murph. (N. Car.) 37.

2. *Isaacs v. People*, 118 Ill. 538; *Pace v. State*, 63 Ga. 159; *Russell v. Oliver*, 78 Tex. 11.

3. *O'Barr v. Alexander*, 37 Ga. 195; *Berry v. State*, 87 Ga. 579; *Griffith v. Eliot*, 60 Tex. 334; *Canfield v. Jackson*, 112 Mich. 120.

The Discovery of the Materiality of Certain Evidence at the trial, after ascertaining the views of the court, is not an excuse for negligence in failing to discover such evidence, which might easily have been discovered if counsel had known its materiality and searched for it. *Codman v. Vermont, etc., R. Co.*, 17 Blatchf. (U. S.) 1.

"A party is bound to know the materiality of testimony known to him, except in cases of surprise at the trial." *Berry v. Metzler*, 7 Cal. 418.

Discovery of More Accurate Evidence. — Where a defendant knew that a bookkeeper could testify that the firm which employed him was not insolvent at a certain time, and could have produced such witness, the subsequent discovery by the bookkeeper of more accurate information, consisting of the trial balances and inventories of the firm, will not render his testimony newly discovered evidence, since the only difference in the knowledge of the witness is his ability to give the exact amount of the

assets of the firm. *Baily v. Hornthal*, 1 N. Y. App. Div. 44.

Alleged newly discovered evidence, which is nothing but data by which the recollections of witnesses are refreshed, enabling them to testify more positively than before to facts corroborative of the defendant's own testimony, is inconclusive and cumulative, and insufficient to require a new trial, especially when no diligence to procure the evidence at the trial is shown. *Plumb v. Campbell*, 129 Ill. 101.

Newly Discovered Defense. — A discovery of facts constituting a new defense is not ground for a new trial for newly discovered evidence, as a new trial is only the re-examination of the issues previously tried. In such case the remedy of the party is by a bill of review for newly discovered matter. *Rich v. Starbuck*, 50 Ind. 126, *citing* *Swift v. Wakeman*, 9 Ind. 552; *Nelson v. Johnson*, 18 Ind. 329.

4. **The Subsequent Discovery of the Importance of Evidence** in possession of the moving party does not render such evidence newly discovered, but discloses the negligence of the applicant. *Van Tassell v. New York, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 312; *Hartman v. Morning Journal Assoc.*, (C. Pl.) 46 N. Y. St. Rep. 403; *Dickson v. Mathers, Hempst.* (U. S.) 65.

5. See *infra*, III. 11. *d. Due Diligence Must Have Been Used Before Trial.*

6. *Grotte v. Schmidt*, 80 Iowa 454; *Katz v. Atfield*, 1 Misc. Rep. (N. Y. City Ct.) 217; *Bledsoe v. Nixon*, 69 N. Car. 81; *Mercer v. King*, 19 Ky. L. Rep. 781, (Ky. 1897) 42 S. W. Rep. 106; *Reeves v. Skipper*, 94 Ala. 407; *Cox v. Prewett*, (Ky. 1894) 26 S. W. Rep. 589;

contents of the instrument were established by secondary evidence, the instrument itself will be mere cumulative evidence, and insufficient unless so clearly decisive as to change the result.¹ A party fails to exercise due diligence if he fails to introduce secondary evidence of an instrument known to be lost.²

d. DUE DILIGENCE MUST HAVE BEEN USED BEFORE TRIAL — (1) *Generally*. — Where a new trial is sought on the ground of newly discovered evidence it must appear not only that the evidence has been discovered since the former trial, but also that it is

Butts v. State, 35 Tex. Crim. Rep. 364; *Less v. Hooks*, (Tex. Civ. App. 1896) 39 S. W. Rep. 319.

In an action to recover the value of the plaintiff's share in his father's estate, the plaintiff claimed that he was induced while drunk to make certain conveyances to his wife. A motion was made for a new trial for newly discovered evidence consisting of an unserved but verified answer of the plaintiff in another case in which he alleged that the conveyances to his wife were valid. It was held that such evidence was not privileged because found among the papers of the plaintiff's wife after her decease, and that a new trial should be granted. *Wilson v. Clancey*, 6 N. Y. App. Div. 449.

The Finding of a Deed Which Is Apparently a Forgery is not sufficient to change the result on a new trial. *Patterson v. Collier*, 77 Ga. 292.

1. **Secondary Evidence**. — *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9; *McMullen v. Winfield Bldg., etc., Assoc.*, 4 Kan. App. 459.

The finding after the verdict of misplaced letters which are relevant to the issue, but whose contents merely tend to corroborate one side of the case, and raise little probability that the result will be changed, will not be sufficient ground for granting a new trial. *Wimpy v. Gaskill*, 79 Ga. 620. See also *Robinson v. Veal*, 79 Ga. 633.

In an Action on a Policy Which Had Been Lost, the plaintiff showed that he had made diligent search. Subsequently to a verdict for the plaintiff, the policy was found in an unusual place, and showed that it was payable to another than the plaintiff, whose receipt was on it. It was held that a new trial should be granted. *Protection L. Ins. Co. v. Dill*, 91 Ill. 174.

2. **Duty to Prove by Secondary Evidence**. — In *Quigley v. Birdseye*, 11 Mont. 439, it was held that a new trial would

not be granted to permit a party to prove a title by lost deed, where no effort was made at the trial to prove the contents of the deed by secondary evidence. The court said: "They [the defendants] could have shown the destruction or loss of the deed, and their diligence in endeavoring to find it, if it were lost, and then proved, or at least endeavored to prove, the contents of the deed by secondary evidence. If they had attempted to make such proof, and unavoidably failed, and in addition thereto if they had, on the trial, made any claims of rights under the Illinois ditch title, or sought to establish any, we should regard with more favor their claim of newly discovered evidence. On the trial they had evidence of their alleged rights under the Illinois ditch title. They had evidence of the loss of the deed, and they had the grantees present in court to prove, or attempt to prove, the contents. They made no such effort. The deed now would prove no more than the secondary evidence of its contents would have proved on the trial. We are of opinion that no meritorious showing of newly discovered evidence is made."

A new trial will not be granted to a party on the ground of newly discovered evidence consisting of a lost document which such party knew at the time of the trial to be in existence, and the contents of which, upon proof of loss, he could have proved by parol. *Chapman v. Moore*, 107 Ind. 223.

The Loss of Relevant Testimony in the Form of Letters would, after diligent search, authorize proof of their contents, and their discovery after verdict and judgment, no reason being shown why they were not proved at the trial, is no ground for a bill for a new trial, especially if they were merely corroborative in a conflict of parol evidence, and not decisive of the controversy. *Wimpy v. Gaskill*, 76 Ga. 41.

such that by the exercise of reasonable diligence on the part of the applicant it could not have been procured for the trial.¹ The authorities are unanimous to the effect that a new trial will not be granted on the ground of newly discovered evidence which could have been discovered before trial by the exercise of reasonable diligence.²

1. Degree of Diligence Required.—The law does not require the exercise of extraordinary diligence. It is sufficient if it appears that the applicant has exercised reasonable diligence. *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534.

The statutes of many states require merely the exercise of "reasonable" diligence to discover evidence before trial. This does not require the exercise of the highest degree of diligence possible. *Stineman v. Beath*, 36 Iowa 73.

Reasonable diligence, within the meaning of the statute, "does not necessarily involve an effort by the party to discover evidence proving or tending to prove a given fact, unless he has sufficient ground to believe it exists, or at least to put him on inquiry." *Skinner v. Walker*, 98 Ky. 729.

Effect of Ruling of Trial Court on Diligence.—Diligence, or the want of it, in discovering testimony in a particular case, depends in so great a degree upon the various circumstances surrounding the parties and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination on the matter of granting a new trial made in view of them will rarely be disturbed. *Jones v. Singleton*, 45 Cal. 92. See also *Smith v. State*, 81 Ga. 479; *Andersen v. State*, 43 Conn. 514; *Topeka v. Smelser*, 5 Kan. App. 95; *Olathe v. Horner*, 38 Kan. 312.

Upon the question of reasonable diligence, the physical and pecuniary condition of the party, his knowledge as to the essential facts of the case, and the difficulty of establishing them by competent testimony are all proper to be considered. *Detroit Sav. Bank v. Truesdall*, 38 Mich. 430; *Ready Roofing Co. v. Taylor*, 15 Blatchf. (U. S.) 94; *Hunter v. Randall*, 69 Me. 183; *Rollins v. State*, 61 Ga. 430; *Etna Ins. Co. v. Sparks*, 62 Ga. 187.

Neglect of Attorney.—A party is charged with the neglect of his attorney where material evidence has been discovered after trial which could have been discovered before by the exercise

of ordinary diligence. *Thompson v. Welde*, 27 N. Y. App. Div. 186.

2. Alabama.—*Lowery v. State*, 98 Ala. 45; *Simpson v. Golden*, 114 Ala. 336; *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496.

Arkansas.—*Bourland v. Skimnee*, 11 Ark. 671; *Holeman v. State*, 13 Ark. 105; *Chandler v. Lazarus*, 55 Ark. 312.

California.—*Stoakes v. Monroe*, 36 Cal. 383; *Baker v. Joseph*, 16 Cal. 173; *Butler v. Vassault*, 40 Cal. 74; *People v. Nelson*, 83 Cal. 421; *Harralson v. Barrett*, 99 Cal. 607; *People v. McCurdy*, 68 Cal. 576; *People v. Jones*, (Cal. 1885) 8 Pac. Rep. 611; *People v. Cesena*, 90 Cal. 381; *People v. Lebong Yune Gun*, 77 Cal. 636; *Weinburg v. Samps*, (Cal. 1893) 33 Pac. Rep. 341; *Smith v. Smith*, 119 Cal. 183; *Russell v. Dennison*, 45 Cal. 337.

Connecticut.—*Noyce v. Huntington*, Kirby (Conn.) 282; *Barber v. Brace*, 3 Conn. 9; *Lester v. State*, 11 Conn. 415; *Norwich, etc., R. Co. v. Cahill*, 18 Conn. 484; *Parsons v. Platt*, 37 Conn. 563; *Waller v. Graves*, 20 Conn. 305.

Delaware.—*McCombs v. Chandler*, 5 Harr. (Del.) 423.

Georgia.—*Wright v. Central R., etc., Co.*, 21 Ga. 345; *Candler v. Clarke*, 90 Ga. 550; *O'Barr v. Alexander*, 37 Ga. 195; *Wise v. State*, 24 Ga. 31; *Spurlock v. West*, 80 Ga. 302; *McAfee v. State*, 31 Ga. 411; *Avery v. State*, 26 Ga. 233; *Roberts v. State*, 3 Ga. 310; *Beard v. Simmons*, 9 Ga. 41; *Wright v. State*, 34 Ga. 110; *Arnett v. Paulett*, 59 Ga. 856; *Verdery v. Savannah, etc., R. Co.*, 82 Ga. 675; *Cedartown v. Freeman*, 89 Ga. 451; *Spier v. State*, 89 Ga. 737; *Brunner v. Black*, 92 Ga. 497; *Hines v. State*, 93 Ga. 187; *Thompson v. Ray*, 92 Ga. 540; *Cahfield v. Jones*, 97 Ga. 334; *Greer v. State*, 87 Ga. 559; *Johnson v. State*, 89 Ga. 107; *Sconyers v. State*, 85 Ga. 672; *Lynch v. State*, 84 Ga. 726; *Wynn v. State*, 81 Ga. 744; *Bryant v. State*, 80 Ga. 272; *Murks v. State*, 92 Ga. 449; *Ford v. State*, 91 Ga. 162; *Gaddis v. State*, 91 Ga. 148; *Etowah Gold Min. Co. v. Exeter*, 91 Ga. 171;

(2) *Discovery of Evidence on Record.* — Thus a new trial will not be granted if the newly discovered evidence is a matter of

McCrary v. Grandy, 92 Ga. 319; McElmurray v. Blue, 91 Ga. 509; Statham v. Shellnut, 86 Ga. 377; Robinson v. Veal, 79 Ga. 633; Poullain v. Poullain, 79 Ga. 11; Patterson v. Collier, 77 Ga. 292; McDonough v. Carter, 98 Ga. 703; King v. Neel, 98 Ga. 438; Cureton v. Clopton, 99 Ga. 616.

Illinois. — Brown v. Luehrs, 95 Ill. 195; Tobin v. People, 101 Ill. 121; Chicago, etc., R. Co. v. Sullivan, 21 Ill. App. 580; Union Rolling Mill Co. v. Gillen, 100 Ill. 52; Dyke v. De Young, 133 Ill. 82; Pomeroy v. Patterson, 40 Ill. App. 275; Dueber Watch Case Mfg. Co. v. Lapp, 35 Ill. App. 372; Chicago Exhaust, etc., Pipe Co. v. Johnson, 44 Ill. App. 224; Williams v. People, 164 Ill. 481; Plumb v. Campbell, 129 Ill. 101; Bean v. People, 124 Ill. 576.

Indiana. — Mason v. Palmerton, 2 Ind. 117; McIntire v. Young, 6 Blackf. (Ind.) 496; Coe v. Givan, 1 Blackf. (Ind.) 367; Ft. Wayne, etc., R. Co. v. Fhalor, 51 Ind. 485; Johnson v. Herr, 88 Ind. 280; Du Souchet v. Dutcher, 113 Ind. 249; Lewis v. Crow, 69 Ind. 434; Allen v. Bond, 112 Ind. 523; Schmurr v. Stults, 119 Ind. 429; Bartholomew v. Loy, 44 Ind. 393; Test v. Larsh, 100 Ind. 563; Kochel v. Bartlett, 88 Ind. 237; Bowman v. Clemmer, 50 Ind. 10; Cook v. Hare, 49 Ind. 268; Graham v. Payne, 122 Ind. 403; Keisling v. Readle, 1 Ind. App. 240; Lockwood v. Rose, 125 Ind. 588; Richter v. Meyers, 5 Ind. App. 33; Morrison v. Casey, 129 Ind. 277; Beers v. Flock, 2 Ind. App. 567; Ward v. Voris, 117 Ind. 368; Kelley v. Kelley, 8 Ind. App. 606; Chicago, etc., R. Co. v. McKeehan, 5 Ind. App. 124; East v. McKee, 14 Ind. App. 45; Huntington-White Lime Co. v. Mock, 14 Ind. App. 221; Crumrine v. Crumrine, 14 Ind. App. 641.

Iowa. — Manson v. Ware, 63 Iowa 346; Mays v. Deaver, 1 Iowa 216; Stuckslager v. McKee, 40 Iowa 212; Goddard v. Leffingwell, 40 Iowa 249; Iowa City First Nat. Bank v. Charter Oak Ins. Co., 40 Iowa 572; Clark v. Nelson, 40 Iowa 678; Norris v. Hix, 74 Iowa 524; Taylor v. Chicago, etc., R. Co., 80 Iowa 431; State v. Dimmitt, 88 Iowa 551; State v. Hall, 97 Iowa 400; Heathcote v. Haskins, 74 Iowa 566.

Kansas. — Sexton v. Lamb, 27 Kan. 432; Clark v. Norman, 24 Kan. 515;

Carson v. Henderson, 34 Kan. 404; Olathe v. Horner, 38 Kan. 312; Smith v. Williams, 11 Kan. 104; Wilkes v. Wolback, 30 Kan. 375; Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195; Lukens v. Garrett, 2 Kan. App. 722; Bowling v. Floyd, 5 Kan. App. 579, 48 Pac. Rep. 875.

Kentucky. — Coffey v. Proctor Coal Co., (Ky. 1892) 20 S. W. Rep. 286; Hedge v. Lehrer, 18 Ky. L. Rep. 558, (Ky. 1896) 37 S. W. Rep. 261; Ashcraft v. Barker, 19 Ky. L. Rep. 222, (Ky. 1897) 39 S. W. Rep. 510.

Louisiana. — Wilson v. Churchman, 4 La. Ann. 452; State v. Bradley, 6 La. Ann. 555; Berger v. Spalding, 13 La. Ann. 580; Stone v. Rose, 2 La. Ann. 225; State v. Marcus, 44 La. Ann. 978; State v. Leftwich, 46 La. Ann. 1194; Coste's Succession, 43 La. Ann. 144; State v. Keaveny, 49 La. Ann. 667.

Maine. — Howard v. Grover, 28 Me. 97; Potter v. Sewall, 54 Me. 142; Titcomb v. Potter, 11 Me. 218; Atkinson v. Conner, 56 Me. 546; Ham v. Ham, 39 Me. 263; Greenleaf v. Grounder, 84 Me. 50; Michaud v. Canadian Pac. R. Co., 88 Me. 381; Hammond v. Phillips, 89 Me. 70.

Massachusetts. — Gardner v. Gardner, 2 Gray (Mass.) 434; Damon v. Carrol, 167 Mass. 198.

Michigan. — Gray v. Barton, 62 Mich. 186.

Minnesota. — Nininger v. Knox, 8 Minn. 140; Austin v. Northern Pac. R. Co., 34 Minn. 351; Hendrickson v. Tracy, 53 Minn. 404; Broat v. Moor, 44 Minn. 468; Galvin v. St. Paul, 62 Minn. 145; Wherry v. Duluth, etc., R. Co., 64 Minn. 415; Nelson v. Carlson, 54 Minn. 90; Meeks v. St. Paul, 64 Minn. 220.

Mississippi. — Vanderburg v. Campbell, 64 Miss. 89; Lee v. Hooker, 7 Smed. & M. (Miss.) 601; Dean v. Young, 13 Smed. & M. (Miss.) 118.

Missouri. — State v. Musick, 101 Mo. 260; State v. Lichliter, 95 Mo. 402; Johnston v. Shortridge, 93 Mo. 227; Smith v. Matthews, 6 Mo. 600; Sturdy v. St. Charles Land, etc., Co., 33 Mo. App. 44; Barry v. Blumenthal, 32 Mo. 29; Tilford v. Ramsey, 43 Mo. 410; Hanley v. Blanton, 1 Mo. 49; Corrigan v. Brady, 38 Mo. App. 649; Shotwell v. McElhinney, 101 Mo. 677; Tall v. Chapman, 66 Mo. App. 581; State v. Johnson, 139 Mo. 197.

record, as it could have been discovered by reasonable diligence. Records are always accessible to both parties, and diligence requires that they be examined and procured in time for the trial.

Montana. — Quigley v. Birdseye, 11 Mont. 439; State v. Gay, 18 Mont. 51.
Nebraska. — Heady v. Fishburn, 3 Neb. 265.

Nevada. — Manning v. Gignoux, 23 Nev. 322.

New Jersey. — Miller v. Ross, 43 N. J. L. 552; Servis v. Cooper, 33 N. J. L. 68; Sheppard v. Sheppard, 10 N. J. L. 250; Deacon v. Allen, 4 N. J. L. 386; Den v. Geiger, 9 N. J. L. 225.

New Mexico. — Ruhe v. Abren, 1 N. Mex. 247.

New York. — People v. Mack, 2 Park Cr. Rep. (N. Y.) 673, 10 How. Pr. (N. Y. Supreme Ct.) 261; Meyer v. Fiegel, 38 How. Pr. (N. Y. Super. Ct.) 424; Whitney v. Saxe, 15 Civ. Pro. Rep. (N. Y. City Ct.) 450; People v. Superior Ct., 5 Wend. (N. Y.) 114, 10 Wend. (N. Y.) 285; Geneva, etc., R. Co. v. Sage, 35 Hun (N. Y.) 95; Campbell v. Genet, 2 Hilt. (N. Y.) 290; Leavy v. Roberts, 2 Hilt. (N. Y.) 285, 8 Abb. Pr. (N. Y.) 310; Williams v. Baldwin, 18 Johns. (N. Y.) 489; Gould v. Moore, 40 N. Y. Super. Ct. 387; Plattsburgh First Nat. Bank v. Heaton, 6 Thomp. & C. (N. Y.) 37; Reese v. Stadler, 54 How. Pr. (N. Y. C. Pl.) 492; Barteau v. Phoenix Mut. L. Ins. Co., 67 Barb. (N. Y.) 354; Oakley v. Sears, 7 Robt. (N. Y.) 111; Hatfield v. Macy, 52 How. Pr. (N. Y. Supreme Ct.) 193; Palmer v. Mulligan, 3 Cai. (N. Y.) 307; Gautier v. Douglass Mfg. Co., 52 How. Pr. (N. Y. Supreme Ct.) 325; Weston v. New York El. R. Co., 42 N. Y. Super. Ct. 156; Price v. Price, 33 Hun (N. Y.) 432, 1 How. Pr. N. S. (N. Y.) 145; Hooker v. Terpening, 55 Hun (N. Y.) 610, 29 N. Y. St. Rep. 818, 8 N. Y. Supp. 639; Albert v. Sweet (Supreme Ct.) 29 N. Y. St. Rep. 644, 9 N. Y. Supp. 86; Luthy v. Regan, 61 Hun (N. Y.) 626, 41 N. Y. St. Rep. 579, 16 N. Y. Supp. 400; Queen v. Bell, 2 Misc. Rep. (N. Y. Super. Ct.) 575, 22 N. Y. Supp. 398; Smith v. Rentz, 73 Hun (N. Y.) 195; Behrens v. Bloom, (City Ct.) 3 N. Y. Supp. 551; Hartman v. Morning Journal Assoc., (C. Pl.) 19 N. Y. Supp. 401, 138 N. Y. 638; Conable v. Smith, (Supreme Ct.) 19 N. Y. Supp. 446, 64 Hun (N. Y.) 638; Michel v. Colegrove, 22 Civ. Pro. Rep. (N. Y. Super. Ct.) 297, 304, 61 N. Y. Super. Ct. 278, 280; Randall v. Packard, 1 Misc. Rep. (N. Y. C. Pl.) 347, 142 N.

Y. 47; Garvey v. U. S. Horse, etc., Show, 3 Misc. Rep. (N. Y. City Ct.) 352; Briel v. Buffalo, 68 Hun (N. Y.) 219, 144 N. Y. 163; Davis v. Grand Rapids F. Ins. Co., 7 N. Y. App. Div. 403; Bath Gas Light Co. v. Claffy, 18 N. Y. App. Div. 155.

North Carolina. — McDonald v. Carson, 95 N. Car. 377.

Pennsylvania. — Fey v. Ryan, 3 Phila. (Pa.) 406, 16 Leg. Int. (Pa.) 164; Turnbull v. O'Hara, 4 Yeates (Pa.) 446; Waln v. Wilkins, 4 Yeates (Pa.) 461; M'Laughlin v. Maybury, 4 Yeates (Pa.) 534; Knox v. Work, 2 Binn. (Pa.) 582; Aubel v. Ealer, 2 Binn. (Pa.) 582, note a.

Rhode Island. — Barrett v. Dodge, 16 R. I. 740; Hawkins v. Capron, 17 R. I. 679.

South Carolina. — Durant v. Philpot, 16 S. Car. 116; Drayton v. Thompson, 1 Bay (S. Car.) 263; State v. Gordon, 1 Bay (S. Car.) 491; Tillman v. Hatcher, 1 Rice L. (S. Car.) 271; Sams v. Hoover, 33 S. Car. 401; Covington v. Covington, 47 S. Car. 263.

South Dakota. — Gaines v. White, 1 S. Dak. 434; Demmon v. Mullen, 6 S. Dak. 554.

Tennessee. — Harbour v. Rayburn, 7 Yerg. (Tenn.) 432; Tabler v. Connor, 1 Baxt. (Tenn.) 195.

Texas. — Waples v. Overaker, 77 Tex. 7; Richards v. Smith, 67 Tex. 610; Watts v. Johnson, 4 Tex. 311; Shaw v. State, 27 Tex. 750; McVey v. State, 23 Tex. App. 659; White v. State, 10 Tex. App. 167; Harrell v. Hill, 15 Tex. 270; Burnley v. Rice, 21 Tex. 171; Cleveland v. Sims, 69 Tex. 153; Sabine, etc., R. Co. v. Wood, 69 Tex. 679; Johnson v. Flint, 75 Tex. 379; Texas, etc., R. Co. v. Barron, 78 Tex. 421; Russell v. Oliver, 78 Tex. 11; Missouri Pac. R. Co. v. White, 80 Tex. 202; Russell v. Wall, 79 Tex. 664; Hocker v. Day, 80 Tex. 529; Castleman v. Norwood, (Tex. Civ. App. 1896) 36 S. W. Rep. 941; Blackwell v. State, 29 Tex. App. 194; Western Union Tel. Co. v. Hearne, 7 Tex. Civ. App. 67; Primm v. Mensing, 14 Tex. Civ. App. 395; Haskins v. State, (Tex. Crim. App. 1892) 20 S. W. Rep. 832; Smith v. State, 22 Tex. App. 350; Bell v. State, 32 Tex. Crim. Rep. 436, (Tex. Crim. App. 1892) 20 S. W. Rep. 362; Barner v. State, (Tex. Crim. App. 1892) 20 S. W. Rep. 559; Reagan v. State, 28

Especially is this rule applicable when it does not appear that the movant was ignorant of the existence of the record in question.¹

(3) *Failure to Introduce Other or Secondary Evidence.* — It is a general rule that if the same fact could have been proven at the trial by evidence other than that newly discovered, a new trial will not be granted, unless the applicant can satisfactorily explain why he did not attempt to use the evidence at his hand.²

Tex. App. 227; *Huffman v. State*, 28 Tex. App. 174; *Schuessler v. State*, 19 Tex. App. 472; *Timatis v. State*, 31 Tex. Crim. Rep. 556; *Smith v. State*, 31 Tex. Crim. Rep. 15; *Briggs v. Rush*, 1 Tex. Civ. App. 19; *Turner v. State*, 37 Tex. Crim. Rep. 451; *Flippo v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 139; *Parker v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 684; *Clay v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 973; *Yeldell v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 424; *Delavan v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 385; *Crawford v. State* (Tex. Crim. App.) 29 S. W. Rep. 42; *Wilson v. State*, 37 Tex. Crim. Rep. 156; *Carrieco v. State*, 36 Tex. Crim. Rep. 618; *Holliday v. State*, 35 Tex. Crim. Rep. 133; *Williams v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 271; *Anderson v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 97.

Vermont. — *Stearns v. Allen*, 18 Vt. 119.

Virginia. — *De Lima v. Glassell*, 4 Hen. & M. (Va.) 369; *Gordon v. Harvey*, 4 Call (Va.) 450; *Arthur v. Chavis*, 6 Rand. (Va.) 152; *Thompson v. Com.*, 8 Gratt. (Va.) 637; *Corey v. Moore*, 86 Va. 721; *Norfolk, etc., R. Co. v. Draper*, 90 Va. 245.

Washington. — *State v. Stowe*, 3 Wash. 206; *Wilson v. Waldron*, 12 Wash. 149.

West Virginia. — *Snider v. Myers*, 3 W. Va. 195; *Carder v. State Bank*, 34 W. Va. 38; *Zickefoose v. Kuykendall*, 12 W. Va. 23; *Tefft v. Marsh*, 1 W. Va. 38; *Dower v. Church*, 21 W. Va. 23.

Wisconsin. — *Wieting v. Millston*, 77 Wis. 523; *Sawyer v. La Flesh*, 65 Wis. 659; *Edmister v. Garrison*, 18 Wis. 594; *Wilson v. Johnson*, 74 Wis. 337; *Harris v. Meyer*, 84 Wis. 145; *Befay v. Wheeler*, 84 Wis. 135.

Utah. — *People v. Peacock*, 5 Utah 237.

United States. — *Chandler v. Thompson*, 30 Fed. Rep. 38; *Rose v. Stephens, etc., Transp. Co.*, 20 Blatchf. (U. S.)

465; *Whetmore v. Murdock*, 3 Woodb. & M. (U. S.) 380; *Washburn v. Gould*, 3 Story (U. S.) 122; *Palmer v. Fiske*, 2 Curt. (U. S.) 14; *Garrison's Case*, 2 Ct. of Cl. 382; *Fikes v. Bentley*, Hempst. (U. S.) 61; *Dickson v. Mathers*, Hempst. (U. S.) 65; *Cootie v. U. S. Bank*, 3 Cranch (C. C.) 95; *Hatch v. The Newport*, 44 Fed. Rep. 300; *Cheaney v. Nebraska, etc., Stone Co.*, 41 Fed. Rep. 740; *Wright v. Southern Express Co.*, 80 Fed. Rep. 85.

1. *Shiels v. Lamar*, 58 Ga. 590; *Fuller v. Harris*, 29 Fed. Rep. 814; *Johnson v. Flint*, 75 Tex. 379; *Galvin v. St. Paul*, 62 Minn. 145; *Robinoe v. Doe*, 6 Blackf. (Ind.) 85; *Peyton v. Kruger*, 77 Ind. 486; *Morgan v. Houston*, 25 Vt. 570; *Weimer v. Lowery*, 11 Cal. 104.

Discovery of Records. — Newly discovered testimony, consisting of deeds on record affecting the very lands in dispute, will not warrant the granting of a new trial, for such records are always accessible to both parties, and diligence would examine and procure them in time for the trial. *Shiels v. Lamar*, 58 Ga. 590.

Where a deed had been lost and could not be procured at the time of trial, but was subsequently found, and it was shown that the index in the register's office was so mutilated that the record of the deed could not have been found without searching the deed books leaf by leaf, a new trial was granted. *Elliott v. Harris*, 81 Ky. 470.

Discovery of Entry in Voluminous Record. — The failure to discover at the trial an entry in the books of a corporation, made more than one hundred pages from any similar entry, and not indexed or referred to in the testimony, was held not such a lack of diligence as to preclude a new trial. *Kruger v. Hanover Nat. Bank*, (Miss. 1894) 16 So. Rep. 353.

2. *Nixon v. Christie*, 84 Ga. 469; *McLain v. Lawson*, 25 Iowa 277; *Herman v. Mason*, 37 Wis. 273.

(4) *Lack of Diligence to Obtain the New Witness.* — Where the proposed new witness could have been discovered before the trial, and his testimony obtained, by the exercise of reasonable diligence, a new trial will be refused unless the circumstances are satisfactorily explained.¹

(5) *Failure to Examine Witness.* — Nor can a new trial on the ground of newly discovered evidence be granted to give the

1. *Moody v. Priest*, 69 Iowa 23; *State v. Ginger*, 80 Iowa 574.

As to *Absence of Witnesses*, see *supra*, III. 5. f. (6) *Absence of Witnesses*.

Witnesses to Conversation. — A new trial will not be granted for newly discovered evidence consisting of the testimony of persons present during a conversation, disclosing material facts, as by the use of ordinary diligence such evidence could have been discovered and produced at the trial. *Bowman v. Clemmer*, 50 Ind. 10.

Interrogation of Hostile Witnesses. — A new trial will not be granted to afford an opportunity to re-examine a witness as to important evidence where the excuse for not interrogating such witness before and at the trial was merely that he was supposed to be hostile. *Gautier v. Douglass Mfg. Co.*, 52 How. Pr. (N. Y. Supreme Ct.) 325.

An applicant for a new trial cannot excuse his failure to obtain a witness to a conversation by showing that such person was unfriendly and might be adverse, as the applicant should have made inquiries as to the knowledge of such person. *Richter v. Meyers*, 5 Ind. App. 33.

But it has been held that the exercise of ordinary diligence does not require that a defendant shall interrogate an employee of the plaintiff where he has no reason to suspect that the employee is a material witness. *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534.

Failure to Inquire of Witnesses in Locality. — A new trial will not be granted for newly discovered evidence consisting of the testimony of a husband and wife who resided near a railroad crossing where the accident occurred, where it appears that no inquiry was made of such persons, and that they, if any persons, were in a position to know the circumstances of the accident. The lack of diligence in failing to make inquiry of such witnesses is not excused by the fact that they had agreed with each other to conceal their information from the defendant if inquiries were

made, as it was the duty of the defendant to have made such inquiries. *Chicago, etc., R. Co. v. McKeehan*, 5 Ind. App. 124.

Imprisonment of the defendant is not an excuse for want of diligence in preparing for the trial, unless it be shown that he had no one not so confined who could have rendered the necessary assistance. *Thomason v. State*, 2 Tex. App. 550; *Childs v. State*, 10 Tex. App. 183.

Evidence Within Easy Reach. — Where the witness relied upon to furnish new evidence was the intimate friend and physician of the accused, and was examined touching the *res gesta*, but failed to disclose the new matter, a new trial was refused. *Collins v. State*, 6 Tex. App. 72.

A new trial will not be granted to permit a defendant to prove his good reputation for truth and honesty, as such evidence could have been discovered before trial. *Ramos v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 378.

Party Whose Mind Was Affected at Time of Trial. — Where it appeared that the plaintiff's mind was affected by personal injuries to recover for which the suit was brought, and that his faculties were not fully restored at the time of the trial, it was held that the same degree of diligence in ascertaining testimony would not be required of him as if he had not labored under such disadvantages. *Berberich v. Louisville Bridge Co.*, (Ky. 1898) 46 S. W. Rep. 691.

Facts Known to Wife of Applicant. — A motion for a new trial on the ground of newly discovered evidence will not be granted where it appears that the evidence relied on is that of the wife of the party making the motion, who came to the place of trial for the purpose of testifying, but was unable to take the stand on account of illness, it appearing that no postponement on account of her illness was asked for, and no effort made to take her testimony in

applicant an opportunity to examine a witness who testified or was present at the trial, as the failure to examine a witness as to all the material points is generally regarded as proof of negligence.¹ The circumstances must be such as to show that dili-

any of the modes provided by law. *Richards v. Smith*, 67 Tex. 610.

Where a husband and wife were plaintiffs upon a cause of action belonging to the wife, and for which she might have sued alone, a new trial on the ground of newly discovered evidence was refused where it was not averred that such evidence was not fully known to the husband at the time of the trial, but merely that the wife had since discovered it. *Berry v. Daily*, 30 Ind. 183.

Where the Evidence Relied upon Is That of a Coparty.—“The evidence offered as newly discovered, under the motion for a new trial, appears to have been known to the officers of the bank at the time of the trial. But one of the witnesses introduced to support the motion was a stockholder in the bank at that time, and was not called upon to testify. He has since sold his stock to the bank. It was incumbent on the bank, if it had desired his testimony, to have caused his interest to be removed at the time of the trial, or to forego the benefit of it. And such interest may generally be removed in season, by ordinary exertion; but if it cannot be, the witness is excluded when offered, by a well-established rule of law, and a subsequent removal of it does not furnish any legal ground for disturbing a verdict.” *Franklin Bank v. Pratt*, 31 Me. 501.

Where the alleged new evidence was that of a codefendant, and it did not appear that a severance was asked for previous to the trial, nor that application was made before it was ended that a verdict of acquittal might be found against such party in order that she might testify on behalf of her codefendants, nor that the applicants became aware after the trial of the fact that the witness would testify in their behalf, it was held that there was not due diligence on the part of the applicant, and a new trial was refused. *State v. Woodworth*, 28 La. Ann. 89. See also *State v. Bean*, 36 N. H. 122.

Where an Accomplice Pleads Guilty, and his evidence which is relied upon to obtain the new trial was known to the applicant on his trial, a new trial will not be granted, as the accomplice's evi-

dence was available at the former trial. *Hudgins v. State*, 61 Ga. 182.

Facts Known to Officers or Employees of Applicant.—A new trial will not be granted for newly discovered evidence consisting of the testimony of witnesses who are officers and employees of the moving party, since such evidence was within easy reach of the applicant and could have been discovered before trial by the use of ordinary diligence. *Cheaney v. Nebraska, etc., Stone Co.*, 41 Fed. Rep. 740; *Burlington, etc., R. Co. v. Klittridge*, 52 Neb. 16; *Crumrine v. Crumrine*, 14 Ind. App. 641.

In an action against a railroad company for negligence a new trial will not be granted to the defendant for newly discovered evidence which was in the possession of its conductor at the time of the trial. *Weston v. New York El. R. Co.*, 42 N. Y. Super. Ct. 156, *affirmed* 73 N. Y. 595.

Evidence Discovered at Trial.—At the trial the defendant discovered from the plaintiff's testimony that the plaintiff had had a conversation with one of the sureties of the note sued on. The defendant's attorney immediately wrote to the surety, who resided in a distant state, inquiring as to the conversation, and in reply learned that the testimony as to the conversation was untrue, that the note in question had been paid, and that the plaintiff had admitted the payment. It appeared that the surety was on bad terms with the defendant, and also that the principal on the note was dead, and that the defendant had no reason to suspect that the surety had any knowledge of the payment. It appeared further that the defendant had no knowledge of the payment, and had not pleaded the same as a defense. It was held that there was no abuse of discretion in granting a new trial. *Longdon v. Kelly*, 51 Mo. App. 572.

1. *Georgia*.—*Poullain v. Poullain*, 79 Ga. 11; *Murks v. State*, 92 Ga. 449; *Ford v. State*, 91 Ga. 162.

Indiana.—*Morrison v. Carey*, 129 Ind. 277; *Pfaffenback v. Lake Shore, etc., R. Co.*, 142 Ind. 246.

Iowa.—*Carson v. Cross*, 14 Iowa 463; *Lindauer v. Hay*, 61 Iowa 663.

gence would not have discovered all the facts to which the witness could testify.¹

Louisiana. — State v. Dorsey, 42 La. Ann. 224.

Missouri. — State v. Cantlin, 118 Mo. 100.

Nebraska. — Van Dorn v. Mengedoh, 41 Neb. 525; Fitzgerald v. Brandt, 36 Neb. 683.

New York. — Fellows v. Emperor, 13 Barb. (N. Y.) 92.

Texas. — Powell v. State, 36 Tex. Crim. Rep. 377.

Duty of Counsel. — It is the duty of counsel to ascertain the extent of the knowledge of the witness while he is testifying, and a new trial will not be granted where there is a failure to do so. Fanning v. M'Craney, 1 Morr. (Iowa) 398.

A Party Ignoring a Notice to Take Depositions cannot afterwards rely on facts which could have been developed on cross-examination, as newly discovered evidence. Bowling v. Floyd, 5 Kan. App. 879, 48 Pac. Rep. 875.

Second New Trial. — Where a party is allowed a new trial to prove a fact by a witness, and he is not produced nor his absence accounted for, no other trial will be granted to prove the same fact by a different witness. There is a want of due diligence. Valega v. Broussard, 3 La. Ann. 145.

Witness in Foreign Parts. — A complaint for a new trial, upon the ground of newly discovered evidence, alleging that the plaintiff's attorney had made careful search for the witness in the city of his last known place of residence, as shown by the evidence therein set out, more than two months prior to the trial, and had then learned that he was in Switzerland, does not sufficiently show due diligence, especially as it is not shown that the plaintiff moved promptly to obtain the relief sought after the evidence first came to his knowledge. Allen v. Bond, 112 Ind. 523.

Witness Agreeing to Strengthen His Testimony. — A new trial will not be granted upon the affidavit of a witness who was examined in the cause, in which he shows that he will greatly strengthen his testimony. It would show negligence on the part of the party introducing him, and, if touching matters about which he testified, would be cumulative. Martin v. Nance, 3 Head (Tenn.) 649.

The Fact that a Witness Forgot to state a material fact, on account of intoxication, is no ground for a new trial. McQueen v. Stewart, 7 Ind. 535.

Former Witness as New Witness. — On petition for a new trial, a witness used at the former trial may be admitted as new as to what has since come to his knowledge. Foster v. Hough, 1 Root (Conn.) 173.

Party Having No Knowledge that Witness Could Give Testimony. — Although a witness, whose evidence would have been material, was present in court during the trial of the cause, and although the defeated party might possibly have been led to suspect, from what was stated on the trial, that such witness could give evidence in his favor, yet if he had no knowledge that the witness could give such testimony he will not be deemed guilty of laches because he failed to discover and avail himself of such a possibility. Bonyng v. Waterbury, 12 Hun (N. Y.) 534.

1. Denial of Witness Before Trial. — Where the proposed witness testified on the trial as a witness for the applicant, but was not interrogated as to a material fact because he had before trial denied his ability to give such evidence, a new trial will be refused, as legal diligence required that the witness should be fully interrogated while testifying at the trial. Smith v. Clews, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 465.

Where counsel assigned for the accused inquired of witnesses as to the facts and received only answers that they saw and knew nothing, a new trial will be granted on discovery that they were eyewitnesses, sufficient diligence being shown. Thomas v. State, 52 Ga. 509.

Where the evidence was an account book kept by the opposite party, shown to have been in his possession, allegations in the complaint for a new trial that inquiries concerning a new book had been made of such party upon the trial when he was testifying as a witness, and that he had denied that such a book was ever in existence, show diligence. Blackburn v. Crowder, 110 Ind. 127.

In support of a motion for a new trial for newly discovered evidence, it appeared by affidavit that the new wit-

c. **NEW EVIDENCE MUST BE MATERIAL.** — The new evidence as set forth must be material to the issues and not merely relating to collateral matters.¹

ness was a boy of fifteen of whom inquiries had been made before the trial, and that he answered to such inquiries that he knew nothing about the cause, believing that what he did know had no bearing thereon. It was held that proper diligence had been shown. *Kochel v. Bartlett*, 88 Ind. 237.

A witness, being called to prove a receipt a forgery, pronounced it genuine, but failed to disclose the fact that it was given for more money than was received, supposing that he would not be permitted to give such evidence. The court, on affidavit to this effect, granted a new trial, there being no conflicting testimony, and the plaintiff being an administrator, without any personal knowledge of the matter. *Fitzgibbon v. Kinney*, 3 Harr. (Del.) 72.

Witness from Another State Discovered in County. — It is not a sufficient ground for a new trial that a witness resident in another state was discovered in the county too late to have him examined, unless it be shown that his deposition could not have been taken. *Conwell v. Anderson*, 2 Ind. 122.

Witness Supposed to Be Dead. — An affidavit that the affiant had supposed the subscribing witness to a deed to be dead, and discovered the contrary only during the trial, and it appearing that no preparation had been made to prove the handwriting of the witness, is not sufficient to support a motion for a new trial on the ground of newly discovered evidence. *Bledsoe v. Little*, 4 How. (Miss.) 13.

Forgotten Testimony. — Where a party had had a conversation with a witness, and failed to examine the witness as to such conversation, because the party had forgotten it, although the witness had not, it was held that a new trial could not be granted, since such evidence would have been obtainable by the exercise of ordinary diligence. *Moran v. Abbey*, 63 Cal. 56.

The fact that the moving party had forgotten the evidence he seeks to introduce in the trial, is not a sufficient excuse for his negligence. *Moran v. Abbey*, 63 Cal. 56. See also *Duignan v. Wyatt*, 3 Blackf. (Ind.) 385; *Hatfield v. Macy*, 52 How. Pr. (N. Y. Supreme Ct.) 193; *Bond v. Cutler*, 7 Mass. 205; *Gregg v. Bankhead*, 22 Tex. 245; *Saw-*

yer v. La Flesh, 65 Wis. 659; *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231; *Johnson v. Blanchard*, 5 R. I. 24.

That a witness has refreshed his memory since the trial by reference to a document which could have been obtained before, is not such newly discovered evidence as to be a ground for new trial. *Hendy v. Desmond*, 62 Cal. 261; *Richards v. Hunt*, 65 Ga. 342; *Shields v. State*, 45 Conn. 266.

Party Forgetting About Witness. — Where a party forgets the presence of a witness to an important conversation until after the trial, he cannot obtain a new trial on the ground of newly discovered evidence, relying upon the testimony of such witness. *Munn v. Worrall*, 16 Barb. (N. Y.) 221. See also *Wilcox v. Joslin*, (Supreme Ct.) 10 N. Y. Supp. 342. But see *Huebner v. Roosevelt*, 7 Daly (N. Y.) 111.

Suspicious Deposition. — Where before trial a party had his suspicions aroused as to the circumstances of the taking of a deposition, the deponent having since died, the fact that evidence has been newly discovered with regard to such deposition is not a ground for a new trial if the party neglected to make inquiries. *Parker v. Chambers*, 24 Ga. 518.

1. *Connecticut.* — *Parsons v. Platt*, 37 Conn. 563.

Iowa. — *Mather v. Butler County*, 33 Iowa 250; *Manson v. Ware*, 63 Iowa 346; *State v. Potts*, 83 Iowa 317.

Kansas. — *Clark v. Norman*, 24 Kan. 515; *Taylor v. Thomas*, 17 Kan. 598; *Sexton v. Lamb*, 27 Kan. 432; *Parker v. Bates*, 29 Kan. 597; *Olathe v. Horner*, 38 Kan. 312.

Massachusetts. — *Watts v. Howard*, 7 Met. (Mass.) 478; *Troeder v. Hyams*, 153 Mass. 536.

Minnesota. — *Smith v. Chapel*, 36 Minn. 180; *Sharpe v. Traver*, 8 Minn. 273.

Mississippi. — *Garnet v. Kirkman*, 41 Miss. 94.

Montana. — *Holland v. Huston*, 20 Mont. 84.

Nebraska. — *Livesey v. Festner*, 28 Neb. 333.

New Hampshire. — *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44.

New York. — *Meyer v. Fiegel*, 38 How. Pr. (N. Y. Super. Ct.) 424; *Fel-*

f. MERELY IMPEACHING EVIDENCE INSUFFICIENT. — New evidence which merely tends to discredit or impeach an adverse party or his witnesses will not avail as a ground for a new trial, as such testimony may be discovered in almost every case, and there must be an end to litigation.¹ The new evidence of such a

lows v. Emperor, 13 Barb. (N. Y.) 102; *Wilcox v. Joslin*, (Supreme Ct.) 32 N. Y. St. Rep. 423, 10 N. Y. Supp. 342; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Ritter v. Phillips*, 34 N. Y. Super. Ct. 289.

Texas. — *Wilson v. State*, 37 Tex. Crim. Rep. 156; *Magruder v. State*, 35 Tex. Crim. Rep. 214; *White v. State*, 10 Tex. App. 167; *Fears v. Albea*, 69 Tex. 437; *Johnson v. Flint*, 75 Tex. 379.

Vermont. — *Myers v. Brownell*, 2 Aik. (Vt.) 407.

Wisconsin. — *Brickley v. Walker*, 68 Wis. 563; *Grace v. McArthur*, 76 Wis. 641.

If the Materiality of the Evidence Is Not Clear the trial court will not refuse a new trial, but will determine its materiality when presented at the trial. *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 411.

Evidence Inadmissible under the Pleadings, or relating to a question not involved in the issue upon which the case was tried, will not justify a new trial, although it be newly discovered. *Brickley v. Walker*, 68 Wis. 563; *Devot v. Marx*, 19 La. Ann. 491; *Pinkard v. Pinkard*, 14 Tex. 356.

The new evidence must be admissible under the issues, and not merely applicable to an issue to be framed afterwards by amendment. *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y. Supreme Ct.) 8.

Divorce Case. — Where a divorce was granted on the ground of the inhuman treatment of the husband, he will not be entitled to a new trial for newly discovered evidence tending to show that the wife's relatives had unduly interested themselves in procuring the divorce, as such testimony would be immaterial to rebut the charge of inhuman treatment. *Harnett v. Harnett*, 59 Iowa 401.

Hearsay. — A new trial will be refused if the newly discovered evidence is merely hearsay and therefore inadmissible. *Turner v. State*, 37 Tex. Crim. Rep. 451.

Where a Wrong Inference Might Have Been, and Probably Was, Drawn by the

jury from the testimony as to a fact not very material, and the remaining evidence strongly supported the verdict, a motion for a new trial on account of the discovery of evidence explaining such testimony was refused. *Tuttle v. Cooper*, 5 Pick. (Mass.) 414.

Incompetent Witness. — A new trial will not be granted for newly discovered evidence which would be incompetent and inadmissible in the case. *Briscoe v. State*, 95 Ga. 496.

Evidence Having No Pertinency as to Issue of Guilty or Not Guilty. — Newly discovered evidence may entitle a defendant to a new trial notwithstanding it has no pertinency to the issue of guilty or not guilty; as, for instance, if it shows that the conviction is for a higher grade of the alleged offense than that for which the defendant is legally amenable. See in illustration *Moore v. State*, 18 Tex. App. 212.

Question Not Involved in Issue. — Newly discovered evidence upon a question not involved in the issue upon which the case was tried will not justify a new trial. *Brickley v. Walker*, 68 Wis. 563. The remedy for a party, who, after trial, has discovered material new matter, not admissible in evidence under the issues tried, is not a new trial, but a review of the judgment. *Rich v. Starbuck*, 50 Ind. 126.

Unsatisfied Judgment — Set-off. — A new trial should be granted if an unsatisfied judgment exists which may properly be pleaded as a set-off, the existence of it being unknown to the defendant's attorney at the trial. *Childs v. District of Columbia*, 19 Ct. of Cl. 332.

1. *Arkansas.* — *Holt v. State*, 47 Ark. 196; *Wallace v. State*, 28 Ark. 531; *Redman v. State*, 40 Ark. 445; *Bourland v. Skimnee*, 11 Ark. 671; *Hudspeth v. State*, 55 Ark. 323; *Wells v. State*, 53 Ark. 211; *Minkwitz v. Steen*, 36 Ark. 260; *Campbell v. State*, 38 Ark. 498; *Walker v. State*, 39 Ark. 221; *Foster v. State*, 45 Ark. 328.

California. — *Klockenbaum v. Piereson*, 22 Cal. 160; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Stoakes v. Monroe*, 36 Cal. 383; *People v. Mc-*

character which will warrant a new trial must be not only impeach-

Curdy, 68 Cal. 576; *People v. Loui Tung*, 90 Cal. 377; *People v. Cesena*, 90 Cal. 381.

Colorado. — *Christ v. People*, 3 Colo. 394; *Fist v. Fist*, 3 Colo. App. 273.

District of Columbia. — *U. S. v. Cross*, 20 Wash. L. Rep. (D. C.) 98.

Georgia. — *Pace v. State*, 63 Ga. 159; *Barrow v. State*, 80 Ga. 191; *Hunt v. State*, 81 Ga. 141; *Parker v. State*, 81 Ga. 332; *Etheridge v. Hobbs*, 77 Ga. 531; *Levinig v. State*, 13 Ga. 513; *Wright v. State*, 34 Ga. 110; *State v. Henley*, R. M. Charlt. (Ga.) 505; *Brown v. State*, 55 Ga. 169; *Baker v. Moor*, 84 Ga. 186; *Mitchell v. Printup*, 25 Ga. 182; *Munro v. Moody*, 78 Ga. 127; *Reid v. State*, 81 Ga. 760; *Dominick v. State*, 81 Ga. 715; *Ramsey v. State*, 92 Ga. 53; *Johnson v. State*, 83 Ga. 553; *Johnson v. Palmour*, 87 Ga. 244; *Hawkins v. Kermod*, 85 Ga. 116; *Edwards v. State*, 90 Ga. 143; *Sweat v. State*, 90 Ga. 315; *Pease v. State*, 91 Ga. 18; *Isbell v. State*, 93 Ga. 194; *Jackson v. State*, 93 Ga. 190; *Childs v. State*, 94 Ga. 703; *Adams v. State*, 93 Ga. 166; *Martin v. Kendrick*, 94 Ga. 709; *Brown v. State*, 97 Ga. 215; *Southern Bell Telephone Co. v. Lynch*, 95 Ga. 529; *Corley v. State*, 87 Ga. 332; *Andrews v. Mitchell*, 92 Ga. 629; *Robinson v. Veal*, 79 Ga. 633; *Lasseter v. Simpson*, 78 Ga. 61; *Feltman v. State*, 97 Ga. 344.

Illinois. — *Tobin v. People*, 101 Ill. 121; *O'Reilly v. Fitzgerald*, 40 Ill. 310; *Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 Ill. 122; *Fletcher v. People*, 117 Ill. 184; *Martin v. Ehrenfels*, 24 Ill. 187; *Bemis v. Horner*, 165 Ill. 347, *affirming* 62 Ill. App. 38; *Blumke v. Dailey*, 67 Ill. App. 381; *Jacobson v. Gunzburg*, 150 Ill. 135.

Indiana. — *Humphreys v. State*, 75 Ind. 469; *Sullivan v. O'Conner*, 77 Ind. 149; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *O'Dea v. State*, 57 Ind. 31; *McIntire v. Young*, 6 Blackf. (Ind.) 496; *Bland v. State*, 2 Ind. 608; *Keck v. Umphries*, 4 Ind. 492; *Fleming v. State*, 11 Ind. 234; *Jackson v. Sharpe*, 29 Ind. 167; *Taylor v. State*, 4 Ind. 540; *Brown v. Grove*, 116 Ind. 84; *Green v. Beckner*, 3 Ind. App. 39; *Meurer v. State*, 129 Ind. 587.

Iowa. — *Morrow v. Chicago*, etc., R. Co., 61 Iowa 487; *Donnelly v. Burkett*, 75 Iowa 613; *McDermott v. Iowa Falls*, etc., R. Co., 85 Iowa 180.

Kansas. — *Parker v. Bates*, 29 Kan. 597; *Clark v. Norman*, 24 Kan. 515; *State v. Smith*, 35 Kan. 618; *Lee v. Birmingham*, 39 Kan. 320; *Titus v. Mitchell*, 3 Kan. App. 90.

Kentucky. — *Clarke v. Rutledge*, 2 A. K. Marsh. (Ky.) 381; *Barrett v. Belshe*, 4 Bibb (Ky.) 348; *Chesapeake, etc., R. Co. v. Friel*, 19 Ky. L. Rep. 152, (Ky. 1897) 39 S. W. Rep. 704.

Louisiana. — *State v. Chambers*, 43 La. Ann. 1108; *State v. Crenshaw*, 45 La. Ann. 496; *State v. Hendrix*, 45 La. Ann. 500; *State v. Burt*, 41 La. Ann. 787; *State v. Keaveny*, 49 La. Ann. 667.

Maine. — *Bradbury v. Cony*, 62 Me. 223.

Massachusetts. — *Hammond v. Wadhams*, 5 Mass. 353; *Com. v. Waite*, 5 Mass. 261; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Hopcraft v. Kittredge*, 162 Mass. 1.

Minnesota. — *Cirkel v. Crosswell*, 36 Minn. 323; *Watson v. St. Paul City R. Co.*, 42 Minn. 46; *Brazil v. Peterson*, 44 Minn. 212.

Mississippi. — *Moore v. Chicago*, etc., R. Co., 59 Miss. 243; *Vanderburg v. Campbell*, 64 Miss. 89.

Missouri. — *State v. Rockett*, 87 Mo. 666; *Phillips v. Phillips*, 46 Mo. 607; *Jaccard v. Davis*, 43 Mo. 535; *Deer v. State*, 14 Mo. 348; *Boggs v. Lynch*, 22 Mo. 563; *State v. Smith*, 65 Mo. 464; *State v. Welsor*, 117 Mo. 570; *Tootle v. Lysaght*, 65 Mo. App. 139; *Shotwell v. McElhinney*, 101 Mo. 677; *Liberty v. Burns*, 114 Mo. 426; *State v. Smith*, 114 Mo. 406; *State v. Sansone*, 116 Mo. 1; *State v. Potter*, 108 Mo. 424; *State v. Howell*, 117 Mo. 307; *State v. Keith*, 53 Mo. App. 383; *Heintz v. Mertz*, 58 Mo. App. 405; *Thayer v. Williams*, 65 Mo. App. 673; *State v. Taylor*, 126 Mo. 531; *State v. Powers*, 130 Mo. 475.

Montana. — *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53.

Nevada. — *Manning v. Gignoux*, 23 Nev. 322.

New York. — *Duryee v. Dennison*, 5 Johns. (N. Y.) 248; *Halsey v. Watson*, 1 Cai. (N. Y.) 24; *Harrington v. Bigelow*, 2 Den. (N. Y.) 109; *Meakin v. Anderson*, 11 Barb. (N. Y.) 215; *Warner v. Western Transp. Co.*, 5 Robt. (N. Y.) 490; *Leavy v. Roberts*, 8 Abb. Pr. (N. Y. C. Pl.) 310; *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285; *People v. Superior Ct.*, 5 Wend. (N. Y.) 114, 10 Wend. (N. Y.) 286; *Bunn v.*

ing, but sufficient to probably change the result if a new trial is

- Hoyt, 3 Johns. (N. Y.) 255; Shumway v. Fowler, 4 Johns. (N. Y.) 425; Carpenter v. Coe, 67 Barb. (N. Y.) 411; Sproul v. Resolute F. Ins. Co., 1 Lans. (N. Y.) 71; Powell v. Jones, 42 Barb. (N. Y.) 24; Nelson v. Neil, 12 N. Y. Wkly. Dig. 161; Raphelsky v. Lynch, 43 How. Pr. (N. Y. Super. Ct.) 157, 12 Abb. Pr. N. S. (N. Y.) 224; Finelite v. Finelite, 68 Hun (N. Y.) 82; Brady v. Industrial Ben. Assoc., 79 Hun (N. Y.) 156; Kanter v. Rubin, (City Ct.) 18 N. Y. Supp. 168; Whitaker v. White, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 240; Corley v. New York, etc., R. Co., 12 N. Y. App. Div. 409; People v. McGuire, 2 Hun (N. Y.) 269; Sims v. Sims, 12 Hun (N. Y.) 231; Michel v. Colegrove, 22 Civ. Pro. Rep. (N. Y. Super. Ct.) 297, 304; Holtz v. Schmidt, 44 N. Y. Super. Ct. 327.
- North Carolina.* — Brown v. Mitchell, 102 N. Car. 347.
- Ohio.* — Searles v. State, 6 Ohio Cir. Ct. Rep. 331.
- Oregon.* — Territory v. Latshaw, 1 Oregon 146.
- Pennsylvania.* — Struthers v. Wagner, 6 Phila. (Pa.) 262, 24 Leg. Int. (Pa.) 348; Ruddy v. Ruddy, 6 Kulp (Pa.) 297; Sweigert v. Finley, 144 Pa. St. 266; Schultz v. Bear Creek Oil Co., 6 Del. Co. Rep. (Pa.) 393.
- Rhode Island.* — Jones v. New York, etc., R. Co., 20 R. I. (pt. i.) 212.
- South Dakota.* — Scheffer v. Corson, 5 S. Dak. 233.
- Texas.* — Grate v. State, 23 Tex. App. 458; Storms v. State, (Tex. Crim. App. 1896) 37 S. W. Rep. 439; Herber v. State, 7 Tex. 69; Atkins v. State, 11 Tex. App. 8; Metzger v. Wendler, 35 Tex. 378; Terry v. State, 3 Tex. App. 236; Love v. State, 3 Tex. App. 501; Little v. State, (Tex. Crim. App. 1896) 35 S. W. Rep. 659; Walker v. State, 32 Tex. Crim. Rep. 517; Miller v. State, 35 Tex. Crim. Rep. 209; Russell v. Nall, 79 Tex. 664; Western Union Tel. Co. v. Haman, 2 Tex. Civ. App. 100; Lewis v. State, (Tex. Crim. App. 1893) 22 S. W. Rep. 687; Cruse v. State, (Tex. Crim. App. 1893) 21 S. W. Rep. 370; Rodgers v. State, (Tex. Crim. App. 1892) 20 S. W. Rep. 709; Messie v. State, (Tex. Crim. App. 1894) 25 S. W. Rep. 626; Matkins v. State, 33 Tex. Crim. Rep. 605; Williams v. State, 33 Tex. Crim. Rep. 128, (Tex. Crim. App. 1893) 22 S. W. Rep. 877; Dawson v. State, 32 Tex. Crim. Rep. 535; Carrico v. State, 36 Tex. Crim. Rep. 618; Butts v. State, 35 Tex. Crim. Rep. 364.
- Utah.* — People v. Peacock, 5 Utah 237; U. S. v. Eldredge, 5 Utah 161.
- Vermont.* — Dodge v. Kendall, 4 Vt. 31; Campbell v. Hyde, 1 D. Chip. (Vt.) 70.
- Virginia.* — Brugh v. Shanks, 5 Leigh (Va.) 598; Thompson v. Com., 8 Gratt. (Va.) 637; Read v. Com., 22 Gratt. (Va.) 924; Brown v. Speyers, 20 Gratt. (Va.) 296.
- West Virginia.* — Gillilan v. Ludington, 6 W. Va. 128; Halstead v. Horton, 38 W. Va. 727; Carder v. State Bank, 34 W. Va. 38.
- Wisconsin.* — Hooker v. Chicago, etc., R. Co., 76 Wis. 542.
- United States.* — U. S. v. Mulholland, 50 Fed. Rep. 413; Lowry v. Mt. Adams, etc., Incline Plane R. Co., 68 Fed. Rep. 827.
- England.* — For early cases at common law see Ford v. Tilly, 2 Salk. 653; Fabrilus v. Cock, 3 Burr. 1771.
- Impeaching testimony is clearly insufficient where it has been denied or explained at the trial or by counter-affidavits. Sutherland v. State, 108 Ind. 389; Mitchell v. White, 74 Ga. 327.
- That a party is able to find other witnesses, who on a new trial would support the issue on his part, or who would contradict or impeach the credibility of a single witness of his adversary, is no more than could be done by almost every defeated litigant. Vanderburg v. Campbell, 64 Miss. 89.
- Rule Contra in South Carolina.** — "The fourth ground of appeal is based upon the proposition that a new trial should not be granted on the ground of newly discovered evidence the effect of which is to impeach or contradict a witness examined at the former hearing. Whatever may be the rule elsewhere, it is quite certain that such is not the rule in this state, nor does it seem to be the rule in England. In Levingsworth v. Fox, 2 Bay (S. Car.) 520, a new trial was granted because evidence was discovered after the trial, showing that one Rountree, a witness who had testified at the former trial, was interested in the event of the suit, though he had stated when examined on his *voir dire* that he had no interest. In Durant v. Ashmore, 2 Rich. L. (S. Car.) 184, a new trial was granted on

granted.¹ If the new evidence tends to prove a distinct and material fact and would probably produce a different result, a new trial should be granted although such evidence may also tend to impeach the adverse party or his witnesses.²

Witness Convicted of Perjury. — A new trial may be granted where a witness has been convicted of perjury in his testimony in the cause,³ but not where the result would probably be the same or

the ground of after-discovered written evidence, which might have affected the credit of a witness examined at the former trial. So, in *Fabrilius v. Cock*, 3 Burr. 1771, a new trial was granted because evidence was discovered after the former trial, going to show the subornation of witnesses who testified at the first trial." *Durant v. Philpot*, 16 S. Car. 116.

Statements of Persons in Extremis. — The rule that newly discovered testimony, for the purpose of impeaching a witness who had testified on the trial, is insufficient to justify the allowance of a new trial is applicable to the statements of persons *in extremis*. *State v. Burt*, 41 La. Ann. 787.

Credit of Sole Witness. — Newly discovered evidence going merely to the credit of a witness, even of a sole witness, is not cause for a new trial. *Hunt v. State*, 81 Ga. 140.

Explaining and Adding to Conversations. — Newly discovered evidence going to explain and add to conversations from which fraudulent misrepresentations of the credit of a person had been inferred, and a verdict accordingly rendered, is neither cumulative nor impeaching, so as to justify the refusal of a new trial. *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107.

Extraordinary Cases. — As a general rule a new trial will not be granted to afford opportunity of impeaching a witness, though cases may arise so imperative as to require the interposition of the court to prevent a palpable wrong. *Cochran v. Ammon*, 16 Ill. 316.

1. *Fabrilius v. Cock*, 3 Burr. 1771; *Phillips v. State*, 35 Tex. Crim. Rep. 480.

Where there is conclusive proof that two witnesses for the prosecution were wholly mistaken in testifying that they saw and spoke with the prisoner at about the time and place of the murder, a new trial will be granted although the new evidence is impeaching. *Com. v. Roddy*, 19 Pa. Co. Ct. Rep. 321.

2. *Cairns v. Keith*, 50 Minn. 32; *Blackburn v. Crowder*, 110 Ind. 127; *Oakley v. Sears*, 1 Robt. (N. Y.) 73; *Murray v. Weber*, 92 Iowa 757.

Newly discovered evidence consisting of admissions of a party contrary to his testimony is sufficient as a ground for a new trial although such evidence tends to impeach the party. See *infra*, p. 207, note paragraph *Admissions of Party*. See also *Weber v. Weber*, (City Ct.) 5 N. Y. Supp. 178.

Newly discovered admissions of a party which contradict his testimony in regard to a fact brought out on cross-examination are not sufficient, as such testimony will be merely impeaching. *Stewart v. J. Harper Bonnell Co.*, 20 Misc. Rep. (N. Y. City Ct.) 174.

New Evidence Impeaching Prosecuting Witness. — Newly discovered evidence of admissions of a prosecuting witness contrary to his testimony is not sufficient to authorize a new trial. Such evidence is not admissible as the admission of a party to the action, but can be used only as impeaching evidence, and a new trial will not be granted for this purpose. *Harper v. State*, 101 Ind. 109; *Tholke v. State*, 50 Ind. 355; *People v. Ah Noon*, 116 Cal. 656.

Impeaching by Proving an Alibi. — A new trial will be granted for newly discovered evidence tending to prove an alibi where the defendant was surprised by the plaintiff's testimony as to sexual intercourse on a certain date and was not prepared to prove an alibi at the trial. Such evidence, if convincing, is sufficient although impeaching the plaintiff's witnesses. *Sargent v. —*, 5 Cow. (N. Y.) 106, followed in *Seeley v. Chittenden*, 4 How. Pr. (N. Y. Supreme Ct.) 265.

3. *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574; *Seward v. Cease*, 50 Ill. 228.

The court will not set aside a verdict obtained by perjury unless the witness has been convicted of perjury, or has died since the trial, and his conviction has thus been rendered impossible.

the evidence is sufficient aside from his testimony.¹

g. MERELY CUMULATIVE EVIDENCE INSUFFICIENT — (1) *General Rule*. — It is a well-settled rule that a new trial will not be granted on the ground of newly discovered evidence when the new evidence relied upon is merely cumulative to that introduced at the former trial.²

Dyche v. Patton, 3 Jones Eq. (N. Car.) 332.

Courts do not look with favor upon a motion for a new trial founded upon newly discovered evidence that a witness for the successful party committed perjury, unless the witness has been convicted. *Holtz v. Schmidt*, 44 N. Y. Super. Ct. 327. Especially is this true where the newly discovered evidence is that of the perjurer. *People v. McGuire*, 2 Hun (N. Y.) 269. But newly discovered evidence that the judgment was recovered by conspiracy and perjury has been deemed sufficient ground for granting a new trial where the fact of the conspiracy was first disclosed by the conspirators upon a quarrel between them after the trial and the motion was made as soon as the fact was discovered. *Raphaelsky v. Lynch*, 34 N. Y. Super. Ct. 31, 43 How. Pr. (N. Y.) 157, 12 Abb. Pr. N. S. (N. Y.) 224.

Witness Contradicting Himself After Trial. — Where a witness testified to one state of facts at the trial and made statements afterwards contradicting the statements formerly made, such fact furnishes no ground for a new trial. *Lasseter v. Simpson*, 78 Ga. 61; *Duryee v. Dennison*, 5 Johns. (N. Y.) 249; *Lake v. Hardee*, 55 Ga. 667; *Com. v. Randall*, Thach. Cr. Cas. (Mass.) 500; *Husted v. Mead*, 58 Conn. 55.

A Confession of Perjury by a Witness is not always a sufficient ground for a new trial, the presumption being that his testimony at the trial was true and that his affidavit for a new trial is false or that his testimony will be worthless. *Holtz v. Schmidt*, 44 N. Y. Super. Ct. 327; *Sims v. Sims*, 12 Hun (N. Y.) 231; *People v. McGuire*, 2 Hun (N. Y.) 269.

1. **A Conviction of a Witness for Perjury** will not necessitate a new trial in another criminal case in which he was a witness where, eliminating his evidence, there is other evidence amply sufficient to justify the conviction. *U. S. v. Biena*, 8 N. Mex. 99.

2. *Alabama*. — *Martin v. Hudson*, 52 Ala. 279; *McLeod v. Shelly Mfg., etc.*, Co., 108 Ala. 81.

Arizona. — *Hayden Milling Co. v.*

Lewis, (Arizona 1891) 32 Pac. Rep. 263.

Arkansas. — *Brown v. Stacy*, 5 Ark. 403; *Brown v. St. Louis, etc., R. Co.*, 52 Ark. 120; *Berry v. Elliott*, 25 Ark. 89; *Burris v. Wise*, 2 Ark. 33; *Bixby v. State*, 15 Ark. 395; *Bourdon v. Mason*, 5 Ark. 256; *Olmstead v. Hill*, 2 Ark. 346; *Bourland v. Skimnee*, 11 Ark. 671; *Robins v. Fowler*, 2 Ark. 133; *Texas, etc., R. Co. v. Orr*, 46 Ark. 182; *St. Louis Southwestern R. Co. v. Dobbins*, 60 Ark. 481 (rehearing denied in 60 Ark. 486); *Kirkpatrick v. Wolfe*, 17 Ark. 96; *White v. State*, 17 Ark. 404; *Merrick v. Britton*, 26 Ark. 496.

California. — *People v. Anthony*, 56 Cal. 397; *People v. Fong Ah Sing*, 70 Cal. 8; *Klockenbaum v. Pierson*, 22 Cal. 160; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Wright v. Carillo*, 22 Cal. 595; *Hobler v. Cole*, 49 Cal. 251; *Williamson v. Tobey*, 86 Cal. 497; *People v. Sutton*, 73 Cal. 243; *Russell v. Dennison*, 45 Cal. 337; *Gaven v. Dopman*, 5 Cal. 342; *Meyer v. Mowry*, 34 Cal. 514; *Stoakes v. Monroe*, 36 Cal. 383; *Spencer v. Doane*, 23 Cal. 418; *Aldrich v. Palmer*, 24 Cal. 513; *Bartlett v. Hogden*, 3 Cal. 55; *Levitsky v. Johnson*, 35 Cal. 41; *Doyle v. Sturla*, 38 Cal. 456; *Jones v. Jones*, 38 Cal. 584; *People v. McCurdy*, 68 Cal. 576; *People v. M'Donell*, 47 Cal. 134; *Reed v. Clark*, 47 Cal. 194; *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164; *Reed v. Drais*, 67 Cal. 491; *People v. Kloss*, 115 Cal. 567; *Crystal Lake Ice Co. v. McAulay*, 75 Cal. 631; *People v. Goldenson*, 76 Cal. 328; *Von Glahn v. Brennan*, 81 Cal. 261; *People v. O'Brien*, 78 Cal. 41; *People v. Mesa*, 93 Cal. 580; *People v. Urquidas*, 96 Cal. 239; *Taylor v. California Stage Co.*, 6 Cal. 229; *Armstrong v. Davis*, 41 Cal. 499; *Millard v. Hathaway*, 27 Cal. 147; *Baker v. Joseph*, 16 Cal. 180; *Brooks v. Lyon*, 3 Cal. 113; *Burritt v. Gibson*, 3 Cal. 396; *Kuhlman v. Burns*, 117 Cal. 469; *Niosi v. Empire Steam Laundry*, 117 Cal. 257; *Mowry v. Raabe*, 89 Cal. 606; *People v. Burdick*, (Cal. 1892) 29 Pac. Rep. 245; *People v. Loui Tung*, 90 Cal. 377; *People v. Cesena*, 90 Cal. 381; *Christen-*

(2) *Definition of Cumulative Evidence.* — There seems to be some confusion in the cases in the use of the word "cumulative"

sen v. McBride, (Cal. 1894) 36 Pac. Rep. 398; *Silva v. Silva*, (Cal. 1894) 38 Pac. Rep. 105; *O'Rourke v. Vennekohl*, 104 Cal. 254; *Wells v. Snow*, (Cal. 1895) 41 Pac. Rep. 858; *McCormick v. Central R. Co.*, 75 Cal. 506; *Kelleher v. Kenney*, (Cal. 1884) 4 Pac. Rep. 1095; *People v. Hong Quin Moon*, 92 Cal. 41; *People v. Demasters*, 109 Cal. 607.

Colorado. — *Martin v. Hazzard Powder Co.*, 2 Colo. 596; *Cole v. Thornburg*, 4 Colo. App. 95.

Connecticut. — *Norwich, etc., R. Co. v. Cahill*, 18 Conn. 493; *Anderson v. State*, 43 Conn. 514; *Parsons v. Platt*, 37 Conn. 563; *Travelers' Ins. Co. v. Savage*, 43 Conn. 187; *Waller v. Graves*, 20 Conn. 305; *Husted v. Mead*, 58 Conn. 55; *Noyce v. Huntington*, *Kirby (Conn.)* 282.

Florida. — *Finlayson v. Lipscomb*, 16 Fla. 751; *Milton v. Blackshear*, 8 Fla. 161; *Coker v. Merritt*, 16 Fla. 416; *Simpson v. Daniels*, 16 Fla. 677; *Howard v. State*, 36 Fla. 21.

Georgia. — *Mitchell v. White*, 74 Ga. 327; *Hill v. State*, 64 Ga. 454; *Purvey v. State*, 66 Ga. 753; *Smith v. State*, 72 Ga. 114; *Erschine v. Duffy*, 76 Ga. 602; *Poullain v. Poullain*, 79 Ga. 11; *Hawkins v. Kermod*, 85 Ga. 116; *McLendon v. Frost*, 57 Ga. 448; *Gardner v. Lambback*, 47 Ga. 133; *Perry v. Houseley*, 40 Ga. 657; *Orand v. Walker*, 41 Ga. 657; *McAfee v. State*, 31 Ga. 411; *Wright v. Greenwood*, 17 Ga. 418; *Dickinson v. Solomons*, 26 Ga. 684; *Coggin v. Jones*, 29 Ga. 257; *Smith v. State*, 81 Ga. 479; *Grubb v. Kalb*, 37 Ga. 459; *Brinson v. Faircloth*, 82 Ga. 185; *O'Shields v. State*, 55 Ga. 696; *Brown v. State*, 51 Ga. 502; *Long v. State*, 54 Ga. 564; *Johnson v. Palmour*, 87 Ga. 244; *Etheridge v. Hobbs*, 77 Ga. 531; *Verdery v. Savannah, etc., R. Co.*, 82 Ga. 675; *Baker v. Moor*, 84 Ga. 186; *Munro v. Moody*, 78 Ga. 127; *Roane v. State*, 97 Ga. 195; *Walker v. State*, 97 Ga. 197; *Brown v. State*, 97 Ga. 215; *Adams v. State*, 97 Ga. 218; *Latimer v. State*, 97 Ga. 218; *Martin v. Kendrick*, 94 Ga. 709; *Blalock v. Denham*, 85 Ga. 646; *Greer v. State*, 87 Ga. 559; *Sweat v. State*, 90 Ga. 315; *Edwards v. State*, 90 Ga. 143; *Tripp v. State*, 95 Ga. 502; *Ogden v. Dodge County*, 97 Ga. 461; *Harrison v. State*, 83 Ga. 129; *Artemus v. State*, 79 Ga. 512; *Mitchell v. State*, 94 Ga. 704;

Coggin v. Parks, 85 Ga. 516; *Hart v. Jackson*, 77 Ga. 493; *Roberts v. State*, 3 Ga. 310; *Irwin v. Morell*, *Dudley (Ga.)* 72; *Giles v. State*, 6 Ga. 276; *Berry v. State*, 10 Ga. 511; *Hines v. Beers*, 74 Ga. 839; *Carter v. State*, 75 Ga. 747; *Wimpy v. Gaskill*, 79 Ga. 620; *Neill v. State*, 79 Ga. 779; *Johnson v. State*, 83 Ga. 553; *Dale v. State*, 88 Ga. 552.

Idaho. — *Flannagan v. Newberg*, 1 Idaho 82; *People v. Biles*, 2 Idaho 103.

Illinois. — *Fuller v. Little*, 61 Ill. 21; *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 374; *Wormley v. Gregg*, 65 Ill. 251; *Scharf v. People*, 34 Ill. App. 400; *Kendall v. Limberg*, 69 Ill. 355; *Blake v. Blake*, 70 Ill. 618; *Fay v. Richards*, 30 Ill. App. 480; *Krug v. Ward*, 77 Ill. 603; *Chicago, etc., R. Co. v. Bryant*, 29 Ill. App. 17; *Skelly v. Boland*, 78 Ill. 438; *Davis v. Mann*, 43 Ill. App. 301; *Schoenfeld v. Brown*, 78 Ill. 487; *Chicago v. Edson*, 43 Ill. App. 417; *McKenzie v. Remington*, 79 Ill. 388; *Halsey v. Stillman*, 48 Ill. App. 413; *Dyer v. People*, 84 Ill. 624; *Biederman v. Brown*, 49 Ill. App. 483; *Elgin v. Renwick*, 86 Ill. 498; *R. J. Gunning Co. v. Cusack*, 50 Ill. App. 291; *Abrahams v. Weiller*, 87 Ill. 179; *Woolverton v. Sumner*, 53 Ill. App. 115; *Leigh v. People*, 113 Ill. 372; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9; *Gilmore v. People*, 124 Ill. 380; *Lilly v. People*, 148 Ill. 467; *Smith v. Belt*, 31 Ill. App. 96; *Chicago First Nat. Bank v. William Ruehl Brewing Co.*, 33 Ill. App. 121; *Monroe v. Snow*, 131 Ill. 137; *Plumb v. Campbell*, 129 Ill. 101; *Singer v. Lidwinosky*, 36 Ill. App. 346; *Bruce v. Truett*, 5 Ill. 454; *Sconce v. Henderson*, 102 Ill. 376; *Ritchey v. West*, 23 Ill. 385; *Harvey v. Collins*, 89 Ill. 255; *Martin v. Ehrensels*, 24 Ill. 187; *Classen v. Cuddigan*, 21 Ill. App. 591; *Bowen v. Rutherford*, 60 Ill. 41; *Cooper v. Johnson*, 27 Ill. App. 504; *O'Neil v. O'Neil*, 123 Ill. 361; *Farrell v. Dooley*, 17 Ill. App. 68; *Kinney v. People*, 108 Ill. 519; *Elgin v. Hoag*, 25 Ill. App. 650; *Calhoun v. O'Neal*, 53 Ill. 354; *Toledo, etc., R. Co. v. Seitz*, 53 Ill. 452; *Aholtz v. Durfee*, 25 Ill. App. 43; *Cleary v. Cummings*, 28 Ill. App. 237; *Klein v. People*, 113 Ill. 596; *Sahlinger v. People*, 102 Ill. 241; *Morrison v. Stewart*, 24 Ill. 24; *Lang-*

in this connection. The clearest and most accurate definition of

don *v.* People, 133 Ill. 382; Schlencker *v.* Risley, 4 Ill. 483; Burns *v.* People, 126 Ill. 284; Smith *v.* Shultz, 2 Ill. 490; Chicago, etc., *R. Co. v. Sullivan*, 21 Ill. App. 580; Adams *v.* People, 47 Ill. 376; Petefish *v.* Watkins, 124 Ill. 387; Williams *v.* People, 164 Ill. 481; Bemis *v.* Horner, 165 Ill. 347, *affirming* 62 Ill. App. 38; Collins *v.* People, 103 Ill. 21; Sterling *v.* Merrill, 25 Ill. App. 596, *affirmed* 124 Ill. 522; Jacobson *v.* Gunzburg, 25 Ill. App. 223, *affirmed* 150 Ill. 135; Bessie *v.* Sawyer, 28 Ill. App. 248; Dyk *v.* De Young, 133 Ill. 82; Keith *v.* Knoche, 43 Ill. App. 161; Chicago Exhaust, etc., *Pipe Co. v. Johnson*, 44 Ill. App. 224; Reid *v.* Flanders, 62 Ill. App. 106; Madison Coal Co. *v.* Beam, 63 Ill. App. 178; Spahn *v.* People, 137 Ill. 538; Chicago, etc., *R. Co. v. Clough*, 134 Ill. 586, *affirming* 33 Ill. App. 129; Hintz *v.* Graupner, 138 Ill. 158, *affirming* 37 Ill. App. 510; Toledo, etc., *R. Co. v. Endres*, 57 Ill. App. 69; De Kalb *v.* Ashley, 61 Ill. App. 647; McGrath *v.* Miller, 61 Ill. App. 497; Fletcher *v.* People, 117 Ill. 184; Crozier *v.* Cooper, 14 Ill. 139; Laflin *v.* Herrington, 17 Ill. 399; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Gottschalk *v.* Hughes, 82 Ill. 484; Claves *v.* White, 83 Ill. 540; Laird *v.* Warren, 92 Ill. 204; McCollom *v.* Indianapolis, etc., *R. Co.*, 94 Ill. 534; Bean *v.* People, 124 Ill. 576.

Indiana. — Hines *v.* Driver, 100 Ind. 319; Marshall *v.* Mathers, 103 Ind. 458; Pennsylvania Co. *v.* Nations, 111 Ind. 203; Jennings *v.* Loring, 5 Ind. 250; Watts *v.* Moffett, 12 Ind. App. 399; Cox *v.* Hutchings, 21 Ind. 219; Beaver *v.* Trittipio, 24 Ind. 41; Porter *v.* State, 2 Ind. 435; Harrison *v.* Price, 22 Ind. 165; Harris *v.* Rupel, 14 Ind. 209; Leedy *v.* Clapp, 18 Ind. 188; State *v.* Clark, 16 Ind. 97; Martin *v.* Garver, 40 Ind. 351; Fox *v.* Reynolds, 24 Ind. 46; Winsett *v.* State, 57 Ind. 26; Merryman *v.* Ryan, 24 Ind. 262; Dodds *v.* Vannoy, 61 Ind. 89; Simpson *v.* Wilson, 6 Ind. 474; Harper *v.* State, 101 Ind. 109; Meurer *v.* State, 129 Ind. 587; Lefever *v.* Johnson, 79 Ind. 554; Hamm *v.* Romine, 98 Ind. 77; Bronson *v.* Hickman, 10 Ind. 3; De Hart *v.* Aper, 107 Ind. 460; Shigley *v.* Snyder, 45 Ind. 543; Sutherland *v.* State, 108 Ind. 389; Zouker *v.* Wiest, 42 Ind. 169; Schnurr *v.* Stults, 119 Ind. 429; Jackson *v.* Sharpe, 29 Ind. 169; Morrison *v.* Carey, 129 Ind. 277; Swift *v.* Wakeman, 9 Ind.

552; Shirel *v.* Baxter, 71 Ind. 352; Westbrook *v.* Aultman, 3 Ind. App. 83; Dennis *v.* State, 103 Ind. 142; Russell *v.* State, (Ind. 1895) 40 N. E. Rep. 666; Eddingfield *v.* State, 12 Ind. App. 312; Cooper *v.* Ellis, 3 Ind. App. 142; Atkinson *v.* Saltsman, 3 Ind. App. 139; Andis *v.* Richie, 120 Ind. 138; Blackburn *v.* Crowder, 110 Ind. 127; Stalcup *v.* State, 129 Ind. 519; Gish *v.* Gish, 7 Ind. App. 104; Smith *v.* State, 143 Ind. 685; Humphries *v.* Marshall, 12 Ind. 609; O'Brian *v.* State, 14 Ind. 469; Larrimore *v.* Williams, 30 Ind. 18; Atkisson *v.* Martin, 39 Ind. 242; Humphreys *v.* Klick, 49 Ind. 189; Cox *v.* Harvey, 53 Ind. 174.

Iowa. — Morrow *v.* Chicago, etc., *R. Co.*, 61 Iowa 487; Manson *v.* Ware, 63 Iowa 346; State *v.* Oeder, 80 Iowa 72; Sturgeon *v.* Ferron, 14 Iowa 160; Wilhelm *v.* Thorington, 14 Iowa 537; Blair *v.* Madison County, 81 Iowa 313; Hickenbottom *v.* Chicago, etc., *R. Co.*, 57 Iowa 704; State *v.* Gleason, 68 Iowa 618; Reeves *v.* Royal, 2 Greene (Iowa) 451; Manix *v.* Malony, 7 Iowa 81; McDaniels *v.* Van Fosen, 11 Iowa 195; Murray *v.* Weber, 92 Iowa 757; Keys *v.* Francis, 28 Iowa 321; Cohol *v.* Allen, 37 Iowa 449; Taylor *v.* Chicago, etc., *R. Co.*, 80 Iowa 431; Bingham *v.* Foster, 37 Iowa 339; German *v.* Maquoketa Sav. Bank, 38 Iowa 368; Iowa City First Nat. Bank *v.* Charter Oak Ins. Co., 40 Iowa 572; Trimble *v.* Tantlinger, 104 Iowa 665; Boggess *v.* Read, 83 Iowa 548; State *v.* Watson, 81 Iowa 380; White *v.* Nafus, 84 Iowa 350; Byford *v.* Girton, 90 Iowa 661; Bryson *v.* Chicago, etc., *R. Co.*, 89 Iowa 677; Britson *v.* Tjernagel, 90 Iowa 356; Eaton *v.* Cripps, 94 Iowa 176; Names *v.* Dwelling House Ins. Co., 95 Iowa 642; Shepherd *v.* Brenton, 15 Iowa 84; Stineman *v.* Beath, 36 Iowa 73; State *v.* Nadal, 69 Iowa 478; State *v.* Whitmer, 77 Iowa 557; Donnelly *v.* Burkett, 75 Iowa 613; State *v.* Potts, 83 Iowa 317.

Kansas. — Sexton *v.* Lamb, 27 Kan. 432; Parker *v.* Bates, 29 Kan. 597; Baughman *v.* Penn, 33 Kan. 504; Clark *v.* Norman, 24 Kan. 515; Olathe *v.* Horner, 38 Kan. 312; Mitchell *v.* Stillings, 20 Kan. 276; O'Leary *v.* Reed, 30 Kan. 749; State *v.* McCool, 34 Kan. 613; McMullen *v.* Winfield Bldg., etc., Assoc., 4 Kan. App. 459; State *v.* Tyson, 56 Kan. 686; Swart-

cumulative evidence is "evidence of the same kind to the same

zell v. Rogers, 3 Kan. 374; Douglass v. Anthony, 45 Kan. 439; Titus v. Mitchell, 3 Kan. App. 90; Harris v. Thompson, 23 Kan. 372; State v. Kearley, 26 Kan. 77; State v. Rohrer, 34 Kan. 427; State v. Stickney, 53 Kan. 308.

Kentucky. — Mercer v. Mercer, 87 Ky. 21; Marcum v. Com., (Ky. 1886) 1 S. W. Rep. 727; Allen v. Perry, 6 Bush (Ky.) 86; Klein v. Gibson, (Ky. 1886) 2 S. W. Rep. 116; Chambers v. Chambers, 2 A. K. Marsh. (Ky.) 348; Ripperdan v. Scott, 1 A. K. Marsh. (Ky.) 151; Berry v. Branham, 3 Ky. L. Rep. 756; Marshall v. Senour, 3 Ky. L. Rep. 756; Hedge v. Lehrer, (Ky. 1896) 37 S. W. Rep. 261; Mitchell v. Robinson, 7 Ky. L. Rep. 98; L. & N. R. Co. v. Wade, 11 Ky. L. Rep. 953; Rider v. Sullivan, 15 Ky. L. Rep. 749; Bell v. Offutt, 10 Bush (Ky.) 643; Sellars v. Cincinnati, etc., R. Co., (Ky. 1895) 29 S. W. Rep. 332, 16 Ky. L. Rep. 833; Williams v. Com., 13 Ky. L. Rep. 753; Smith v. Com., 13 Ky. L. Rep. 612, (Ky. 1891) 17 S. W. Rep. 868; Palmer v. Mt. Sterling Nat. Bank, 13 Ky. L. Rep. 790; Newton v. Cook, 17 Ky. L. Rep. 1189, (Ky. 1896) 33 S. W. Rep. 934; Wells v. Phelps, 4 Bibb (Ky.) 563; Finley v. Tyler, 3 T. B. Mon. (Ky.) 400; Houston v. Kidwell, 83 Ky. 301, (Ky. 1890) 14 S. W. Rep. 377; Lewis v. Com., 93 Ky. 238; Adams Oil Co. v. Stout, (Ky. 1897) 41 S. W. Rep. 563.

Louisiana. — State v. Alvarez, 7 La. Ann. 284; State v. Robertson, Mann. Unrep. Cas. (La.) 257; State v. Fahey, 35 La. Ann. 9; State v. Hyland, 36 La. Ann. 709; State v. Lamothe, 37 La. Ann. 43; State v. Hanks, 39 La. Ann. 234; State v. Travis, 39 La. Ann. 356; State v. Harris, 39 La. Ann. 1105; State v. Garig, 43 La. Ann. 365; State v. Jones, 46 La. Ann. 545; State v. Green, 49 La. Ann. 60; State v. Hollier, 49 La. Ann. 371; Vicknair v. Trosclair, 45 La. Ann. 373; State v. Hendrix, 45 La. Ann. 500; State v. Crenshaw, 45 La. Ann. 496; Coste's Succession, 43 La. Ann. 144.

Maine. — McLaughlin v. Doane, 56 Me. 289; Ham v. Ham, 39 Me. 263; Handly v. Call, 30 Me. 9; Snowman v. Wardwell, 32 Me. 275; Warren v. Hope, 6 Me. 479; Atkinson v. Conner, 56 Me. 546; Dodge v. Dodge, 86 Me. 393; Glidden v. Dunlap, 28 Me. 379; Strout v. Stewart, 63 Me. 227.

Massachusetts. — Gardner v. Gardner,

2 Gray (Mass.) 434; Gardner v. Mitchell, 6 Pick. (Mass.) 114; Yarmouth v. Dennis, 6 Pick. (Mass.) 117, note; Sawyer v. Merrill, 10 Pick. (Mass.) 16.

Michigan. — Guerold v. Holz, 103 Mich. 123; White v. Peabody, 106 Mich. 144.

Minnesota. — Lowe v. Minneapolis St. R. Co., 37 Minn. 283; Jones v. Chicago, etc., R. Co., 42 Minn. 183; Schacherl v. St. Paul City R. Co., 42 Minn. 42; Gilmore v. Brost, 39 Minn. 190; Cummings v. Taylor, 24 Minn. 429; State v. Dumphey, 4 Minn. 438; Mead v. Constans, 5 Minn. 171; Mininger v. Knox, 8 Minn. 140; Johnson v. Coles, 21 Minn. 108; Meeks v. St. Paul, 64 Minn. 220; Adamant Mfg. Co. v. Pete, 61 Minn. 464; Layman v. Minneapolis St. R. Co., 66 Minn. 452; Brazil v. Peterson, 44 Minn. 212; Elmborg v. St. Paul City R. Co., 51 Minn. 70; Nelson v. Finseth, 55 Minn. 417.

Mississippi. — Moody v. Fair, 27 Miss. 788; Vanderburg v. Campbell, 64 Miss. 89; Newcomb v. State, 37 Miss. 383; Hare v. Sproul, 2 How. (Miss.) 772; Louisville, etc., R. Co. v. Crayton, 69 Miss. 152; Vardeman v. Byrne, 7 How. (Miss.) 365; Cooper v. State, 53 Miss. 393.

Missouri. — Culbertson v. Hill, 87 Mo. 553; Corrigan v. Brady, 38 Mo. App. 649; Donovan v. Ryan, 35 Mo. App. 160; State v. Rockett, 47 Mo. 666; Mercantile Bank v. Hawe, 33 Mo. App. 214; Dollman v. Munson, 90 Mo. 85; State v. Larrimore, 20 Mo. 425; Wells v. Sanger, 21 Mo. 354; Beauchamp v. Sconce, 12 Mo. 57; State v. Stumbo, 26 Mo. 306; Miller v. Whitson, 40 Mo. 97; Boggs v. Lynch, 22 Mo. 563; State v. Potter, 108 Mo. 424; State v. Redemeier, 71 Mo. 173; State v. Woodward, 95 Mo. 129; Heintz v. Mertz, 58 Mo. App. 405; Payne v. Weems, 36 Mo. App. 54; Liberty v. Burns, 114 Mo. 426; State v. Keith, 53 Mo. App. 383; Thayer v. Williams, 65 Mo. App. 673; State v. Emory, 79 Mo. 461; State v. Willoughby, 76 Mo. 215; Snyder v. Burnham, 77 Mo. 52; Hanley v. Life Assoc. of America, 69 Mo. 380; State v. Myers, 115 Mo. 394; State v. Beard, 126 Mo. 548; State v. Johnson, 139 Mo. 197; State v. Griffin, 87 Mo. 608; State v. Wightman, 27 Mo. 121; State v. Ray, 53 Mo. 345; Cook v. St. Louis, etc., R. Co., 56 Mo. 380; State v. Butler, 67

point." Although evidence is additional to other evidence tending

Mo. 59; *Howland v. Reeves*, 25 Mo. App. 458.

Montana. — *Morse v. Swan*, 2 Mont. 306; *Caruthers v. Pemberton*, 1 Mont. 111; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53; *Territory v. Bryson*, 9 Mont. 32; *O'Donnell v. Bennett*, 12 Mont. 242; *Territory v. Clayton*, 8 Mont. 1.

Nebraska. — *Campbell v. Holland*, 22 Neb. 587; *Brooks v. Dutcher*, 22 Neb. 644; *Hill v. Helman*, 33 Neb. 731; *Scofield v. Brown*, 7 Neb. 221; *Halliday v. Briggs*, 15 Neb. 219; *Flannagan v. Heath*, 31 Neb. 776; *Livesey v. Festner*, 28 Neb. 333; *Bolar v. Williams*, 14 Neb. 386; *Schreckengast v. Ealy*, 16 Neb. 510.

Nevada. — *Gray v. Harrison*, 1 Nev. 502; *Howard v. Winters*, 3 Nev. 539.

New Hampshire. — *Dennett v. Dennett*, 44 N. H. 531.

New Jersey. — *Kirk v. Rickerson*, 46 N. J. L. 16; *Tomlin v. Cox*, 19 N. J. L. 76; *Den v. Geiger*, 9 N. J. L. 228; *Den v. Wintermute*, 13 N. J. L. 177; *Mechanics' F. Ins. Co. v. Nichols*, 16 N. J. L. 410; *Read v. Barker*, 30 N. J. L. 378; *Deacon v. Allen*, 4 N. J. L. 386; *McDowell v. Perrine*, 36 N. J. Eq. 632.

New Mexico. — *Territory v. Yarberr*, 2 N. Mex. 391.

New York. — *People v. Superior Ct.*, 10 Wend. (N. Y.) 235; *Raphelsky v. Lynch*, 43 How. Pr. (N. Y. Super. Ct.) 157, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. (N. Y.) 224; *Oakley v. Sears*, 7 Robt. (N. Y.) 111; *Myers v. Riley*, 36 Hun (N. Y.) 20; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Geneva, etc., R. Co. v. Sage*, 35 Hun (N. Y.) 95; *Gale v. New York Cent., etc., R. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 385, 13 Hun (N. Y.) 1; *Fleming v. Hollenback*, 7 Barb. (N. Y.) 271; *Cole v. Van Keuren*, 51 How. Pr. (N. Y. Supreme Ct.) 451; *Barteau v. Phoenix Mut. L. Ins. Co.*, 67 Barb. (N. Y.) 354; *Peck v. Hiler*, 30 Barb. (N. Y.) 655; *Cole v. Cole*, 50 How. Pr. (N. Y. Supreme Ct.) 59; *Sheldon v. Stryker*, 27 How. Pr. (N. Y. Supreme Ct.) 387, 42 Barb. (N. Y.) 284; *Plyer v. German-American Ins. Co.*, (Supreme Ct.) 1 N. Y. Supp. 395; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Adams v. Bush*, 23 How. Pr. (N. Y. Supreme Ct.) 262; *Williams v. People*, 45 Barb. (N. Y.) 201; *Tripler v. Ehehalt*, 5 Robt. (N. Y.) 609; *Brisbane v. Adams*,

1 Sandf. (N. Y.) 195; *Best v. Starks*, 24 How. Pr. (N. Y. Supreme Ct.) 58; *Pike v. Evans*, 15 Johns. (N. Y.) 210; *Steinbach v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 129; *Smith v. Brush*, 8 Johns. (N. Y.) 84; *Burnett v. Phalon*, 4 Bosw. (N. Y.) 622; *Albert v. Sweet*, (Supreme Ct. 9 N. Y. Supp. 86; *Hogan v. Carroll*, (Supreme Ct.) 7 N. Y. Supp. 183, 54 Hun (N. Y.) 635; *Hicks v. British American Assur. Co.*, 13 N. Y. App. Div. 444; *Cameron v. Leonard*, 17 N. Y. App. Div. 127; *Hooker v. Terpening*, (Supreme Ct.) 29 N. Y. St. Rep. 818, 8 N. Y. Supp. 639; *O'Hara v. New York Cent., etc., R. Co.*, 92 Hun (N. Y.) 56; *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62; *Wilson v. Heath*, 68 Hun (N. Y.) 209; *Jackson v. Ft. Covington*, (Supreme Ct.) 40 N. Y. St. Rep. 67, 15 N. Y. Supp. 793; *Kanter v. Rubin*, (City Ct.) 45 N. Y. St. Rep. 277, 18 N. Y. Supp. 168; *Ott v. Buffalo*, 131 N. Y. 594, *affirming* 61 Hun (N. Y.) 624, 16 N. Y. Supp. 1; *Plyer v. German-American Ins. Co.*, 48 Hun (N. Y.) 618, 1 N. Y. Supp. 395; *Clegg v. New York Newspaper Union*, 51 Hun (N. Y.) 232, 129 N. Y. 638; *Cole v. Fall Brook Coal Co.*, 57 Hun (N. Y.) 585, 10 N. Y. Supp. 417, 61 Hun (N. Y.) 623, 16 N. Y. Supp. 789; *Jackson v. Ft. Covington*, 61 Hun (N. Y.) 622, 15 N. Y. Supp. 793; *Shute v. Jones*, (Supreme Ct.) 24 N. Y. Supp. 637; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124; *Dunham v. Winans*, 2 Paige (N. Y.) 24; *Plattsburgh First Nat. Bank v. Heaton*, 6 Thomp. & C. (N. Y.) 37; *Seeley v. Chittenden*, 4 How. Pr. (N. Y. Supreme Ct.) 265, *affirmed* 10 Barb. (N. Y.) 303; *Abrams v. Van Brunt St., etc., R. Co.*, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 402; *Wheelwright v. Beers*, 2 Hall (N. Y.) 391; *Whitney v. Saxe*, 15 Civ. Pro. Rep. (N. Y. City Ct.) 450; *Roberts v. Johnstown Bank*, (Supreme Ct.) 14 N. Y. Supp. 432; *People v. Shea*, 16 Misc. Rep. (N. Y. Supreme Ct.) 111; *Lawrence v. Ely*, 38 N. Y. 42.

North Carolina. — *Simmons v. Mann*, 92 N. Car. 12; *State v. Starnes*, 97 N. Car. 423; *Sikes v. Parker*, 95 N. Car. 232.

Ohio. — *Perrin v. Protection Ins. Co.*, 11 Ohio 147; *Loeffner v. State*, 10 Ohio St. 598; *Reed v. McGrew*, 5 Ohio 375; *Searles v. State*, 6 Ohio Cir. Ct. Rep. 331.

to prove the same position, yet it is not cumulative if it is of a

Oklahoma. — *Twine v. Kilgore*, 3 Okla. 640.

Oregon. — *Jackson v. Sharff*, 1 Oregon 246.

Pennsylvania. — *Com. v. Schoeppe*, 1 Leg. Gaz. (Pa.) 450; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Com. v. Kane*, 12 Phila. (Pa.) 630, 35 Leg. Int. (Pa.) 420; *Ream v. Oldweiler*, 17 Pittsb. Leg. J. (Pa.) 157, 2 Leg. Gaz. (Pa.) 147; *Com. v. Thompson*, 4 Phila. (Pa.) 215, 17 Leg. Int. (Pa.) 309; *Potts v. Feeder Dam Coal Co.*, 6 Phila. (Pa.) 249, 24 Leg. Int. (Pa.) 261; *Bonham v. Santee*, 2 Luz. L. Reg. (Pa.) 84; *Evans v. Bitner*, 4 Lanc. Bar (Pa.) 7, Sept. 1872; *Ruddy v. Ruddy*, 6 Kulp (Pa.) 297; *Com. v. Yot Sing*, 7 Kulp (Pa.) 349; *Com. v. Brown*, 7 Kulp (Pa.) 103.

Rhode Island. — *Kaul v. Brown*, 17 R. I. 14; *Potter v. Padelford*, 3 R. I. 162; *Windham County Bank v. Kendall*, 7 R. I. 77.

South Carolina. — *Turner's Motion*, 39 S. Car. 414.

South Dakota. — *Scheffer v. Corson*, 5 S. Dak. 233.

Tennessee. — *Irwin v. Jordan*, 7 Humph. (Tenn.) 167; *Noel v. McCrory*, 7 Coldw. (Tenn.) 623; *McGavock v. Brown*, 4 Humph. (Tenn.) 251; *Jones v. White*, 11 Humph. (Tenn.) 268; *Dossett v. Miller*, 3 Sneed (Tenn.) 72; *King v. State*, 91 Tenn. 617; *Burson v. Dosser*, 1 Heisk. (Tenn.) 754.

Texas. — *Latham v. Selkirk*, 11 Tex. 314; *Castro v. Wurzbach*, 13 Tex. 128; *Galveston Oil Co. v. Thompson*, 76 Tex. 235; *East Line, etc., R. Co. v. Boon*, (Tex. 1886) 1 S. W. Rep. 632; *Walker v. Brown*, 66 Tex. 556; *Sabine, etc., R. Co. v. Wood*, 69 Tex. 679; *State v. Moore*, 7 Tex. 257; *McCartney v. Martin*, 1 Tex. Unrep. Cas. 143; *Bowles v. Glasgow*, 2 Tex. Unrep. Cas. 714; *Garner v. State*, 34 Tex. Crim. Rep. 356; *Blount v. State*, 34 Tex. Crim. Rep. 640; *Carrasco v. State*, 34 Tex. Crim. Rep. 565; *Johnson v. Flint*, 75 Tex. 379; *Barber v. Hoffman*, (Tex. Civ. App. 1896) 37 S. W. Rep. 769; *Borchers v. Galvin*, (Tex. Civ. App. 1896) 37 S. W. Rep. 178; *Terry v. State*, 3 Tex. App. 236; *Jester v. Francis*, (Tex. Civ. App. 1895) 31 S. W. Rep. 245; *Blackwell v. State*, 29 Tex. App. 194; *Eddy v. Still*, 3 Tex. Civ. App. 346; *Eddy v. Newton*, (Tex. Civ. App.

1893) 22 S. W. Rep. 533; *Rodgers v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 709; *Day v. Goodman*, (Tex. 1891) 17 S. W. Rep. 475; *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96; *Fears v. Albea*, 69 Tex. 437; *Screws v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 796; *Porter v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 695; *Turner v. State*, 37 Tex. Crim. Rep. 451; *Scruggs v. State*, 35 Tex. Crim. Rep. 622; *Little v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 659; *Washington v. State*, 35 Tex. Crim. Rep. 154; *Riojas v. State*, 36 Tex. Crim. Rep. 182; *McAdams v. State*, 24 Tex. App. 86; *Granger v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 671; *Duke v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 43; *Robinson v. Martell*, 11 Tex. 149; *Wolf v. Mahan*, 57 Tex. 171; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608.

Utah. — *People v. Peacock*, 5 Utah 237, 240; *U. S. v. Eldredge*, 5 Utah 161.

Vermont. — *Bullock v. Beach*, 3 Vt. 73; *Kirkby v. Waterford*, 14 Vt. 414; *Perkins v. Dana*, 19 Vt. 589; *Knapp v. Fisher*, 49 Vt. 94; *Dodge v. Kendall*, 4 Vt. 31; *Kirby v. Waterford*, 14 Vt. 414; *Barker v. French*, 18 Vt. 460; *Stearns v. Allen*, 18 Vt. 119; *Briggs v. Gleason*, 27 Vt. 114; *Burr v. Palmer*, 23 Vt. 244; *Westmore v. Sheffield*, 56 Vt. 239.

Virginia. — *Akers v. Akers*, 83 Va. 633; *Smith v. Watson*, 82 Va. 712; *Tate v. Tate*, 85 Va. 205; *Harnsbarger v. Kinney*, 13 Gratt. (Va.) 511; *Hoomes v. Kuhn*, 4 Call (Va.) 274; *Preston v. Otey*, 88 Va. 491; *Bond v. Com.*, 83 Va. 581; *Randolph v. Randolph*, 1 Hen. & M. (Va.) 181; *Nuckols v. Jones*, 8 Gratt. (Va.) 267; *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Kern v. Wyatt*, 89 Va. 885.

Washington. — *McKilver v. Manchester*, 1 Wash. Ter. 255.

West Virginia. — *Bales v. State*, 3 W. Va. 685; *Carder v. State Bank*, 34 W. Va. 38; *Dower v. Church*, 21 W. Va. 23; *White v. Ward*, 35 W. Va. 418; *Halstead v. Horton*, 38 W. Va. 727; *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 421; *Sisler v. Shaffer*, 43 W. Va. 769; *Smith v. McLain*, 11 W. Va. 654.

Wisconsin. — *Krueger v. Merrill*, 66 Wis. 28; *Bigelow v. Sickles*, 75 Wis. 427; *Gans v. Harmilson*, 44 Wis. 323; *Wieting v. Millston*, 77 Wis. 523; *Edmister v. Garrison*, 18 Wis. 594; *Keeler v. Jacobs*, 87 Wis. 545; *Thrasher v.*

different character tending to establish the same general result by proof of a new and distinct fact.¹ It is additional evidence of a fact which the moving party has tried to establish at the trial.²

Postel, 79 Wis. 503; Wilson v. Plank, 41 Wis. 94.

Wyoming. — Link v. Union Pac. R. Co., 3 Wyoming 680.

United States — Palmer v. Fiske, 2 Curt. (U. S.) 14; Wiggin v. Coffin, 3 Story (U. S.) 1; Alsop v. Commercial Ins. Co., 1 Sumn. (U. S.) 451; Ames v. Howard, 1 Sumn. (U. S.) 482; Lowry v. Mt. Adams, etc., Incline Plane R. Co., 68 Fed. Rep. 827; Flint, etc., R. Co. v. Marine Ins. Co., 71 Fed. Rep. 210; Brown v. Evans, 17 Fed. Rep. 912; Southard v. Brussell, 16 How. (U. S.) 547; Dexter v. Arnold, 5 Mason (U. S.) 303; Wood v. Mann, 2 Sumn. (U. S.) 316; Baker v. Whiting, 1 Story (U. S.) 218; Jenkins v. Eldredge, 3 Story (U. S.) 299; Chandler v. Thompson, 30 Fed. Rep. 38; Aiken v. Bemis, 3 Woodb. & M. (U. S.) 348.

Canada. — Smith v. Neill, 9 New Bruns. 105; Doe v. Babineau, 11 New Bruns. 89; Hooper v. Christoe, 14 U. C. C. P. 117; Reg. v. McIlroy, 15 U. C. C. P. 116; McDermott v. Ireson, 38 U. C. Q. B. 1; Miller v. Confederation L. Ins. Co., 14 Ont. App. 218, affirming 11 Ont. Rep. 120; Trumble v. Hortin, 22 Ont. App. 51; Howarth v. McGugan, 23 Ont. Rep. 396.

1. Glidden v. Dunlap, 28 Me. 379; Bradish v. State, 35 Vt. 452; Parker v. Hardy, 24 Pick. (Mass.) 246; Waller v. Graves, 20 Conn. 305; Howland v. Reeves, 25 Mo. App. 458; Lefever v. Johnson, 79 Ind. 554; Winsett v. State, 57 Ind. 26; Zouker v. Wiest, 42 Ind. 169; Shirel v. Baxter, 71 Ind. 352; McMullen v. Winfield Bldg., etc., Assoc., 4 Kan. App. 459; Halstead v. Horton, 38 W. Va. 727; Grogan v. Chesapeake, etc., R. Co., 39 W. Va. 415.

Testimony of New Witnesses to Same Fact. — Where witnesses have testified to facts on the trial, the testimony of new witnesses to the same facts is merely cumulative and not sufficient to justify a new trial. It would be otherwise if the testimony of the new witness as to different facts was offered in support of the general proposition. Hinton v. Cream City R. Co., 65 Wis. 323; Krueger v. Merrill, 66 Wis. 28; Reed v. McGrew, 5 Ohio 386; O'Shields v. State, 55 Ga. 696.

2. People v. Superior Ct., 10 Wend. (N. Y.) 285; Brisbane v. Adams, 1

Sandf. (N. Y.) 195; Adams v. Bush, 23 How. Pr. (N. Y. Supreme Ct.) 262; Steinbach v. Columbian Ins. Co., 2 Cal. (N. Y.) 129; Oakley v. Sears, 7 Robt. (N. Y.) 111; Leavy v. Roberts, 2 Hilt. (N. Y.) 285.

Evidence is not cumulative merely because former evidence may have indirectly tended to establish the same fact. Wolf v. Mahan, 57 Tex. 171.

Cumulative evidence is such as tends to support the same facts which were before attempted to be proved. Chatfield v. Lathrop, 6 Pick. (Mass.) 417; Gardner v. Mitchell, 6 Pick. (Mass.) 116; People v. Superior Ct., 10 Wend. (N. Y.) 286; Howarth v. McGugan, 23 Ont. Rep. 396; Doe v. Babineau, 11 New Bruns. 89.

Where the new evidence relied upon tended to show direct admissions of the plaintiff, it was held not cumulative, the only evidence of a like nature introduced at the trial having been evidence of acquiescence by the plaintiff in statements made by his wife. Goldsworthy v. Linden, 75 Wis. 24, wherein the court said: "This court has held that 'testimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent.' Wilson v. Plank, 41 Wis. 94."

All evidence material to the issue, after any such evidence has been given, is in a certain sense cumulative; that is, is added to what has been given before. It tends to sustain the issue. But cumulative evidence, in legal phrase, means evidence from the same or a new witness, simply repeating, in substance and effect, or adding to, what has been before testified to. Parshall v. Klinck, 43 Barb. (N. Y.) 203.

Illustrations of Cumulative Evidence. — In replevin for a horse, the issue was whether the defendant had bought the horse of the plaintiff or held it as bailee. A witness testified that the defendant told him he was breaking the horse for the plaintiff. A new trial was refused where the evidence relied upon was that of a witness to an admission of the defendant's that he had not bought the horse of the plaintiff,

New and Independent Fact. — The new evidence is not cumulative when it relates to a new and independent fact not in evidence and not controverted at the trial.¹

but was breaking it for him. *Andis v. Richie*, 120 Ind. 138.

The issue in the first trial was whether money had been paid to one A. There was evidence of an admission of A. that he had received it. The new testimony was that of a witness who saw A. receive it. It was held that it was not cumulative. *St. John v. Alderson*, 32 Gratt. (Va.) 140.

A Lost Instrument Is Cumulative Evidence where its contents have been proved at the trial by secondary evidence and the instrument is not such evidence as will change the result. *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9; *McMullen v. Winfield Bldg., etc., Assoc.*, 4 Kan. App. 459.

Corroborative Testimony. — In *Scott v. Scott*, 9 Jur. N. S. 1251, 9 L. T. N. S. 454, it was said: "It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed; and if it were otherwise, there are few cases that would not be tried a second time." *Approved in Reg. v. McIlroy*, 15 U. C. C. P. 116; *Fawcett v. Mothersell*, 14 U. C. C. P. 104.

Mere corroborative evidence tending to support the evidence introduced at the trial is cumulative. *Wimpy v. Gaskill*, 79 Ga. 620; *Giles v. State*, 6 Ga. 276; *Jenkins v. Eldredge*, 3 Story (U. S.) 299.

Admissions of Party. — Where admissions of a party are given in evidence on the trial, other admissions of a similar character and to the same point are cumulative. *Hines v. Driver*, 100 Ind. 315; *Twine v. Kilgore*, 3 Okla. 640; *Zoucker v. Wiest*, 42 Ind. 169; *Cox v. Harvey*, 53 Ind. 174; *Wynne v. Newman*, 75 Va. 811; *Manson v. Ware*, 63 Iowa 346; *Cooper v. Ellis*, 3 Ind. App. 142; *Hawkins v. Kermode*, 85 Ga. 116.

The admission by a party of a disputed fact is not cumulative to other evidence introduced at the trial tending to prove such fact. *Rains v. Ballou*, 54 Ind. 79; *Humphreys v. Klick*, 49 Ind. 189; *Murray v. Weber*, 92 Iowa 757; *Andrews v. Mitchell*, 92 Ga. 629; *Preston v. Otey*, 88 Va. 491; *Hosford v. Rowe*, 41 Minn. 245; *Gardner v.*

Mitchell, 6 Pick. (Mass.) 114; *Klopp v. Jill*, 4 Kan. 482.

Evidence of direct admissions of the plaintiff is not cumulative where the only evidence on this point was to the effect that he acquiesced in similar statements made by his wife in his presence. *Goldsworthy v. Linden*, 75 Wis. 24.

An admission to be implied from the silence of a person will not justify a new trial where such person was under no obligation to speak. *Terry v. Greer*, 55 Mo. App. 507.

An after-discovered admission of a party is not cumulative or impeaching testimony within the rules as to newly discovered evidence although it contradicts the testimony of such party. *Oakley v. Sears*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 368.

1. *Wilson v. Plank*, 41 Wis. 94; *Den v. Wintermute*, 13 N. J. L. 177; *Keeler v. Jacobs*, 87 Wis. 545; *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415; *Cole v. Fall Brook Coal Co.*, (Supreme Ct.) 40 N. Y. St. Rep. 834, 16 N. Y. Supp. 789.

"The kind and character of the facts make the distinction. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretense for saying they are cumulative." *Guyot v. Butts*, 4 Wend. (N. Y.) 579 [cited and approved in *Leavy v. Roberts*, 2 Hilt. (N. Y.) 285, 8 Abb. Pr. (N. Y.) 310; *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Wynne v. Newman*, 75 Va. 811; *Wilson v. Plank*, 41 Wis. 94].

"If the evidence be cumulative because it relates to the issue, or one of the issues about which any proof has been given, then a new trial upon newly discovered evidence would be an impossibility; but if the rule be that newly discovered evidence of some material fact relevant to the issue, and which was not proved or controverted on the trial, is not cumulative, then there may be many cases in which a new trial would be matter of justice." *Leavy v. Roberts*, 8 Abb. Pr. (N. Y. C. Pl.) 310.

New Probative Fact. — Where the issue was to the fact of lewdness, and the evidence tended to prove lewdness with

Tending to Establish Same Claim.—If the new evidence tends to establish a new fact not in dispute at the trial, such evidence is not cumulative merely because it tends to establish the same claim or defense.¹

(3) *Limitations of the Rule.*—The Reason of This Rule appears to be that in almost every case some cumulative evidence may be discovered after trial, and that if such evidence were sufficient there

one person, new evidence of lewdness with other persons is not cumulative although it tends to prove the ultimate fact of lewdness. *Boggess v. Read*, 83 Iowa 548, in which case the court said: "In a literal sense, that is cumulative that adds to what already is. Now if a new trial is to be refused where it would be cumulative of evidence that tends to establish the ultimate facts or issues in the case, then the statute as to new trials for newly discovered evidence would be practically inoperative, because the application would always be because of cumulative evidence. Such a construction, so far as we know, has never been given in the application of the law as to cumulative evidence."

"Cumulative evidence, as the term is here used, is held to be evidence which speaks to facts in relation to which there was evidence on the trial; or, in other words, it is additional evidence of the same kind, and to the same point, as that given on the first trial. But it is not cumulative if it relate to distinct and independent facts of a different character tending to establish the same ground of claim or defense." *Layman v. Minneapolis St. R. Co.*, 66 Minn. 452.

1. *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Grogan v. Chesapeake, etc.*, R. Co., 39 W. Va. 415; *Keeler v. Jacobs*, 87 Wis. 545, and cases cited; *Wilson v. Plank*, 41 Wis. 94; *German v. Maquoketa Sav. Bank*, 38 Iowa 368.

New Evidence to Same Issue Is Not Cumulative.—"From some of the cases on this subject it may perhaps be inferred that courts have supposed all additional evidence to be cumulative merely which conduced to establish the same ground of claim or defense before relied upon, and that none would be available for a new trial unless it disclosed or established some new ground. But this does not seem to us to be the true rule, as recognized in the best-considered cases. There are often various distinct and independent facts going to establish the

same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject: as in the present case, Merwin testified only that the libel, as printed and published, was not like the paper written by him and signed by Waller in the particular referred to. But now appears a new fact entirely independent of the testimony of Merwin—one which did not exist at the time Merwin speaks of—which is that another person, without the knowledge or consent of either Waller or Merwin, inserted the objectionable words into the article which appeared in the newspaper." *Waller v. Graves*, 20 Conn. 306.

It Is Presumed that the New Evidence Is Not Cumulative.—The adverse party must show that the new evidence is cumulative in order to have his objection sustained. *Howland v. Reeves*, 25 Mo. App. 458. See also *Hobler v. Cole*, 49 Cal. 250.

But on appeal from an order refusing a new trial the presumption in favor of the order is that the new evidence is cumulative. *Thom v. Davis*, 16 Kan. 22; *Clark v. Hall*, 10 Kan. 81; *Kirby v. Childs*, 10 Kan. 639.

Method of Proving Evidence Cumulative.—"In practice it would be difficult for the moving party to establish the negative at the outset. His mere statement in terms that the evidence is not cumulative would, of course, go for nothing. If, in point of fact, the newly discovered evidence be cumulative, within the rule, it is easy for the opposing party to set forth in his counter affidavit so much of the evidence given at the trial as will make it so appear." *Hobler v. Cole*, 49 Cal. 250.

would practically be no end of litigation.¹

Where Verdict Is Unjust. — But it would seem that the reason of the rule does not extend to cases where verdicts are manifestly unjust and not in accordance with all the facts disclosed by the new evidence.²

The Rule Is Generally Regarded as Inflexible and not to be violated by the trial courts, although it may appear that the cumulative evidence will change the result and that a new trial would promote justice.³ A new trial cannot be granted merely because a party could make a stronger case with cumulative evidence.⁴

1. *Scott v. Scott*, 9 L. T. N. S. 454, 9 Jur. N. S. 1251; *Southard v. Russell*, 16 How. (U. S.) 547; *Wright v. Greenwood*, 17 Ga. 418; *Perry v. Houseley*, 40 Ga. 657; *Warren v. Hope*, 6 Me. 479; *Snowman v. Wardwell*, 32 Me. 275; *Ham v. Ham*, 39 Me. 263; *Beauchamp v. Sconce*, 12 Mo. 57; *Wells v. Sanger*, 21 Mo. 354; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Jackson v. Ft. Covington*, (Supreme Ct.) 15 N. Y. Supp. 793; *Lander v. Miles*, 3 Oregon 40; *Wolf v. Mahan*, 57 Tex. 171.

2. "The reason of the rule forbidding a new trial for the purpose of admitting cumulative testimony does not apply where the party has had no fair opportunity to procure and adduce evidence on an issue raised by his adversary for the first time during the trial, by the introduction of evidence which could not be anticipated. The reason of the rule is that public policy, looking to the finality of trials, requires that parties be held to diligence in preparing their cases, and that they shall not be allowed a second trial because they mistook the amount of testimony requisite. *Powell v. Jones*, 42 Barb. (N. Y.) 30. But the policy which seeks to limit continued litigation does not apply where a party has had no fair opportunity to present his side of the case — no real day in court. In discussing this subject, Chief Justice Wheeler said: 'It is desirable that there should be an end of litigation with as little delay and expense as possible, consistently with the great end of litigation — a correct decision of causes according to their real merits; but it should always be sought in subordination to the great end to be attained.' *Mitchell v. Bass*, 26 Tex. 377. In the same opinion he also said: 'Where there can be any doubt of the justice of the verdict, to refuse a new trial when the party has really discov-

ered new evidence of a conclusive tendency would be against justice and precedent.'" *Wolf v. Mahan*, 57 Tex. 171.

3. "It looks like a great hardship that a defeated litigant should not be permitted to have the advantage of after-discovered and strongly decisive corroborating testimony which he was unable to use at the trial; yet to establish such a precedent would be to cause litigants to be careless in preparation for trial, and open the way to the manufactory of such testimony, to the delay and subversion of justice." *Sisler v. Shaffer*, 43 W. Va. 769.

Criticism of This Rule. — "The rule or principle requiring the denial of a motion for a new trial, on the ground of the evidence, newly discovered, being cumulative, does not rest upon any just or solid foundation. It is simply the dictate of authority which has been followed without much consideration of its foundation. It is not one to be extended to cases not falling directly within its language. For there is the same propriety and necessity for giving a party a new trial who can vindicate himself, or sustain his cause of action, by cumulative evidence as there is for any other reason. And there is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well-founded defense, because the evidence discovered by him by which that can be done may be of the same quality or description as that given upon the trial in which he has been defeated." *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54, followed in *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62.

4. **No Opportunity to Make Stronger Case.** — Although cumulative evidence on another trial might add some addi-

Discretion of Trial Court. — In some jurisdictions the rule may be relaxed, the trial court being free to exercise its discretion where a new trial will promote justice and the cumulative evidence will probably change the result.¹ The weight of authority appears to be that it is not an abuse of discretion to grant a new trial where the newly discovered evidence will probably change the result, although such evidence is cumulative.²

tional weight to the evidence of the applicant, a new trial must be refused. *Conlan v. Mead*, 172 Ill. 13, the court saying: "New trials cannot be granted to enable parties to make a case somewhat stronger on a second trial. If they could, there never would be an end to litigation."

1. A new trial may be granted on cumulative evidence where it is of a conclusive and decisive character and would probably change the verdict. See the title *Cumulative Evidence*, 8 Am. and Eng. Encyc. of Law 477.

In *Vollkommer v. Nassau Electric R. Co.*, 23 N. Y. App. Div. 88, it was said: "In some respects the evidence may be criticised as cumulative, but this is not always an insuperable objection to granting a new trial. * * * The general principle which should govern courts in disposing of applications of the character of the one now before us is well stated by Judge Allen in *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628: 'Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well-defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end.'"

Whether the New Evidence Is Cumulative or Not Is a Question of Law in deciding which the trial court exercises no discretion. The rule that an order of court granting a new trial will not be readily reversed applies only where a discretion is imposed, and has no application where there are errors of law. *Manson v. Ware*, 63 Iowa 346.

New evidence consisting of the testimony of a witness corroborating the testimony of one of the parties on a controverted point is cumulative, but

the evidence being conflicting and evenly balanced, and the manifest opinion of the court being that the jury was misled and that injustice had been done, there was no abuse of discretion in granting a new trial. *Smith v. Grover*, 74 Wis. 171.

Where it clearly appears that the lower court granted a new trial for newly discovered evidence which was merely cumulative, the order will be reversed as an error of law. *McMullen v. Winfield Bldg., etc., Assoc.*, 4 Kan. App. 459.

2. Cumulative Evidence Sufficient if Decisive. — Although the new evidence is cumulative, the trial court may, in the exercise of a sound discretion, grant a new trial if convinced that such evidence should change the result. *Hart v. Brainerd*, 68 Conn. 50; *Keet v. Mason*, 167 Mass. 154; *Preston v. Otey*, 88 Va. 491; *Ellis v. Gingsburg*, 163 Mass. 143; *Durant v. Philpot*, 16 S. Car. 116; *Schlenker v. Risley*, 4 Ill. 483.

In *Barker v. French*, 18 Vt. 460, it was said that a new trial will not be refused solely because the new evidence is cumulative, if it will make a doubtful case clear.

Illustrations of Sufficient Cumulative Evidence. — Where a prisoner is convicted of murder in the first degree, a new trial may be granted on merely cumulative evidence of insanity, although a number of witnesses testified at the trial that the defendant was insane, if it appears that such evidence would probably change the result. *Andersen v. State*, 43 Conn. 514.

Where several witnesses had testified that a marriage certificate was a forgery, new evidence that a witness to the certificate was absent from the state on the date thereof and that several witnesses would testify that a person prepared the instrument in their presence and forged the magistrate's name to it was held sufficient ground for a new trial, under the peculiar circumstances of the case, though merely

h. SHOWING NEWLY DISCOVERED EVIDENCE — (1) Evidence in Support of Motion. — A motion on the ground of newly discovered evidence must, of course, be supported by competent proof.¹ This usually consists of the affidavit of the applicant and the affidavits of the new witnesses. The evidence taken at the

cumulative. The court said that while cumulative evidence is ordinarily insufficient, yet such direct and decisive evidence of forgery was something so unusual that the defendant could not be expected to inquire after it, and that in reality it constituted evidence tending to prove a new and independent fact. *Knowles v. Northrop*, 53 Conn. 360.

In a suit for seduction under promise of marriage the plaintiff testified to the principal facts, and also that, after promise, the marriage was postponed until spring; also to a subsequent conversation concerning the marriage and to conversations after the seduction. It was held that newly discovered evidence of subsequent conversations between the parties, similar to those to which the plaintiff had testified, was not cumulative, and was sufficient to warrant a new trial. *Kochel v. Bartlett*, 88 Ind. 237.

Rebuttal of False Testimony. — Where it appears from records that the defendant has secured a verdict by introducing false testimony, a new trial may be granted by the trial court in its discretion although the newly discovered evidence showing such misconduct is largely cumulative. *Cleslie v. Freichs*, 95 Iowa 83.

Corroboration of Adverse Witness. — Where the newly discovered evidence is decisive, it will not be excluded as cumulative merely because it is corroborative of the testimony adduced from an adverse witness at the former trial. *White v. Nafus*, 84 Iowa 350, in which case an adverse witness admitted on cross-examination that a witness to a will was not present when the will was signed. After trial a witness was discovered corroborating such testimony, and it was held that a new trial should be granted. The court said: "To our minds it would be a harsh and unjust application of the rule to say that newly discovered evidence shall not be ground for a new trial because cumulative of evidence incidentally favorable to the party on cross-examination. In many cases such evidence, because of its meagreness,

would not be relied upon. The natural meaning or understanding of cumulative evidence, as applied to new trials, is evidently that to be added to evidence before used by the party to establish some particular fact; that is, the party shall not make one attempt to establish the fact by evidence, and, failing, have a new trial to make another attempt by additional evidence." This case criticises a dictum to the contrary in *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107.

Cumulative evidence is not sufficient even though first discovered on cross-examination of an adverse witness. *Fawcett v. Mothersell*, 14 U. C. C. P. 104.

Cumulative but Decisive Evidence. — Where the secondary evidence as to provisions of a lost writing was conflicting, the writing itself when found is cumulative evidence, but it is nevertheless of such decisive character as to require a new trial. *Mercer v. Mercer*, 87 Ky. 21; *Mercer v. King*, (Ky. 1897) 42 S. W. Rep. 106.

Cumulative Evidence to Prove Alibi. — If the newly discovered evidence is clearly sufficient to prove an alibi, a new trial will not be refused merely because such evidence is cumulative. *State v. Stowe*, 3 Wash. 206; *Smythe v. State*, 17 Tex. App. 244; *Lawson v. State*, 13 Tex. App. 264; *Tyler v. State*, 13 Tex. App. 205.

"That evidence is cumulative where the object sought is to prove an alibi is no reason for its exclusion. On the contrary, the greater the number of witnesses to the facts establishing it, the stronger, ordinarily, would be our reliance upon and conviction of its truth." *Pinckord v. State*, 13 Tex. App. 468.

1. Statements in motions for new trials do not prove themselves, but must be supported by evidence, such as affidavits or bills of exceptions. *State v. McDaniel*, 94 Mo. 301; *State v. Bulling*, 105 Mo. 204; *State v. Moses*, 139 Mo. 218; *State v. Welsor*, 117 Mo. 570; *Patterson v. Jack*, 59 Iowa 632; *Adams v. Ashby*, 2 Bibb (Ky.) 287; *People v. Eppinger*, 114 Cal. 350.

former trial is sometimes presented by a case or a bill of exceptions.

(2) *Case or Bill of Exceptions.* — The moving party is not required to present to the court the evidence taken at the former trial, especially where the judge hearing the motion presided at the trial;¹ but in some states a bill of exceptions or a case settled by the judge is required by rule of court or by statute.²

(3) *Affidavit of Applicant* — *Generally.* — Every motion for a new trial on the ground of newly discovered evidence must be supported by the affidavit of the applicant³ and his attorney,⁴ stating

1. Anonymous, 7 Wend. (N. Y.) 331; Sproul v. Resolute F. Ins. Co., 1 Lans. (N. Y.) 71.

On Appeal the order of the lower court granting or refusing a new trial cannot be reviewed where the evidence taken at the trial is not preserved in the record, as the appellate court cannot determine the relevancy and sufficiency of the new evidence. Atkinson v. Saltsman, 3 Ind. App. 139.

2. *New York.* — Under section 997 of the New York code a court cannot grant a new trial on the ground of newly discovered evidence unless the evidence at the trial is preserved in a case settled and signed by the trial judge, so that the new evidence may be weighed and compared with the evidence in the case. Boyd v. Boyd, 11 Misc. Rep. (N. Y. C. Pl.) 357 [citing authorities and overruling and reversing Boyd v. Boyd, 9 Misc. Rep. (N. Y. C. Pl.) 161]; Davis v. Grand Rapids F. Ins. Co., 5 N. Y. App. Div. 36; Harris v. Gregg, 4 N. Y. App. Div. 615, 38 N. Y. Supp. 844; Bantleon v. Meier, 81 Hun (N. Y.) 162; Michel v. Colegrove, 22 Civ. Pro. Rep. (N. Y. Super. Ct.) 297, 304, 61 N. Y. Super. Ct. 278, 280; Russell v. Randall, (Supreme Ct.) 30 N. Y. St. Rep. 452, 123 N. Y. 436; Thayer Mfg. Jewelry Co. v. Steinau, 58 How. Pr. (N. Y. Supreme Ct.) 315; Holmes v. Evans, 59 N. Y. Super. Ct. 121; Warner v. Western Transp. Co., 5 Robt. (N. Y.) 499.

The statute is declaratory of the practice prior to its enactment, and is imperative. Bantleon v. Meier, 81 Hun (N. Y.) 162.

But a case is waived if not required by the adverse party at the hearing. Russell v. Randall, 123 N. Y. 436.

3. *Affidavit of Applicant Necessary.* — A motion for a new trial on the ground of newly discovered evidence must be supported by the affidavit of the applicant, or a reason must be given why

the affidavit is not made personally but by the applicant's attorney or another person. State v. Nickens, 122 Mo. 607; State v. McLaughlin, 27 Mo. 111; State v. Campbell, 115 Mo. 391; State v. Laycock, 136 Mo. 93; Berry v. State, 10 Ga. 511.

A Motion by a Corporation must be supported by the affidavit of some of its officers or agents, as the motion cannot be granted on the affidavit of the new witness alone. Kansas City v. Marsh Oil Co., 140 Mo. 458.

Where an Insane Person Is a Party the court may dispense with his affidavit and receive the affidavit of counsel. State v. Hebert, 39 La. Ann. 319.

4. Barrow v. State, 80 Ga. 191.

The Affidavit of an Attorney is not alone sufficient, as it must be made to appear that the applicant was himself ignorant of the evidence at the time of the trial. It should appear that both client and attorney were ignorant at the trial and discovered the facts afterwards. Broat v. Moor, 44 Minn. 468; Russell v. Oliver, 78 Tex. 11; Harber v. Sexton, 66 Iowa 211; U. S. v. Crittenden, Hempst. (U. S.) 61.

Affidavit of One of Several Defendants. — The affidavit of one of several defendants, showing diligence and the newly discovered evidence, is sufficient to support the motion, as the affidavits of all defendants are not required. Howland v. Reeves, 25 Mo. App. 458.

Hearsay as to Diligence. — The affidavit of an attorney that by his direction the applicant employed a large number of persons to ascertain the whereabouts of certain witnesses, and that efforts were continuously and unremittingly made, is hearsay as to diligence and is insufficient. Yost Mfg. Co. v. Alton, 67 Ill. App. 537.

Form of Affidavit. — In Mann v. State, 34 Ga. 1, it was held that a new trial should not be refused merely because the affidavit of the applicant failed to

the date when the evidence was discovered and the diligence used to discover it before trial, the nature of the newly discovered evidence, and the names of the new witnesses.¹

Stating the Facts Proving Diligence. — The particular efforts which were made to discover the testimony before trial must be stated, giving the circumstances, and the names of persons of whom inquiry was made.² It is not sufficient merely to aver that the affiant used "due diligence" or "reasonable diligence," or to employ equivalent expressions,³ as the court must determine the

state the residence of the new witness or aver that the affiant expected the benefit of his testimony at a future trial.

Must State Circumstances of Inquiry. — To show * * * diligence it is not sufficient to state generally that he [the applicant] exercised diligence, but he must set forth the facts constituting it. It is not enough to state in his affidavit that he made diligent inquiry, but he should state the time, place, and circumstances of the making of inquiry, and it should appear that he made the inquiries in the proper quarter and at the proper time. If it be attempted to show an excuse for not making inquiries, the excuse should be reasonable, and such as entirely to exclude negligence on the part of the applicant, and the court must have before it such facts as excuse and justify the inactivity." *State v. Taylor*, 5 Ind. App. 29.

"It is not sufficient to say generally that he made inquiry of all whom he had reason to believe knew anything about the controversy." *Richter v. Meyers*, 5 Ind. App. 33.

1. *Edwards v. Barnes*, 55 Ill. App. 38; *Harlev v. Harlev*, 67 Ill. App. 138; *Russell v. Nall*, 79 Tex. 664; *Smith v. Williams*, 11 Kan. 104.

2. Inquiry of Persons Likely to Know. — A mere averment that the affiant made inquiry of all persons likely to know the evidence since discovered is insufficient without stating also the names of such persons and the times and places of inquiry with sufficient particularity to enable the court to determine whether diligence was exercised. *Moody v. Priest*, 69 Iowa 23; *Smith v. Williams*, 11 Kan. 104; *Patterson v. Collier*, 77 Ga. 292.

But in *Boggess v. Read*, 83 Iowa 548, an averment that before trial the applicant made inquiry of a great many persons who he supposed had knowledge, or who would be likely to have knowledge, of the matters in

issue in said case, and in each and every instance pursued each and every line or hint of evidence with diligence, to the full extent of his ability, was held sufficient although the particulars and names of persons were not stated. The court said: "The fact that the affidavit states conclusions rather than particular facts from which the conclusions might be found goes rather to the value of the affidavit as evidence than to its legality as such. * * * Nothing in the record will justify our interference with the action of the court on the question of diligence."

In *Smith v. Wagaman*, 58 Iowa 11, the newly discovered evidence consisted of the testimony of certain witnesses present at the time of a conversation between the parties. The affiant averred that he did not know the names of these witnesses and was unable to ascertain their names until after the trial, though he had made every exertion to do so. It was held that such averment was insufficient, as it did not show the names of the persons of whom he made inquiry. It appeared that the adverse party was present at the time, and it did not appear that the applicant made inquiry of him.

3. Alabama. — *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496; *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81.

Arkansas. — *Peterson v. Gresham*, 25 Ark. 380; *Halliburton v. Johnson*, 30 Ark. 723; *Chandler v. Lazarus*, 55 Ark. 312; *Merrick v. Britton*, 26 Ark. 496; *Murphy v. State*, 38 Ark. 514; *St. Louis Southwestern R. Co. v. Stanfield*, 63 Ark. 643; *Runnels v. State*, 28 Ark. 121.

California. — *People v. Kloss*, 115 Cal. 567.

Georgia. — *Cordele Guano Co. v. Carter*, 94 Ga. 702; *Canfield v. Jones*, 97 Ga. 334.

Indiana. — *Pemberton v. Johnson*, 113 Ind. 538.

question of diligence from the facts related in the affidavit of the applicant.

Affidavit of Attorney for Applicant.—The fact of discovery and the showing of diligence must be made by the affidavit of the applicant, and not by his attorney,¹ unless a showing is made that the applicant cannot be charged with knowledge or negligence because of nonresidence or incapacity.²

Affidavits of New Witnesses.—In addition to the affidavit of the

Iowa.—*Boot v. Brewster*, 75 Iowa 631; *Cahalan v. Cahalan*, 82 Iowa 416; *Moody v. Priest*, 69 Iowa 23; *Sully v. Kuchl*, 30 Iowa 275; *Carson v. Cross*, 14 Iowa 463; *Cohol v. Allen*, 37 Iowa 449; *Stuckslager v. McKee*, 40 Iowa 212; *Smith v. Wagaman*, 58 Iowa 11.

Kansas.—*Smith v. Williams*, 11 Kan. 104; *Boyd v. Sanford*, 14 Kan. 280; *Carson v. Henderson*, 34 Kan. 404.

Kentucky.—*Ewing v. M'Connel*, 1 A. K. Marsh. (Ky.) 188.

Maine.—*Michaud v. Canadian Pac. R. Co.*, 88 Me. 381.

Minnesota.—*Evans v. Christopher*, 24 Minn. 330; *Laurel v. State Nat. Bank*, 25 Minn. 48; *Fenno v. Chapin*, 27 Minn. 519; *Wherry v. Duluth, etc., R. Co.*, 64 Minn. 415; *Bradley v. Norris*, 67 Minn. 48.

Missouri.—*State v. Luke*, 104 Mo. 563; *State v. Fritterer*, 65 Mo. 422; *State v. Butler*, 67 Mo. 59; *Snyder v. Burnham*, 77 Mo. 52; *State v. Myers*, 115 Mo. 394; *Roemmich v. Wamsganz*, 8 Mo. App. 576; *State v. Nagel*, 136 Mo. 45; *Smith v. Williams*, 2 Mo. App. Rep. 1284.

Montana.—*State v. Gay*, 18 Mont. 51.

Nebraska.—*Goracke v. Hintz*, 13 Neb. 390; *Tomer v. Densmore*, 8 Neb. 384.

Nevada.—*Pinschower v. Hanks*, 18 Nev. 99.

North Carolina.—*Shehan v. Malone*, 72 N. Car. 59; *Sikes v. Parker*, 95 N. Car. 232.

Texas.—*Madden v. Shapard*, 3 Tex. 49; *Burnley v. Rice*, 21 Tex. 171; *Wilson v. State*, 37 Tex. Crim. Rep. 156; *Wheeler v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 942; *Gulf, etc., R. Co. v. Reagan*, (Tex. Civ. App. 1896) 34 S. W. Rep. 796; *Anderson v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 97; *Williams v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 271.

West Virginia.—*Snider v. Myers*, 3 W. Va. 195; *Varner v. Core*, 20 W. Va. 472.

Must State Facts Rebutting Inference of Negligence.—In *Champion v. Ulmer*, 70 Ill. 322, the applicant merely averred in his affidavit that "the facts hereinbefore recited have come to the knowledge of this affiant since the trial of said case had at this term." This was held insufficient. "It is the rule of this court," it was said, "upon the question of diligence, that the party must negative, in his affidavit, every circumstance from which negligence may be inferred." *Citing Crozier v. Cooper*, 14 Ill. 139; *Lafin v. Herrington*, 17 Ill. 403.

"The affidavit should have gone into a minute detail of the efforts, for it was necessary that it should 'negate every circumstance from which negligence may be inferred.'" *Harlev v. Harlev*, 67 Ill. App. 138.

Inability to Procure Testimony for Trial.—Where an affidavit merely avers that the affiant was unable to procure the newly discovered evidence before trial, it is insufficient, because it does not disclose facts showing diligence. *Heady v. Fishburn*, 3 Neb. 263; *Skaggs v. State*, 108 Ind. 53; *Ward v. Voris*, 117 Ind. 368.

1. Affidavit of Attorney Insufficient.—The affidavit of the attorney for the applicant alone is insufficient when it does not appear that the party himself may not have known of the evidence or had exercised diligence to procure the testimony. *Roziene v. Wolf*, 43 Iowa 393; *State v. McLaughlin*, 27 Mo. 111; *Cole v. Thornburg*, 4 Colo. App. 95; *Russell v. Oliver*, 78 Tex. 11.

2. Applicant a Nonresident.—The affidavit of an attorney for an applicant who did not reside in the county and who intrusted the preparation and management of the cause to his attorney was held sufficient where it appeared that the attorney was diligent and had discovered new testimony in the county of which the client could not have had knowledge. *Sterling v. Arnold*, 54 Ga. 690.

applicant, the newly discovered evidence must be established by the affidavits of the new witnesses,¹ setting forth the facts to which they will testify,² or a satisfactory excuse must be given for

1. *Alabama*. — *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81.
- Arkansas*. — *Pleasant v. State*, 13 Ark. 366.
- California*. — *Arnold v. Skaggs*, 35 Cal. 686; *Jenny Lind Co. v. Bower*, 11 Cal. 194.
- Georgia*. — *Suggs v. Anderson*, 12 Ga. 461.
- Illinois*. — *Doyle v. Kuchar*, 57 Ill. App. 375.
- Indiana*. — *Priddy v. Dodd*, 4 Ind. 84; *Cummins v. Walden*, 4 Blackf. (Ind.) 307; *Quinn v. State*, 123 Ind. 59; *Shipman v. State*, 38 Ind. 549; *Ogden v. Kelsey*, 4 Ind. App. 299; *McDonald v. Coryell*, 134 Ind. 493; *Vandyne v. State*, 130 Ind. 26; *McQueen v. Stewart*, 7 Ind. 535; *Mann v. Clifton*, 3 Blackf. (Ind.) 304; *Cowden v. Wade*, 23 Ind. 471.
- Iowa*. — *Warren v. State*, 1 Greene (Iowa) 106; *Sully v. Kuehl*, 30 Iowa 275; *Manix v. Malony*, 7 Iowa 81; *Hand v. Langland*, 67 Iowa 185.
- Kansas*. — *State v. Kellerman*, 14 Kan. 135.
- Kentucky*. — *Bright v. Wilson*, 7 B. Mon. (Ky.) 122; *Bronson v. Green*, 2 Duv. (Ky.) 234.
- Louisiana*. — *State v. Hollier*, 49 La. Ann. 371.
- Minnesota*. — *Keough v. McNitt*, 6 Minn. 513.
- Mississippi*. — *Hare v. Sproul*, 2 How. (Miss.) 772; *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313; *Rulon v. Lintol*, 2 How. (Miss.) 891.
- Missouri*. — *Boggs v. Lynch*, 22 Mo. 563; *Caldwell v. Dickson*, 29 Mo. 227; *State v. McLaughlin*, 27 Mo. 111; *Culbertson v. Hill*, 87 Mo. 553; *State v. Jewell*, 90 Mo. 467; *Obert v. Strube*, 51 Mo. App. 621; *Lovell v. Davis*, 52 Mo. App. 342; *State v. Campbell*, 115 Mo. 391; *State v. Ray*, 53 Mo. 349; *State v. Nagel*, 136 Mo. 45; *State v. Moses*, 139 Mo. 217.
- New York*. — *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y. Ct. App.) 104; *Denn v. Morrell*, 1 Hall (N. Y.) 382; *Denny v. Blumenthal*, 8 Misc. Rep. (N. Y. City Ct.) 544; *Roberts v. Johnstown Bank*, (Supreme Ct.) 14 N. Y. Supp. 432, 38 N. Y. St. Rep. 563; *Matter of Collins*, 6 Den. (N. Y.) 286; *Matter of Cohen*, 84 Hun (N. Y.) 586; *Gould v. Moore*, 40 N. Y. Super. Ct. 387.
- North Dakota*. — *Braithwaite v. Aiken*, 2 N. Dak. 57.
- Tennessee*. — *Chambers v. Brown*, Cook (Tenn.) 292; *Scott v. Wilson*, Cook (Tenn.) 315; *Read v. Staton*, 3 Hayw. (Tenn.) 164.
- Texas*. — *Glascocock v. Manor*, 4 Tex. 7; *Edrington v. Kiger*, 4 Tex. 89; *Welsh v. State*, 11 Tex. 368; *Burnley v. Rice*, 21 Tex. 171; *Moore v. Wills*, 69 Tex. 109; *Russell v. Nall*, 79 Tex. 664.
- Vermont*. — *Webber v. Ives*, 1 Tyler (Vt.) 441.
- Virginia*. — *Brown v. Speyers*, 20 Gratt. (Va.) 296.
- West Virginia*. — *Strader v. Goff*, 6 W. Va. 257; *Varner v. Core*, 20 W. Va. 472.
- Wisconsin*. — *Blood v. Whitman*, 3 Pin. (Wis.) 54; *Wilson v. Johnson*, 74 Wis. 337; *Smith v. Cushing*, 18 Wis. 295.

The Reason for requiring the affidavits of the new witnesses is to guard against unfounded applications and to present the best rather than hearsay evidence of what such witnesses will relate. *Caldwell v. Dickson*, 29 Mo. 227.

Best Evidence. — The affidavit of the witness himself is the best evidence susceptible in the case, and must therefore be produced, or its absence accounted for. *Eddy v. Caldwell*, 7 Minn. 225.

Criminal Cases. — A new trial on the ground of newly discovered evidence will not be granted upon the unsupported affidavit of the defendant in a criminal case. *Jones v. State*, 35 Fla. 289. Especially is this true where the prisoner's affidavit contains merely hearsay evidence. *State v. Hall*, 97 Iowa 400.

Information and Belief. — The affidavit of a new witness should state competent testimony and not aver on information and belief that certain things occurred, as was customary at a certain port. *Hecla Powder Co. v. Sigua Iron Co.*, 1 N. Y. App. Div. 371.

2. "The newly discovered evidence should be set out verbatim, just as it can be testified to in court, and be sub-

not obtaining such affidavits.¹ In the absence of such explanation, the mere *ex parte* affidavit of the applicant, setting forth the newly discovered evidence and stating the facts to which the new witnesses will testify, is not sufficient.²

12. Errors of Law Occurring at the Trial—*a*. WHAT ERRORS MAY BE INCLUDED.—This statutory ground is broad enough to include all errors in rulings at the trial not otherwise made a ground for a new trial.³ It does not include errors in rulings made before trial⁴ or after entry of the judg-

scribed and sworn to by each of the newly discovered witnesses." 3 *Graham & Waterman on New Trials* 1071, quoted in *Burnley v. Rice*, 21 Tex. 171.

It will not be sufficient for the affiant to state generally that he will "corroborate and substantiate the testimony" of another witness. *Matter of Cohen*, 84 Hun (N. Y.) 586.

1. *Fisher v. People*, 103 Ill. 101; *Smith v. Cushing*, 18 Wis. 295; *State v. Kellerman*, 14 Kan. 135.

When Affidavit of Proposed Witness Not Required—Excuses.—The refusal of the proposed witness to make such affidavit is not a sufficient excuse, as the court on such showing would compel the witness to testify. *Rater v. State*, 49 Ind. 507; *Gardner v. State*, 94 Ind. 489; *Garvey v. U. S. Horse, etc.*, Show, 3 Misc. Rep. (N. Y. City Ct.) 352. But see *contra*, *Katz v. Atfield*, 1 Misc. Rep. (N. Y. City Ct.) 217.

Where the applicant is imprisoned and without means to obtain the affidavit of a proposed witness, a nonresident, it is error to refuse to grant a new trial for want of such affidavit, as the court could continue the case to enable the applicant to procure such evidence. "The rule does not require an impossibility." *Gibson v. State*, 9 Ind. 264. But see *contra*, *Atkinson v. Saltsman*, 3 Ind. App. 139.

The fact that the applicant is in custody is not a sufficient excuse for failure to obtain the affidavits of resident witnesses. *Shipman v. State*, 38 Ind. 549.

The affidavit of the applicant is alone sufficient where it avers that the affidavit of the new witness cannot be procured because the latter is a nonresident. *Smith v. Cushing*, 18 Wis. 295.

Lack of time to procure the affidavits of new witnesses is not a sufficient excuse, since the hearing could have been

postponed for such cause. *Johnson v. Lovett*, 31 Ga. 187.

Newly discovered evidence of admissions by a person that he had committed a crime should be established by his affidavit, or, if he is not accessible, by the affidavit of a witness who heard the admissions. *Jackson v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 998.

2. *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81; *White v. Wallen*, 17 Ga. 106; *Giles v. State*, 6 Ga. 276; *Scranton v. Tilley*, 16 Tex. 183; *State v. Kellerman*, 14 Kan. 135; *Cozart v. Lisle*, Meigs (Tenn.) 65; *Shumway v. Fowler*, 4 Johns. (N. Y.) 425; *Ritchey v. West*, 23 Ill. 385; *Eddy v. Caldwell*, 7 Minn. 225; *State v. Williams*, 14 W. Va. 851.

3. *Ohio Valley R., etc., Co. v. Kuhn*, (Ky. 1887) 5 S. W. Rep. 419.

A Denial of Right to Open and Close is a ruling which must be assigned as a ground for a new trial. *Davis v. Mason*, 4 Pick. (Mass.) 156; *Abshire v. State*, 52 Ind. 99.

Error in a Ruling on Competency of Jurors should be assigned as a ground for a new trial. *Pickens v. Hobbs*, 42 Ind. 270; *Lamphier v. State*, 70 Ind. 317.

Impaneling Jury—Trial.—Alleged error in impaneling a jury and trying the cause in the appellant's absence and without notice to her should be assigned in a motion for a new trial as errors of law occurring at the trial. *Martin v. Motsinger*, 130 Ind. 555.

4. *Powder River Cattle Co. v. Custer County*, 9 Mont. 145.

Decisions on Motions Before Trial are not errors of law occurring at the trial. A ruling on a motion to strike out a portion of a pleading can be reviewed by exception and is not a ground for a new trial. *New Albany v. White*, 100 Ind. 206 [*citing* *Chase v. Arctic Ditchers*, 43 Ind. 74; *Daubenspeck v. Daubenspeck*, 44 Ind. 320; *Tucker v. Call*, 45 Ind. 31; *Hamilton v. Elkins*, 46 Ind. 213; *Cates v. Thayer*, 93 Ind. 156].

ment.¹ Errors in the verdict or in rulings concerning the verdict may in some states be assigned as errors of law.² A party complaining of the form of a judgment or error concerning it must present his objections to the lower court in his motion for a new trial, in order to have the error corrected on appeal.³

b. ERRORS IN PLEADINGS. — A new trial will not be granted on account of errors or defects in the pleadings.⁴

Of such an error it was said that "it was not an 'error of law occurring at the trial.' It is obvious that a new trial would not correct such an error; for after a new trial was granted the error would stand in the record the same as before." *Reed v. Spayde*, 56 Ind. 394.

Orders Entered Before Trial. — A refusal to compel a party to answer interrogatories filed with the pleading is a ruling connected with the pleadings and is not an error of law occurring at the trial. Such ruling may be reviewed by exception, but not by motion for a new trial. *Cates v. Thayer*, 93 Ind. 156.

Orders before trial requiring a party to give testimony and submit to a medical examination out of court are not errors of law occurring at the trial. *Pfaffenback v. Lake Shore, etc., R. Co.*, 142 Ind. 246.

1. See *infra*, XV. *Decision of Motion* — *General Principles Governing*.

2. **Objections to the Verdict** and rulings concerning the verdict must be first assigned as error in the motion for a new trial. *Douglass v. Kraft*, 9 Cal. 562; *Weatherly v. Higgins*, 6 Ind. 73; *Lures v. Botte*, 26 Ind. 343; *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273; *Parmelee v. Smith*, 21 Ill. 620; *Simon v. Brashear*, 9 Rob. (La.) 59; *Eaton v. Barnhill*, 68 Miss. 305; *Chapman v. White*, 52 Mo. 179; *McCormick v. Hubbell*, 4 Mont. 87; *Armstrong v. Lynch*, 29 Neb. 87; *Crooker v. Stover*, 41 Neb. 693.

3. **Objections to the Form of the Judgment**, or that it was irregularly entered, must first be presented to the lower court by motion for a new trial. *Hancock v. Heaton*, 53 Ind. 111; *Boone v. Pelichet*, 13 La. Ann. 203; *Smith v. Foster*, 59 Ind. 595; *Fickle v. St. Louis, etc., R. Co.*, 54 Mo. 219; *Jenkins v. Esterly*, 22 Wis. 128.

Error in Conclusions of Law Based on Findings. — A new trial cannot be granted by the trial court for error in the conclusions of law based on its findings, as this is not an "error

in law occurring at the trial," but an error occurring after trial. The remedy is by exception and appeal from the decree, as Rev. Code N. Dak., § 5630, provides for a trial anew in the Supreme Court in such cases. *McKenzie v. Bismarck Water Co.*, 6 N. Dak. 361.

A new trial will not be granted merely because of an unnecessary and immaterial statement in the conclusions of law. *People v. Center*, 66 Cal. 551.

4. **Defect in Pleadings** — *California*. — *People v. Turner*, 39 Cal. 370.

Connecticut. — *Minor v. Mead*, 3 Conn. 289; *Pearl v. Rawdin*, 5 Day (Conn.) 244; *Tolland v. Willington*, 26 Conn. 578; *Canterbury v. Bennett*, 22 Conn. 623.

Georgia. — *Griffin v. Justices*, 17 Ga. 96.

Indiana. — *Ward v. Bateman*, 34 Ind. 110; *Chapin v. Jackson*, 45 Ind. 153; *Leiter v. Jackson*, 8 Ind. App. 98.

Kentucky. — *Burns v. Allen*, 2 B. Mon. (Ky.) 246; *Brown v. Wilson*, 12 B. Mon. (Ky.) 100.

Maine. — *Winslow v. Cumberland Bank*, 26 Me. 9.

Massachusetts. — *Dwyer v. Brannon*, 6 Mass. 330.

New York. — *Meyer v. M'Lean*, 1 Johns. (N. Y.) 510; *Pike v. Evans*, 15 Johns. (N. Y.) 212; *Corning v. Corning*, 6 N. Y. 97; *White v. Spencer*, 14 N. Y. 247; *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

South Carolina. — *Saluda Mfg. Co. v. Pennington*, 2 Spears L. (S. Car.) 735; *Stoll v. Ryan*, 1 Treadw. (S. Car.) 96.

Vermont. — *Beardsley v. Knight*, 4 Vt. 471; *Barney v. Bliss*, 2 Aik. (Vt.) 60.

Virginia. — *Green v. Judith*, 5 Rand. (Va.) 1.

United States. — *Book v. Justice Min. Co.*, 58 Fed. Rep. 827.

A motion for a new trial is the proper remedy for error in admitting or rejecting testimony, or in the charge of the judge to the jury; a motion in error, for errors in the declaration, pleadings, and judgment. *Tolland v. Willington*, 26 Conn. 578.

Decisions on Demurrers and Motions. — Errors in rulings on demurrers and motions relating to the pleadings may be reviewed on exceptions without a motion for a new trial. Such errors of law are not grounds for a new trial.¹

It is no ground for a new trial that a demurrer to a special plea was erroneously sustained when the facts alleged in such plea might have been given in evidence under other pleas. *Powell v. Asten*, 36 Ala. 140; *Bates v. Coe*, 10 Conn. 280.

Mississippi — Contra. — It is ground for a new trial to strike out a plea on motion, unless it was improperly filed or was utterly frivolous. *Marshall v. Hamilton*, 41 Miss. 229.

A verdict should be set aside where the cause was submitted to the jury on the issues joined without disposing of a demurrer to a plea. *Vance v. Isbel*, 13 Smed. & M. (Miss.) 371. But see *contra*, *Calderwood v. Tevis*, 23 Cal. 335.

A Defect of Parties Defendant is not a ground for a new trial, since such defect is waived by a failure to demur or to answer in abatement, under Rev. Stat. Ind. 1881, § 341. *Carico v. Moore*, 4 Ind. App. 20; *Darnall v. Simpkins*, 10 Ind. App. 469. But see *Maverick v. Burney*, 88 Tex. 560.

A Defect of Parties Plaintiff is a ground for a new trial where such defect is first discovered by evidence elicited at the trial. *Ft. Worth, etc., R. Co. v. Wilson*, 85 Tex. 516; *East Line, etc., R. Co. v. Culberson*, 68 Tex. 664; *Dallas, etc., R. Co. v. Spiker*, 59 Tex. 435; *Galveston, etc., R. Co. v. McCray*, (Tex. Civ. App. 1897) 43 S. W. Rep. 275.

Pleadings Confusing to Jury. — A new trial will be granted where the pleadings are so defective as to confuse the jurors and make it impossible for them to render an intelligent verdict. *Pearce v. Jordan*, 9 Fla. 526.

Where the Record Shows that a Good Plea in Bar Has Not Been Tried, the defendant can have a new trial. *Dermott v. Wallack*, 1 Black (U. S.) 96; *Brown v. Hendersons*, 4 Munf. (Va.) 492; *Blakely v. Frazier*, 11 S. Car. 122.

Issues for Submission to Jury. — The requirement of Code N. Car., § 395, that issues shall be made up and reduced to writing for submission to the jury, is mandatory, and if not complied with a new trial should be granted. *Bowen v. Whitaker*, 92 N. Car. 367.

An Objection to a Variance between pleading and proof which could easily have been obviated by amendment during trial if objected to in due time is not sufficient ground for a new trial. *Chicago v. Seben*, 62 Ill. App. 248.

Waiver by Failure to Demur. — Defects in pleadings should be reached by demurrer or by motion in arrest of judgment. After trial objections to errors in the pleadings are deemed to be waived and cannot be raised by motion for a new trial. *Brockert v. Central Iowa R. Co.*, 82 Iowa 369.

1. *Clark v. Hare*, 39 Ark. 258; *Fleming v. Dorst*, 18 Ind. 493; *Craig v. Ensey*, 63 Ind. 140; *New Albany v. White*, 100 Ind. 206; *Leiter v. Jackson*, 8 Ind. App. 98; *Hardison v. Mann*, (Ind. App. 1898) 50 N. E. Rep. 899; *Parker v. Waugh*, 34 Mo. 340; *Bruce v. Vogel*, 38 Mo. 100; *O'Connor v. Koch*, 56 Mo. 253; *Bowie v. Kansas City*, 51 Mo. 454; *Perkins v. McDowell*, 3 Wyoming 328.

Sufficiency of Pleadings. — The objection that a petition or answer does not state sufficient facts to constitute a cause of action or defense is a question of law which may be determined from the record without presenting the question to the lower court by a motion for a new trial. *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414; *Dodge City Water-Supply Co. v. Dodge City*, 55 Kan. 60; *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108; *Hays v. Mercier*, 22 Neb. 656; *Schmid v. Schmid*, 37 Neb. 629; *Scarborough v. Myrick*, 47 Neb. 794.

Decisions on Demurrer — Arkansas. — *Clark v. Hare*, 39 Ark. 258.

California. — *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162.

Georgia. — *Griffin v. Justices*, 17 Ga. 96; *De Barry-Baya Merchants' Line v. Austin*, 76 Ga. 306; *Nicholls v. Popwell*, 80 Ga. 604; *Rogers v. Rogers*, 78 Ga. 683; *Gibson v. Carreker*, 82 Ga. 46; *Willbanks v. Untriner*, 98 Ga. 801; *Griffin v. Johnson*, 84 Ga. 279.

Indiana. — *Rodgers v. Lacey*, 23 Ind. 507; *Gray v. Stiver*, 24 Ind. 174.

Kansas. — *Earlywine v. Topeka, etc., R. Co.*, 43 Kan. 746.

Kentucky. — *Bogenschutz v. Smith*,

c. DECISIONS ON MOTIONS PERTAINING TO CONDUCT OF TRIAL. — A motion for a new trial is generally not necessary to secure a review of decisions on motions rendered before or after the trial,¹ but is required where the ruling is made during the

(Ky. 1887) 3 S. W. Rep. 800; *Johnson v. U. S. Bank*, 2 B. Mon. (Ky.) 310.

Missouri. — *Hannah v. Hannah*, 109 Mo. 236.

Nebraska. — *O'Donohue v. Hendrix*, 13 Neb. 255.

South Dakota. — *Ross v. Wait*, 2 S. Dak. 638.

Texas. — *Harbert v. Henly*, 31 Tex. 666.

Wyoming. — *Perkins v. McDowell*, 3 Wyoming 328.

Contra. — *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813.

Demurrer to Indictment. — Error in a decision on demurrer to an indictment is not a ground for a new trial, but may be reviewed by direct exception on error. *Flemister v. State*, 81 Ga. 768; *Robson v. State*, 83 Ga. 166; *People v. Turner*, 39 Cal. 370.

Missouri — Motion to Strike Out Parts of Pleadings. — A ruling of a court in striking out a part of a pleading does not become a part of the record, and to secure a review of such ruling it must be brought to the attention of the trial court by a motion for a new trial. *Boatmen's Sav. Bank v. McMenamy*, 35 Mo. App. 198; *State v. Shobe*, 23 Mo. App. 474; *Parker v. Straat*, 39 Mo. App. 616; *Palmer v. Shenkel*, 50 Mo. App. 571; *Acocock v. Acocock*, 57 Mo. 154; *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463. See *contra*, *Beach v. Spokane Ranch, etc., Co.*, (Mont. 1898) 52 Pac. Rep. 560.

Plea in Abatement. — A ruling on a plea in abatement not assigned as error in a motion for a new trial will not be considered on appeal. *Burgen v. Divinal*, 11 Ark. 314. But see *contra*, *Bohanan v. State*, 15 Neb. 209.

1. Decisions on Motions Before or After Trial. — *Evans v. State*, 58 Ind. 587; *McAllister v. Willey*, 60 Ind. 195; *Tibbetts v. O'Connell*, 66 Ind. 171; *Markson v. Haney*, 47 Ind. 31; *Vawter v. Gilliland*, 55 Ind. 278; *Shoemaker v. Smith*, 74 Ind. 71; *Parker v. Waugh*, 34 Mo. 340; *Bruce v. Vogel*, 38 Mo. 100; *Meek v. Hewitt*, 48 Mo. 337; *Slagel v. Murdock*, 65 Mo. 522; *Johnson v. Latta*, 84 Mo. 139; *Crow v. Stevens*, 44 Mo. App. 137; *Scherrer v. Hale*, 9 Mont. 63; *Claffin v. American Nat. Bank*, 46 Neb. 884.

New Trial of Motion Refused. — A motion to strike out of an order the words "and by consent of plaintiffs" was tried upon evidence which was preserved in a bill of exceptions. On appeal from an order overruling the motion it was held that there such hearing was not a trial of an "issue of fact" arising "upon the pleadings;" that there was no statute permitting a new trial of a motion, and that the order could be reviewed without a motion for a new trial. *Beach v. Spokane Ranch, etc., Co.*, (Mont. 1898) 52 Pac. Rep. 560, citing *Harper v. Hildreth*, 99 Cal. 265.

Motion to Discharge Attachment. — The hearing and ruling on a motion to discharge an attachment do not constitute a trial, and such ruling may be reviewed without a motion for a new trial. *Cheyenne First Nat. Bank v. Swan*, 3 Wyoming 356; *Francis v. Burnett*, 84 Ky. 23; *Sibley v. Condensed Lubricating Oil Co.*, 12 Cinc. Wkly. L. Bul. 308; *Beitman v. McKenzie*, 12 Cinc. Wkly. L. Bul. 321; *Stone v. Bank*, 8 Ohio Cir. Ct. Rep. 636.

Motion to Remand. — A ruling on a motion to remand a cause to a justice of the peace may be reviewed without a motion for a new trial. *Tibbetts v. O'Connell*, 66 Ind. 171.

Motion to Set Aside Judicial Sale. — A ruling on a motion to set aside a judicial sale is not made during the progress or trial of a cause. *Dreese v. Myers*, 52 Kan. 126; *St. Louis v. Brooks*, 107 Mo. 380, overruling *Bishop v. Ransom*, 39 Mo. 417. *Contra*, *Tunstall v. Jones*, 25 Ark. 272.

Motion for Writ of Assistance. — A motion or petition for a writ of assistance is not such an action as entitles a party to a new trial as a matter of right. *Gillilan v. Milligan*, 144 Ind. 154.

Motion to Set Aside Award. — A motion for a new trial is not necessary to secure a review of an order overruling a motion to set aside an award. *Graves v. Scoville*, 17 Neb. 593. See *contra*, *Wallace v. Underwood*, 32 Mo. App. 473.

Motion to Dismiss. — A ruling on a motion to dismiss may be reviewed without a motion for a new trial. *Aultman v. Daggs*, 50 Mo. App. 280.

trial.¹ The error of law must be one pertaining to the trial of an issue of fact.²

Motion to Set Aside Judgment.—It is not essential to the plaintiff's right to appeal from an order setting aside a judgment by default that he should move for a new trial as in an ordinary action, although the defendant introduced evidence at the hearing though not entitled to do so. *Reinke v. Morse*, (Ky. 1889) 10 S. W. Rep. 468.

Rulings on Motions for Judgment on Special Findings need not be assigned as ground for a new trial. *Horn v. Eberhart*, 17 Ind. 118; *Logansport v. Wright*, 25 Ind. 512; *Roberts v. Smith*, 34 Ind. 550; *Adamson v. Rose*, 30 Ind. 380; *Byram v. Galbraith*, 75 Ind. 134. See in general article SPECIAL FINDINGS OF JURIES.

Motion to Tax Costs.—Error in overruling a motion to tax costs is not a ground for a new trial. *Corwin v. Thomas*, 83 Ind. 110.

1. **Motion for Change of Venue.**—Rulings on motions for change of venue will not be reviewed where there is no assignment of such error in the motion for new trial. *Horton v. Wilson*, 25 Ind. 316; *Knarr v. Conaway*, 53 Ind. 120; *Norwood v. Harness*, 98 Ind. 134; *Scanlin v. Stewart*, 138 Ind. 574; *Wilson v. Johnson*, 145 Ind. 40; *Krutz v. Howard*, 70 Ind. 174; *Walker v. Heller*, 73 Ind. 46; *Blakely v. Frazier*, 11 S. Car. 122.

Exceptions to rulings on applications for change of venue must be brought to the attention of the trial court by a motion for new trial, since such applications are not a part of the record proper. *Wolff v. Ward*, 104 Mo. 127.

Motion for Continuance.—Rulings relating to motions for continuance will not be reviewed unless assigned as error in the motion for a new trial.

Arkansas.—*Watts v. Cohn*, 40 Ark. 114.

California.—*Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161.

Indiana.—*Kent v. Lawson*, 12 Ind. 675; *Downing v. Evansville*, etc., R. Co., 13 Ind. 148; *McCammock v. Clark*, 16 Ind. 320; *Hughes v. Ainslee*, 28 Ind. 346; *Carr v. Eaton*, 42 Ind. 385; *Arbuckle v. McCoy*, 53 Ind. 63; *Morgan v. Hyatt*, 62 Ind. 560; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310.

Missouri.—*McMurdock v. Kimberlin*, 23 Mo. App. 523; *State v. Mann*, 83 Mo. 589; *Jones v. Missouri Pac. R. Co.*, 31 Mo. App. 614; *State v. French*, 47

Mo. App. 474; *State v. Jewell*, 90 Mo. 467.

Nebraska.—*Johnson v. Dinsmore*, 11 Neb. 391.

New Jersey.—*Ogden v. Gibbons*, 5 N. J. L. 598.

See also article CONTINUANCES, vol. 4, p. 906 *et seq.*

But in *Kansas* it is held that error in refusing a continuance is not an error made in the course of the trial, and such ruling may be reviewed without a motion for a new trial. *Cook v. Larson*, 47 Kan. 70.

In *Nevada*, if an exception is taken to the order refusing a continuance and made a part of the record by a bill of exceptions signed by the judge, there is no imperative necessity for a motion for a new trial to secure a review of such ruling. *Beatty v. Sylvester*, 3 Nev. 228.

A Refusal to Compel More Specific Answers to Interrogatories is a ruling which must be assigned as a ground for a new trial. *Staser v. Hogan*, 120 Ind. 207; *Patterson v. Lord*, 47 Ind. 203; *West v. Cavins*, 74 Ind. 265.

Nonsuit.—Error in granting a nonsuit is properly assigned as an error of law occurring at the trial. *Donahue v. Gallavan*, 43 Cal. 576; *Harris v. Gregg*, 17 N. Y. App. Div. 210, 38 N. Y. Supp. 844; *Stooks v. Foote*, (Supreme Ct.) 46 N. Y. Supp. 718; *Jackson v. Consolidated Traction Co.*, 59 N. J. L. 25.

Demurrer to the Evidence.—Error of the court in sustaining a demurrer to the evidence is properly assigned as a ground for a new trial. *Missouri Pac. R. Co. v. Goodrich*, 38 Kan. 224. But see *contra*, *Wabash, etc., R. Co. v. Nice*, 99 Ind. 152.

Objection to Evidence Because Complaint Does Not State a Cause of Action.—A ruling on an objection to the introduction of any evidence because the petition or complaint does not state a cause of action may be reviewed by motion for a new trial as an error of law occurring at the trial. *Ross v. Wait*, 2 S. Dak. 638; *Waugenheim v. Graham*, 39 Cal. 175.

Direction of Verdict.—Error in directing a verdict is properly specified as an error of law occurring at the trial. *Sioux Banking Co. v. Kendall*, 6 S. Dak. 543.

2. **Rulings Not Pertaining to the Trial.**—“Rulings which do not pertain to

d. **ERRORS IN INSTRUCTIONS.** — Instructions to trial juries are expositions of the principles of law which the juries are bound to apply in order to render verdicts establishing the rights of the parties according to the facts proved. Therefore error in giving or refusing instructions is properly assigned as an error of law occurring at the trial.¹ Unless such error is assigned as a ground for a new trial the instructions cannot be reviewed on appeal.²

the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, motions addressed to pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial, to make them available in error proceedings. This is the well-settled doctrine of this court." *Claffin v. American Nat. Bank*, 46 Neb. 884.

Connecticut. — Rulings of the court on the admission or rejection of evidence may be reviewed on appeal, but cannot be considered in passing upon a motion for a new trial under Pub. Laws Conn. 1895, c. 51. *White v. Howd*, 66 Conn. 264.

1. An error in giving or refusing instructions cannot be reviewed as an "irregularity," but must be assigned as an "error of law." *Valerius v. Richard*, 57 Minn. 443.

The term "errors of law" generally refers to such errors as appear in the bill of exceptions. But it also includes errors in the instructions, although the instructions are not to be incorporated in the bill of exceptions. *Cleveland Paper Co. v. Banks*, 15 Neb. 20.

See also article INSTRUCTIONS, vol. 11, p. 47.

2. Error in Instruction Must Be Assigned as a Ground for a New Trial — *Alabama*. — *Kuhl v. Long*, 102 Ala. 563.

Arkansas. — *McCarroll v. Stafford*, 24 Ark. 224; *Steck v. Mahar*, 26 Ark. 536; *Ward v. Carlton*, 26 Ark. 662; *Lambert v. Killian*, 27 Ark. 549; *Young v. King*, 33 Ark. 745; *Ray v. Light*, 34 Ark. 421; *Fry v. Ford*, 38 Ark. 246; *Adler-Goldman Commission Co. v. Hathcock*, 55 Ark. 579.

Dakota. — *Waldron v. Evans*, 1 Dakota 11. *Contra*, *McPherrin v. Jones*, 5 N. Dak. 261.

Georgia. — *Irvin v. Corbin*, 57 Ga. 594.

Illinois. — *Kelly v. Shumway*, 51 Ill. App. 634; *Illinois Cent. R. Co. v. O'Keefe*, 154 Ill. 508, reversing 49 Ill. App. 320.

Indiana. — *Smith v. Allen*, 16 Ind. 316; *Hallock v. Iglehart*, 30 Ind. 327; *Schenck v. Butsch*, 32 Ind. 338; *Bodamer v. Hutton*, 40 Ind. 244; *Patterson v. Indianapolis, etc., Plank Road Co.*, 56 Ind. 20; *Sowle v. Cosner*, 56 Ind. 276; *Eckleman v. Miller*, 57 Ind. 88; *Freeze v. De Puy*, 57 Ind. 183; *Bridge-water v. Bridgewater*, 62 Ind. 82; *Vande-ver v. Garshwiler*, 63 Ind. 185; *Taylor v. Shelkett*, 66 Ind. 297; *Louisville, etc., R. Co. v. Krimming*, 87 Ind. 351; *Williams v. Riley*, 88 Ind. 290; *Drinkout v. Eagle Mach. Works*, 90 Ind. 423; *Wright v. Nipple*, 92 Ind. 310; *North-Western Mut. L. Ins. Co. v. Heilmann*, 93 Ind. 24; *Cline v. Lindsey*, 110 Ind. 337; *Knisely v. Hire*, 2 Ind. App. 86; *Cannelton Water Co. v. Burkett*, 13 Ind. App. 277; *Fourthman v. Fourthman*, 15 Ind. App. 199; *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273; *Miller v. Eldridge*, 126 Ind. 461.

Iowa. — *Leiber v. Chicago, etc., R. Co.*, 84 Iowa 97; *Thompson v. Anderson*, 94 Iowa 554; *Dean v. Zenor*, 96 Iowa 752; *State v. Knutson*, 91 Iowa 549.

Kentucky. — *Humphreys v. Walton*, 2 Bush (Ky.) 580; *Gutzwiller v. Wagner*, 3 Ky. L. Rep. 470; *Mercer v. King*, 13 Ky. L. Rep. 429.

Missouri. — *Floersch v. State Bank*, 10 Mo. 515; *Rhodes v. White*, 11 Mo. 623; *Lyle v. White*, 11 Mo. 623; *Gordon v. Gordon*, 13 Mo. 215; *Pogue v. State*, 13 Mo. 444; *Vivian v. Lafayette County*, 13 Mo. 453; *Brady v. Connelly*, 52 Mo. 19; *Matlock v. Williams*, 59 Mo. 105; *Klostermann v. Germania L. Ins. Co.*, 6 Mo. App. 582; *Anthony v. St. Louis, etc., R. Co.*, 76 Mo. 18; *State v. Richardson*, 77 Mo. 589; *Griffin v. Regan*, 79 Mo. 73; *Cordes v. Straszer*, 8 Mo. App. 61; *Gaines v. Fender*, 82 Mo. 497; *Schlicker v. Gordon*, 19 Mo. App. 479; *Light v. St. Louis, etc., R. Co.*, 89 Mo. 108; *Griffith v. Hanks*, 91 Mo. 109; *Kimberlin v. Short*, 24 Mo. App. 643; *Webb v. Allington*, 27 Mo. App. 559; *Thomas v. Hooker Colville Steam Pump Co.*, 28 Mo. App. 563; *White v.*

A new trial will not be granted for error in the instructions if the jury disregarded the erroneous instruction and rendered a correct verdict.¹ To determine whether an error in the instructions is harmless or prejudicial see article INSTRUCTIONS, vol. 11, p. 47.

c. ERRORS IN EVIDENCE. — Errors in admitting and excluding evidence are grounds for a new trial and cannot be assigned as independent errors on appeal.² Such errors should be assigned

Quinlan, 30 Mo. App. 54; Home Ins. Co. v. Schultz, 30 Mo. App. 91; Crum v. Elliston, 33 Mo. App. 620; Hofheimer v. Losen, 24 Mo. App. 652; Fields v. Baum, 35 Mo. App. 511; Price v. Vanstone, 40 Mo. App. 207; Connelly v. Shamrock Benev. Soc., 43 Mo. App. 283; State v. Ragsdale, 59 Mo. App. 590; McPherson v. Meyer, 1 Mo. App. Rep. 464. *Contra*, Fine v. Rogers, 15 Mo. 315.

Nebraska. — Horbach v. Miller, 4 Neb. 31; McCormick v. Keith, 8 Neb. 142; Cleveland Paper Co. v. Banks, 15 Neb. 20; Hastings, etc., R. Co. v. Ingalls, 15 Neb. 123; Schreckengast v. Ealy, 16 Neb. 510; Nyce v. Shaffer, 20 Neb. 507; Omaha, etc., R. Co. v. O'Donnell, 22 Neb. 475; Sherwin v. O'Connor, 24 Neb. 603; Walker v. Haggerty, 30 Neb. 120; Hanover F. Ins. Co. v. Schellak, 35 Neb. 701; Barton v. McKay, 36 Neb. 632; Wanzer v. State, 41 Neb. 238; Hendrick v. Strauss, 42 Neb. 485; Peaks v. Lord, 42 Neb. 15; Dunphy v. Bartenbach, 40 Neb. 143; Barr v. Omaha, 42 Neb. 341; Hamilton v. Goff, 45 Neb. 339.

New York. — Bulkeley v. Keteltas, 4 Sandf. (N. Y.) 450.

North Carolina. — McKinnon v. Morrison, 104 N. Car. 354.

Ohio. — Hills v. Ludwig, 21 Ohio L. J. 319.

Pennsylvania. — Burd v. Dansdale, 2 Binn. (Pa.) 80; Dennis v. Alexander, 3 Pa. St. 50.

South Carolina. — Bowen v. Carolina, etc., R. Co., 34 S. Car. 217.

Texas. — Ysleta v. Babbitt, 8 Tex. Civ. App. 432. *Contra*, Allen v. Stephanes, 18 Tex. 658; Gulf, etc., R. Co. v. Sparger, 11 Tex. Civ. App. 82; Western Union Tel. Co. v. Mitchell, 89 Tex. 441.

Contra — *Tennessee*. — Luty v. Purdy, 2 Overt. (Tenn.) 163.

Error in Refusal of Instructions. — Where a verdict for the plaintiff must have been rendered upon one of two causes of action, but it cannot be determined upon which, a refusal to give

a proper instruction on behalf of the defendant as to either one of the causes of action will entitle him to a new trial. *Pennsylvania Co. v. Miller*, 35 Ohio St. 541.

Error of the court in failing to mark each instruction "given" or "refused," as the case may be, is not available where such error was not called to the attention of the trial court by a motion for a new trial. *Tagg v. Miller*, 10 Neb. 442; *Fish v. Chicago, etc., R. Co.*, 81 Iowa 280.

1. See *supra*, III. 8. *e.* Verdict Contrary to Instructions.

2. *Arkansas*. — *Graham v. Roark*, 23 Ark. 19; *Steck v. Mahar*, 26 Ark. 536; *Ward v. Carlton*, 26 Ark. 662; *Lambert v. Killian*, 27 Ark. 549; *Young v. King*, 33 Ark. 745; *Knox v. Hellums*, 38 Ark. 413.

Dakota. — *Waldron v. Evans*, 1 Dakota 11.

Georgia. — *Irvin v. Corbin*, 57 Ga. 594; *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Illinois. — *Miller v. Ridgely*, 19 Ill. App. 306; *Chicago, etc., R. Co. v. Elmore*, 32 Ill. App. 418.

Indiana. — *Daily v. Nuttman*, 14 Ind. 339; *Fleming v. Potter*, 14 Ind. 486; *Ridge v. Sunman*, 14 Ind. 540; *State v. Manley*, 15 Ind. 8; *Hindman v. Troxell*, 15 Ind. 123; *McCammock v. Clark*, 16 Ind. 320; *Aurora v. West*, 22 Ind. 88; *Ringle v. Bicknell*, 32 Ind. 369; *Sage v. Brown*, 34 Ind. 464; *Harding v. Whitney*, 40 Ind. 379; *McDill v. Gunn*, 43 Ind. 315; *Parks v. Hill*, 45 Ind. 172; *Fromer v. State*, 49 Ind. 580; *Nelson v. Blakey*, 54 Ind. 29; *Breckenridge v. McAfee*, 54 Ind. 141; *Patterson v. Indianapolis, etc., Plank Road Co.*, 56 Ind. 20; *Watson v. Piel*, 58 Ind. 566; *Bailey v. Boyd*, 59 Ind. 292; *McAllister v. Willey*, 60 Ind. 195; *Kyser v. Wells*, 60 Ind. 261; *Craig v. Ensey*, 63 Ind. 140; *Vandever v. Garshwiler*, 63 Ind. 185; *Wright v. Miller*, 63 Ind. 220; *Marsh v. Terrell*, 63 Ind. 363; *Merrifield v. Weston*, 68 Ind. 70; *Stahl v. Hammontree*, 72 Ind. 103; *Malson*

as causes for a new trial.¹

f. HARMLESS ERRORS OF LAW. — A new trial will be granted as a matter of course where errors of law were committed in the conduct of the trial, unless it is apparent that the error complained

v. State, 75 Ind. 142; *Caldwell v. Fayette County*, 80 Ind. 99; *Boots v. Griffith*, 89 Ind. 246; *Hayes v. Walker*, 90 Ind. 105; *Kenney v. Phillipy*, 91 Ind. 511; *Lake Erie, etc., R. Co. v. Parker*, 94 Ind. 91; *Trout v. Perciful*, 105 Ind. 532; *National Bank, etc., Co. v. Dunn*, 106 Ind. 110; *Frybarger v. Andre*, 106 Ind. 337; *Moore v. Harland*, 102 Ind. 474; *Harter v. Eltzroth*, 111 Ind. 159; *Racer v. Baker*, 113 Ind. 177; *Ortwein v. Jeffries*, 1 Ind. App. 290; *McGuffey v. McClain*, 130 Ind. 327; *Balue v. Sear*, 131 Ind. 301; *Knisely v. Hire*, 2 Ind. App. 86; *Jackson v. Swope*, 134 Ind. 111; *Indiana Imp. Co. v. Wagner*, 138 Ind. 658; *Marion School Tp. v. Carpenter*, 12 Ind. App. 191.

Kentucky. — *Humphreys v. Walton*, 2 Bush (Ky.) 580; *Com. v. Williams*, 14 Bush (Ky.) 297; *Henderson v. Dupre*, 82 Ky. 678; *Todd v. Louisville, etc., R. Co.*, 10 Ky. L. Rep. 864, (Ky. 1889) 11 S. W. Rep. 8; *Coomes v. Stulzer*, 13 Ky. L. Rep. 332.

Missouri. — *Floersch v. State Bank*, 10 Mo. 515; *Rhodes v. White*, 11 Mo. 623; *Lyle v. White*, 11 Mo. 624; *Pogue v. State*, 13 Mo. 444; *Vivian v. Lafayette County*, 13 Mo. 453; *Kanada v. North*, 14 Mo. 615; *Margrave v. Ausmuss*, 51 Mo. 561; *Burns v. Whelan*, 52 Mo. 520; *Carver v. Thornhill*, 53 Mo. 283; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Hulett v. Nugent*, 71 Mo. 131; *State v. Richardson*, 77 Mo. 589; *Snell v. Harrison*, 83 Mo. 651; *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272; *Thomas v. Hooker-Colville Steam Pump Co.*, 28 Mo. App. 563; *Albert v. Seiler*, 31 Mo. App. 247; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677; *German Sav. Inst. v. Jacoby*, 97 Mo. 617; *Fields v. Baum*, 35 Mo. App. 511; *Powell v. Palmer*, 45 Mo. App. 236; *Gentry v. Templeton*, 47 Mo. App. 55; *St. Louis v. Siefert*, 111 Mo. 662; *Mays v. Mays*, 114 Mo. 536; *Johnson v. Loomis*, 50 Mo. App. 142; *Smith v. Zimmerman*, 51 Mo. App. 519; *Ward v. Board of Equalization*, 135 Mo. 309.

Nebraska. — *Heard v. Dubuque County Bank*, 8 Neb. 10; *McCormick v. Keith*, 8 Neb. 142; *Stanton County v. Canfield*, 10 Neb. 389; *Birdsall v.*

Carter, 11 Neb. 143; *Yates v. Kinney*, 25 Neb. 120; *Milner v. Antelope County*, 35 Neb. 237.

West Virginia. — *Halstead v. Horton*, 38 W. Va. 727.

1. **Errors in Evidence Should Be Presented to Lower Court by Motion for a New Trial.** — The objection that improper testimony was admitted at the trial will not be reviewed by the Supreme Court unless the record shows not only that an exception was taken to its admission, but also that the objection was presented to the lower court as a reason for a new trial. *Horton v. Wilson*, 25 Ind. 316; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339; *Owen v. Phillips*, 73 Ind. 284; *Rees v. Blackwell*, 6 Ind. App. 506; *Scofield v. Brown*, 7 Neb. 221. *Contra*, *Saxton v. Allen*, 49 Mo. 417.

Refusal to strike out testimony must be first presented to the lower court on motion for a new trial, or it will not be considered on appeal. *Pennsylvania Co. v. Smith*, 98 Ind. 42.

An erroneous ruling in admitting or excluding evidence is a ground for new trial as an "error of law occurring at the trial," which will be deemed waived unless assigned as a ground for a new trial. *Golding v. Eidson*, 2 Kan. App. 307.

Contra. — Questions as to the admissibility of evidence arising on examination of the sufficiency of the evidence to sustain the verdict will be treated precisely as if the admissibility had been assigned on motion for a new trial. *Selleck v. Rusco*, 46 Conn. 370.

A motion for a new trial is not necessary to secure the review of an order excluding from the consideration of the jury material evidence which had been admitted. *Smith v. Gillett*, 50 Ill. 290.

An exception to the admission of improper evidence is available where the judgment is wholly unsupported by the evidence, although the bill of exceptions does not disclose that a motion for a new trial was made. *Goss, etc., Mfg. Co. v. People*, 4 Ill. App. 510.

An order of court excluding testimony which is decisive of the case may be reviewed without a motion for a new trial. *McCoy v. Julien*, 15 Iowa 371.

of did not and could not affect the verdict.¹

g. OVERRULED CASES—CHANGE OF RULINGS—New Trial to Conform to Later Decisions.—Where the trial court has made certain

1. Harmless Error.—*Arkansas*.—*Carlock v. Spencer*, 7 Ark. 12.

California.—*Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504.

Connecticut.—*Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453; *Holly v. Brown*, 14 Conn. 255; *Brush v. Keeler*, 34 Conn. 499; *Norwich, etc., v. R. Co. v. Cahill*, 18 Conn. 484; *Parker v. Griswold*, 17 Conn. 288.

Georgia.—*Lew's v. State*, 33 Ga. 131; *Justices v. Griffin, etc.*, Plank Road Co., 15 Ga. 39; *Eagle, etc., Mfg. Co. v. West*, 61 Ga. 120; *Allen v. State*, 61 Ga. 166; *Branch v. Du Bose*, 55 Ga. 21; *Morton v. Pearman*, 30 Ga. 281; *Boon v. Boon*, 29 Ga. 134; *Parke v. Foster*, 26 Ga. 465; *Linday v. Thomas*, 26 Ga. 537.

Indiana.—*Morford v. Woodworth*, 7 Ind. 83; *Bischof v. Coffelt*, 6 Ind. 23; *McCall v. Seevers*, 5 Ind. 187; *Lett v. Horner*, 5 Blackf. (Ind.) 296; *Telford v. Wilson*, 71 Ind. 555.

Iowa.—*McKay v. Leonard*, 17 Iowa 569; *Robinson v. Keith*, 25 Iowa 321.

Kentucky.—*Lively v. Ball*, 2 B. Mon. (Ky.) 53; *Price v. Evans*, 4 B. Mon. (Ky.) 386.

Maine.—*Freeman v. Rankins*, 21 Me. 446; *Thacher v. Jones*, 31 Me. 528; *Newell v. Ayer*, 32 Me. 334; *Dodge v. Greeley*, 31 Me. 343; *Hovey v. Hobson*, 53 Me. 256; *Comstock v. Smith*, 23 Me. 202; *Stewart v. Belfast Foundry Co.*, 69 Me. 17.

Maryland.—*Cross v. Hall*, 4 Md. 426.

Michigan.—*People v. Scott*, 6 Mich. 287.

Minnesota.—*Coit v. Waples*, 1 Minn. 134.

Missouri.—*Hook v. Craghead*, 35 Mo. 380.

New Jersey.—*Myers v. Hollingsworth*, 26 N. J. L. 186.

New York.—*Horner v. Wood*, 16 Barb. (N. Y.) 386; *Gardner v. Clark*, 17 Barb. (N. Y.) 538; *Mansfield v. Wheeler*, 23 Wend. (N. Y.) 79; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Camden, etc., R. etc., Co. v. Belknap*, 21 Wend. (N. Y.) 354; *People v. Hartung*, 8 Abb. Pr. (N. Y.) Supreme Ct. 132; *Camp v. Pulver*, 5 Barb. (N. Y.) 91; *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Benjamin v. Smith*, 12 Wend. (N. Y.) 404; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.)

58; *Beach v. Raymond*, 2 E. D. Smith (N. Y.) 496; *Hunt v. Bennett*, 4 E. D. Smith (N. Y.) 647, 19 N. Y. 173; *Forrest v. Forrest*, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144; *Brown v. Hoburger*, 52 Barb. (N. Y.) 15; *Renaud v. Peck*, 2 Hilt. (N. Y.) 137.

North Carolina.—*Hobb v. Outlaw*, 6 Jones L. (N. Car.) 174; *Fagan v. Williamson*, 8 Jones L. (N. Car.) 433; *Ratliff v. Huntly*, 5 Ired. L. (N. Car.) 545; *Graham v. Houston*, 4 Dev. L. (N. Car.) 232; *State v. Frank*, 5 Jones L. (N. Car.) 384; *Hall v. Woodside*, 8 Ired. L. (N. Car.) 119; *McDugald v. Smith*, 11 Ired. L. (N. Car.) 576.

Pennsylvania.—*Eckert v. Cameron*, 43 Pa. St. 120.

Rhode Island.—*Olney v. Chadsey*, 7 R. I. 224.

South Carolina.—*Means v. Means*, 7 Rich. L. (S. Car.) 533; *Lewis v. Bell*, 3 Strobb. L. (S. Car.) 256; *Peoples v. Smith*, 8 Rich. L. (S. Car.) 90.

Tennessee.—*Mitchell v. Churchman*, 4 Humph. (Tenn.) 218; *Allen v. McNew*, 8 Humph. (Tenn.) 46.

Texas.—*Musquis v. Blake*, 24 Tex. 461.

Vermont.—*Pomeroy v. Taylor*, Brayt. (Vt.) 169.

Washington.—*Newberg v. Farmer*, 1 Wash. Ter. 182.

United States.—*Mirick v. Hemphill*, Hempst. (U. S.) 179; *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 345; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193.

A new trial will not be granted merely because the commissioners appointed to hear the evidence demanded excessive fees from the plaintiff before permitting a hearing, where such fees were in fact paid and the testimony was subsequently introduced. *Maher v. Shenhall*, 96 Iowa 634.

Error in Excluding a Party from hearing the testimony of the witnesses for the adverse party is not a ground for a new trial where it is apparent that such error was harmless. *Randolph v. McCain*, 34 Ark. 696.

Verdict Too Favorable.—Under Pen. Code Cal., § 1404, providing that a verdict shall not be set aside or a new trial granted on the motion of the defendant except for some error prejudicial to him, a new trial will not be granted to a defendant charged with

orders and rulings in conformity to a decision of the appellate court, and such decision has been overruled, such errors of law will be corrected by granting a new trial without compelling the unsuccessful party to obtain a reversal.¹

Change of Rulings During Trial.—Litigants have to rely upon and conform to the rulings of the trial court, and if prejudiced by a change of rulings during the trial, a new trial should be granted for errors of law.² A new trial may be granted on the ground of mistake and surprise where a party has been misled by inconsistent

murder, but convicted of manslaughter only, on the ground that such verdict was too favorable to him. *People v. Muhlner*, 115 Cal. 303.

Where New Trial Will Produce Same Result.—A new trial will not be granted for an error in the rejection of evidence where it can be ascertained from the record that the verdict was correct and that the admission of the rejected evidence would not change the result. *Hart v. Johnson*, 6 Ohio 87.

A new trial will not be granted for errors of law where it appears from uncontradicted testimony that the result must be the same on a new trial. *Gilbert v. Walker*, 64 Conn. 390.

Ordering Judgment for Nominal Damages.—Error of the trial court in ordering a judgment for the defendant for six cents as nominal damages in a case which should have been dismissed is error without material prejudice and not a ground for a new trial. *Osborne v. Johnson*, 35 Minn. 300.

In *Gerbier v. Emery*, 2 Wash. (U. S.) 413, the court refused to grant a new trial because, in the event of a new trial being granted, the defendant would compel the plaintiff to submit to a nonsuit, in consequence of a defect in the declaration, thus defeating justice in the case. The court said: "If we were * * * to grant a new trial, it would be upon the terms of permitting the plaintiff to amend and to add a new count. * * * Then, it is obvious, the new trial could be of no use to the defendant."

1. New Trial to Conform to Later Decision—Overruled Cases.—During the same term the trial court may review its order refusing and grant a new trial to correct its rulings in accordance with a later decision of the Supreme Court on a similar question. Such proceeding is not an abuse of discretion. *Snow v. Vandever*, 33 Neb. 735.

Although the Supreme Court of the

United States has decided a similar case between the same parties later than and contrary to the decision of the Court of Admiralty, the latter court will not grant a new trial after the expiration of several terms. *Petty v. Merrill*, 12 Blatchf. (U. S.) 11.

Where evidence was excluded at the trial in conformity to a decision of the Supreme Court, and the decision was afterwards overruled, a new trial should be granted. *Starkweather v. Loomis*, 2 Vt. 573.

Where a party, relying upon a decision of the Supreme Court, omitted to prove a certain claim to be a community debt, and after the submission of the case the decision relied on was overruled, and the trial court followed the later decision, it was held that a new trial on the ground of surprise should be granted. The party had a right to rely upon the decision of the Supreme Court, and the surprise did not relate to a mere misapprehension of the laws. *Allen v. Chambers*, 18 Wash. 341.

But in New York it was held not to be a ground for a new trial that since the trial the appellate court had changed its view of the law governing the case. *Forstman v. Schulting*, 38 Hun (N. Y.) 482.

2. *Parks v. Nichols*, 20 Ill. App. 143; *Guerin v. Smith*, 62 Mich. 369; *McLennan v. Prentice*, 79 Wis. 488; *Helms v. Chadbourne*, 48 Wis. 690; *Dunham v. Baxter*, 4 Mass. 79; *Sanchez v. McMahon*, 35 Cal. 224.

A Reliance upon a Statute Which Had Been Repealed, but which was supposed at the trial to be in force, necessitates a new trial. *Belmont v. Morrill*, 69 Me. 314.

Error in Overlooking a Statute by which the court should have decided the rights of the parties is an error of law necessitating a new trial. *Cooper v. Cooper*, 86 Ind. 75; *Tarrar v. Nunamaker*, 5 Rich. L. (S. Car.) 484.

rulings or mistakes of law committed by the court.¹

IV. NEW TRIAL AS OF RIGHT. — The statutes of many states permit a new trial as of right in actions for possession of real estate and without establishing any ground for a new trial. See article EJECTMENT, vol. 7, p. 355.

V. NEW TRIAL IN FEDERAL COURTS — Conformity to State Laws. — In the federal courts the law and procedure of new trials are not modified or affected by state legislation.² Such courts follow the common law both as to the grounds for a new trial and the procedure. The trial courts are free to exercise their discretion in granting or refusing new trials, and such orders are not subject to review by error or appeal.³

VI. NEW TRIAL IN CRIMINAL CASES — 1. At Common Law — Not Granted in Felony Cases. — New trials were granted at common law in cases of misdemeanor,⁴ but not in cases of felony,⁵ unless it was a criminal proceeding for the enforcement of a civil right.⁶ In cases where a new trial would have been proper the practice was

1. See *supra*, III. 5. *Accident or Surprise*.

2. The Federal Statute Requiring Conformity of Procedure in civil causes to the procedure in state courts (Rev. Stat. U. S., § 914), is not applicable to new trials. Provisions of state statutes limiting the discretion of the trial court in regard to new trials are not binding on federal courts. The practice in such cases is determined by the course of the common law. *Hughey v. Sullivan*, 80 Fed. Rep. 72; *Lowry v. Mt. Adams, etc.*, *Incline Plane R. Co.*, 68 Fed. Rep. 827; *U. S. v. Molloy*, 31 Fed. Rep. 19; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Newcomb v. Wood*, 97 U. S. 581; *Fishburn v. Chicago, etc., R. Co.*, 137 U. S. 60; *Chateaugay Ore, etc., Co., Petitioner*, 128 U. S. 554; *Rumford Chemical Works v. Finnie*, 2 Flipp. (U. S.) 459; *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 132 U. S. 191.

A New Trial as a Matter of Right will be granted by federal courts, as such statutes are binding on federal courts as a rule of property, but not as to matters of procedure. *Equator Co. v. Hall*, 106 U. S. 86.

Criminal Law. — The rule in the state courts of *Missouri*, that a new trial will be granted if the record fails to show a formal arraignment and plea (*State v. Vanhook*, 88 Mo. 105; *State v. Jaques*, 68 Mo. 260; *State v. Saunders*, 53 Mo. 234), does not control the federal practice. *U. S. v. Molloy*, 31 Fed. Rep. 19.

3. See *infra*, XXI. *Review of Order Granting or Denying New Trial*.

4. *State v. Prescott*, 7 N. H. 287; *Com. v. Green*, 17 Mass. 515; *People v. Comstock*, 8 Wend. (N. Y.) 549; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *U. S. v. Gibert*, 2 Sumn. (U. S.) 19; *State v. Slack*, 1 Bailey L. (S. Car.) 330; *Rex v. Mawbey*, 6 T. R. 619; *Rex v. Bear*, 2 Salk. 646; *Rex v. Simmons*, 1 Wils. 329; *Rex v. Curril*, Lofft 156; *Rex v. Askew*, 3 M. & S. 9; *Rex v. Gough*, 2 Doug. 791; *Rex v. Tremaine*, 7 D. & R. 684; *Rex v. Smith*, 2 Show. 165.

It is well settled that although the trial courts could grant a new trial only for irregularities in the record, the superior courts might award a new trial in order to fulfil the purposes of substantial justice. *Rex v. Mawbey*, 6 T. R. 638; *Ex p. Morgan*, 2 Chit. Rep. 250, 18 E. C. L. 324.

5. *Rex v. Mawbey*, 6 T. R. 638; *Rex v. Oxford County*, 13 East 416, note b; *Rex v. Fowler*, 4 B. & Ald. 275, 6 E. C. L. 482.

6. *Reg. v. Russell*, 3 El. & Bl. 942, 77 E. C. L. 942, 23 L. J. M. C. 173; *Rex v. Burbon*, 5 M. & S. 392; *Rex v. West Riding*, 2 East 342, note a; *Reg. v. Chorley*, 12 Q. B. 515, 64 E. C. L. 515; *Atty.-Gen. v. Bertrand*, L. R. 1 P. C. 520, *overruling Reg. v. Scaife*, 17 Q. B. 238, 79 E. C. L. 238, 18 Q. B. 773, 83 E. C. L. 773, 2 Dowl. P. C. 553.

The tendency is to refuse a new trial in such cases. *Reg. v. Duncan*, 7 Q. B. Div. 198; *Reg. v. Southampton County*, 19 Q. B. Div. 590.

to recommend a pardon of the felony.¹ Where the errors appeared in the record a new trial could be obtained by the accused on a writ of venire *de novo*.²

2. Modern Law — No Distinction Between Felonies and Misdemeanors. — The doctrine of the common law that one convicted of felony had no right to a new trial is now universally rejected in state and federal courts,³ and no distinction is made between felonies and misdemeanors except that a new trial is more readily granted to one convicted of felony, as the consequences of refusal are greater.⁴

3. On Application of the State. — The general rule is that after an acquittal of a charge of felony or misdemeanor a new trial cannot be granted on application of the state, although the acquittal was due to error of law or mistake of the jury.⁵

4. Effect on Rights of Accused. — See Am. and Eng. Encyc. of Law, title *Jeopardy*.

5. Grounds for New Trial — a. IN GENERAL — A Statutory Right Only. — A new trial may usually be granted in criminal cases for the same grounds as in civil cases;⁶ but the right to a new trial is statutory and is limited to the grounds provided by the statutes and codes of criminal procedure.⁷ Where the grounds are the

1. If the conviction appeared to be improper, the trial judge could only grant a brief stay during which the convict might apply for a pardon. 4 Bl. Com. 375; *Rex v. Oxford County*, 13 East 416, note *b*.

2. *Venire de Novo*. — *People v. M'Kay*, 18 Johns. (N. Y.) 212; *Shepherd v. People*, 25 N. Y. 406; *Com. v. Gibson*, 2 Va. Cas. 70; *State v. Hardie*, 3 Murph. (N. Car.) 232; *Rex v. Fowler*, 4 B. & Ald. 273, 6 E. C. L. 481.

3. *Alabama*. — *State v. Slack*, 6 Ala. 676.

Connecticut. — *Andersen v. State*, 43 Conn. 514.

Georgia. — *State v. Sims, Dudley* (Ga.) 213.

Illinois. — *Lane v. People*, 10 Ill. 308.

Indiana. — *Weinzorphlin v. State*, 7 Blackf. (Ind.) 186.

Massachusetts. — *Com. v. Roby*, 12 Pick. (Mass.) 496; *Com. v. Green*, 17 Mass. 515.

Michigan. — *People v. Marble*, 38 Mich. 309.

New Hampshire. — *Buzzell v. State*, 59 N. H. 61; *State v. Prescott*, 7 N. H. 287.

New York. — *People v. Morrison*, 1 Park. Cr. Rep. (Greene Oyer & T. Ct.) 625; *People v. McMahon*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 663.

North Carolina. — *State v. Merrill*, 2 Dev. L. (N. Car.) 269.

South Carolina. — *State v. Larumbo*, Harp. L. (S. Car.) 183; *State v. Wood*, 1 Mill (S. Car.) 29.

Virginia. — *Grayson v. Com.*, 6 Gratt. (Va.) 712; *Allen v. Com.*, 2 Leigh (Va.) 727; *Ball v. Com.*, 8 Leigh (Va.) 726.

United States. — *U. S. v. Fries*, 3 Dall. (U. S.) 515; *U. S. v. Keen*, 1 McLean (U. S.) 429; *U. S. v. Conner*, 3 McLean (U. S.) 573; *U. S. v. Halberstadt, Gilp*. (U. S.) 262; *U. S. v. Harding*, 1 Wall. Jr. (C. C.) 127; *U. S. v. Macomb*, 5 McLean (U. S.) 286.

The common law was held applicable in some early cases which have been overruled. *People v. Comstock*, 8 Wend. (N. Y.) 549; *Com. v. Green*, 17 Mass. 515.

4. *State v. Tomlinson*, 11 Iowa 401; *State v. Jones*, 12 Mo. App. 93.

5. **New Trial in Action to Recover Penalty.** — In a suit brought to recover a penalty the court has full power to grant a new trial although the verdict was in favor of the defendant, as the action is civil and not criminal. *U. S. v. Halberstadt, Gilp*. (U. S.) 262, citing *Wilson v. Rastall*, 4 T. R. 753; *Calcraft v. Gibbs*, 5 T. R. 19.

6. See *supra*, III. *Grounds for New Trial*.

7. The codes of criminal procedure

same they have been treated in this article in connection with civil cases, reserving some distinctions to be noticed under this subtitle.

b. IRREGULARITY IN PROCEDURE.—A new trial will be granted for such irregularity in the proceedings as allowing the private examination of a witness,¹ or proceeding with the trial when the accused was absent,² or because the record is so incomplete as to prevent a review,³ or because the term of office of the trial judge expired before the case was made up,⁴ or for omission of the court to ask the accused what he had to say why judgment should not be pronounced against him,⁵ or for abuse of discretion in refusing a continuance.⁶ But a new trial will not be granted for trifling irregularities which constitute mere harmless error and have not prevented a fair trial.⁷

c. MISCONDUCT OF JURY OR PREVAILING PARTY.—As to Misconduct of Jury, see article JURY, vol. 12, p. 223.

As to Misconduct of Prevailing Party, see article TRIAL.

As to Misconduct of Prosecuting Attorney, see article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

d. ACCIDENT OR SURPRISE.—The same principles apply as in civil cases in granting new trials for accident or surprise by which a party is prevented, without fault on his part, from having a fair trial.⁸

sometimes provide that new trials shall be granted only on the grounds enumerated therein. *People v. Fair*, 43 Cal. 137; *State v. Davis*, (Idaho 1898) 53 Pac. Rep. 678; *People v. O'Brien*, 88 Cal. 483; *People v. Bernstein*, 18 Cal. 699; *McMahon v. State*, 17 Tex. App. 321; *Roseborough v. State*, 43 Tex. 570; *Childs v. State*, 10 Tex. App. 183.

1. *Simpson v. State*, 31 Ind. 90.

2. See article TRIAL.

3. *Gaiter v. State*, 45 Miss. 441; *Babb v. State*, 8 Tex. App. 173; *State v. Reed*, 67 Mo. 36; *Sara v. State*, 22 Tex. App. 639; *Henderson v. State*, 20 Tex. App. 304; *Johnson v. State*, 16 Tex. App. 372; *Ruston v. State*, 15 Tex. App. 336; *Trammell v. State*, 1 Tex. App. 121.

4. *State v. O'Kelly*, 88 N. Car. 609; *State v. Randall*, 88 N. Car. 611.

5. *Messner v. People*, 45 N. Y. 1.

6. See article CONTINUANCES, vol. 4, p. 822.

Error in Indorsing Names of Witnesses upon an information in disregard of statute may be ground for a new trial. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 460.

7. Harmless Error.—*Walker v. State*, 39 Ark. 221; *People v. Ah Who*, 49 Cal. 32; *People v. Graham*, 21 Cal. 261; *Bacon v. State*, 22 Fla. 52; *Hester*

v. State, 17 Ga. 130; *Thomas v. State*, 27 Ga. 287; *State v. Viers*, 82 Iowa 397; *State v. Huff*, 76 Iowa 200; *State v. Newkirk*, 80 Ind. 131; *Keithler v. State*, 10 Smed. & M. (Miss.) 192; *People v. Draper*, 28 Hun (N. Y.) 1; *Jackson v. State*, 39 Ohio St. 37; *State v. Congdon*, 14 R. I. 458; *State v. Camp*, 23 Vt. 551; *Parham v. State*, 10 Lea (Tenn.) 498.

8. Accident and Surprise.—See *supra*, III. 5. *Accident or Surprise*; and see the following cases:

Arkansas.—*Taffe v. State*, 23 Ark. 34; *McPherson v. State*, 29 Ark. 225; *Shepherd v. State*, 34 Ark. 659; *Anderson v. State*, 41 Ark. 229; *Nickens v. State*, 55 Ark. 567; *Overton v. State*, 57 Ark. 60; *Bixby v. State*, 15 Ark. 395.

Georgia.—*O'Shields v. State*, 55 Ga. 696; *Brown v. State*, 51 Ga. 502; *Long v. State*, 54 Ga. 564; *Young v. State*, 56 Ga. 403; *Ash v. State*, 56 Ga. 583; *Jones v. State*, 48 Ga. 163; *Lynes v. State*, 46 Ga. 208; *Teal v. State*, 22 Ga. 75; *Wise v. State*, 24 Ga. 31; *Carter v. State*, 46 Ga. 637; *Attaway v. State*, 56 Ga. 363; *Giles v. State*, 6 Ga. 276; *Carr v. State*, 14 Ga. 358; *Meeks v. State*, 57 Ga. 329; *Peterson v. State*, 50 Ga. 142.

Indiana.—*Rainey v. State*, 53 Ind. 278; *Hazen v. State*, 58 Ind. 197.

c. VERDICT CONTRARY TO EVIDENCE OR LAW — Weight and Sufficiency of Evidence. — As in civil cases, the trial court may in its discretion grant or refuse a new trial where the verdict is against the weight of conflicting evidence,¹ as well as where the verdict

Iowa. — *State v. Burge*, 7 Iowa 255; *State v. Benton*, 65 Iowa 482; *Trulock v. State*, 1 Iowa 515.

Louisiana. — *State v. Simien*, 36 La. Ann. 923.

Minnesota. — *State v. Bagan*, 41 Minn. 285.

Mississippi. — *Newcomb v. State*, 37 Miss. 383.

Missouri. — *State v. Locke*, 26 Mo. 603; *State v. Wightman*, 27 Mo. 121.

Ohio. — *Loeffner v. State*, 10 Ohio St. 598.

New York. — *People v. O'Brien*, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 203.

Texas. — *Yanez v. State*, 20 Tex. 656; *Robinson v. State*, 15 Tex. 311; *Mayfield v. State*, 44 Tex. 59.

Vermont. — *State v. Williams*, 27 Vt. 724.

Virginia. — *Wholford v. Com.*, 4 Gratt. (Va.) 553.

Surprise in Evidence. — Where the accused was deprived of testimony vital to his defense, owing to the improper form of the indictment, a new trial will be granted. *Com. v. Manson*, 2 Ashm. (Pa.) 31.

A new trial will be granted for surprise at testimony of witnesses for the accused who appear to have been tampered with. *Todd v. State*, 25 Ind. 212.

Where a witness in a prosecution for seduction fixes the date of the offense at a day which the defendant had no reason to anticipate a new trial will be granted for surprise and to permit proof of an alibi. *Sargent v. —*, 5 Cow. (N. Y.) 106.

But ordinarily surprise by the introduction of unexpected evidence is not sufficient ground for a new trial. *Rex v. Hollingberry*, 6 D. & R. 345, 16 E. C. L. 262, 4 B. & C. 329, 10 E. C. L. 346; *State v. Schnelle*, 24 W. Va. 767; *State v. Smith*, 24 W. Va. 814.

Preliminary Evidence. — A defendant cannot complain of surprise occasioned by the introduction of evidence which has been introduced in the preliminary examination. *State v. Hunter*, 18 Wash. 670.

Incompetency of Counsel has been held to be a ground for a new trial in criminal cases, although it is not in civil

cases. *State v. Jones*, 12 Mo. App. 93; *State v. Bengé*, 61 Iowa 658.

Appointment of Counsel. — Appointment by the court of counsel who is not acceptable to the defendant is no ground for a new trial. *People v. Murray*, 52 Mich. 288.

Mistakes of Counsel. — A new trial may be granted for mistake of counsel as to the admissibility of evidence where the accused is surprised and a good defense defeated. *State v. Williams*, 27 Vt. 724; *State v. Gunter*, 30 La. Ann. 536; *Babb v. State*, 8 Tex. App. 173.

Imprisonment Excusing Lack of Preparation. — Surprise due to want of preparation is not a ground for a new trial where the only excuse was that the defendant was in prison. *Yanez v. State*, 20 Tex. 656; *State v. Boyd*, 37 La. Am. 781. But see *contra*, *Rosencrants v. State*, 6 Ind. 407.

Mistake in Testimony by a witness may be a ground for a new trial. *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Reg. v. Whitehouse*, 18 Eng. L. & Eq. 105; *Com. v. Randall*, Thach. Cr. Cas. (Mass.) 500.

Surprise by Absence of Witness. — In a case where the proof of diligence to procure the attendance of an important witness would not have been sufficient in a civil case, it was held to be sufficient in a criminal case. The court said: "Although there should be a strict observance in all applications for new trials, of the rule that due diligence should be shown, and proper effort made to secure the testimony, it is well settled that in criminal cases, especially in capital cases, the courts will not always require the same strictness that is exacted in civil cases on such applications." *U. S. v. Briggs*, 19 D. C. 585.

Public Excitement at Time of Trial. — *Com. v. Flanagan*, 7 W. & S. (Pa.) 415; *Hoover v. State*, 48 Neb. 184.

Pregnancy is not a ground for a new trial of a felony where a death penalty cannot be imposed. *Holeman v. State*, 13 Ark. 105.

1. *People v. Lum Yit*, 83 Cal. 130.

Court May Grant on Its Own Motion. — Where the crime is not established by

is not sustained by sufficient evidence,¹ or where an essential element of the crime is not established.² It is the imperative duty of the judge in criminal cases to weigh the evidence and exercise a salutary supervision of the verdict.³

Construction of Evidence. — The rule in civil cases that the verdict will be sustained if consistent with any reasonable construction

sufficient evidence it is not an abuse of discretion for the trial judge to grant a new trial on his own motion although he has advised the jury to acquit and the jury has returned a verdict of guilty. *People v. Knutte*, 111 Cal. 453.

1. The rule that an appellate court will not set aside a verdict unless it is palpably against the evidence, is not applied by appellate courts on review of criminal cases. A new trial will be granted on appeal if the evidence in a capital case is not such as to convince the court that justice has been done. *Falk v. People*, 42 Ill. 331. See also *People v. Knutte*, 111 Cal. 453.

The Rule that All Material Facts Are Supported by Some Evidence cannot be adopted by the trial judge in criminal cases. "Nor does it affect the question that the evidence in the case may have a legal tendency to prove all the material facts. Guilt is to be established beyond a reasonable doubt; and while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction." *People v. Knutte*, 111 Cal. 453.

A new trial is properly granted by a trial judge when in his opinion the evidence as a whole is not sufficient to sustain the conviction, although the evidence is wholly for the prosecution and there is some evidence of each essential fact. *People v. Knutte*, 111 Cal. 453.

2. Failure to Establish Essential Fact — *Connecticut*. — *State v. Lyon*, 12 Conn. 487.

Illinois. — *Falk v. People*, 42 Ill. 331; *Dunn v. People*, 109 Ill. 635.

Indiana. — *Bruce v. State*, 87 Ind. 450.

Massachusetts. — *Com. v. Briggs*, 5 Pick. (Mass.) 429.

Michigan. — *People v. Parkhurst*, 49 Mich. 22; *People v. Kohler*, 49 Mich. 324; *People v. Howard*, 50 Mich. 241.

Minnesota. — *State v. Hogard*, 12 Minn. 293.

Missouri. — *State v. Bird*, 1 Mo. 585; *State v. Hopper*, 71 Mo. 425.

Nevada. — *State v. Ah Kung*, 17 Nev. 361.

North Carolina. — *State v. Atkinson*, 93 N. Car. 519.

South Carolina. — *State v. Anderson*, 2 Bailey L. (S. Car.) 565; *State v. Hamilton*, 17 S. Car. 462.

Tennessee. — *Bedford v. State*, 5 Humph. (Tenn.) 553.

Texas. — *King v. State*, 4 Tex. App. 256; *Satterwhite v. State*, 6 Tex. App. 609; *Ellis v. State*, 10 Tex. App. 540; *Adams v. State*, 10 Tex. App. 677; *Pogue v. State*, 12 Tex. App. 283; *Walker v. State*, 14 Tex. App. 609.

Virginia. — *Hatchett v. Com.*, 76 Va. 1026.

Wisconsin. — *Ohms v. State*, 49 Wis. 415; *State v. Leppere*, 66 Wis. 355.

A verdict of guilty will be set aside where there is no evidence to connect the accused with the crime. *State v. Johnson*, 45 S. Car. 483; *State v. Payne*, 6 Wash. 574.

Failure to Prove Venue is a ground for a new trial. *Hoover v. State*, 1 W. Va. 336; *Carter v. State*, 48 Ga. 43; *Evans v. State*, 17 Fla. 192; *Walker v. State*, 35 Ark. 386.

3. Judge Must Weigh Evidence. — "It is made his duty to grant a new trial if in his opinion the verdict is against the evidence. This is one of the most important duties which the trial judge has to perform, and, since no efficient review of his action can be had, it is peculiarly incumbent upon the judge to weigh the evidence with care, and grant a new trial when in his opinion the interests of justice require it. In my opinion, there is no more prolific cause of the miscarriage of justice than the reluctance of trial judges to grant new trials in criminal cases." *People v. Chew Wing Gow*, 120 Cal. 298.

Where the evidence fairly tends to prove the guilt of the accused, the trial judge should not set aside a verdict of guilty merely because he may entertain doubts as to the sufficiency of the evidence. *Williams v. State*, 61 Wis. 281.

of the evidence does not apply to criminal cases, where the hypothesis of innocence must prevail.¹

f. NEWLY DISCOVERED EVIDENCE. — The general principles which govern applications for new trial in criminal cases on the ground of newly discovered evidence are the same as in civil cases where this is a ground for a new trial.² The same degree of diligence to discover the new evidence is not required in criminal cases, especially in capital cases.³

g. ERRORS OF LAW OCCURRING AT THE TRIAL — *What Errors Included.* — A new trial may be granted for error of law occurring at

1. Where the circumstances on which a conviction is based can be as reasonably explained upon the hypothesis of the defendant's innocence as upon that of his guilt a new trial should be granted. *State v. Nesbit*, (Idaho 1895) 43 Pac. Rep. 66; *Bell v. State*, 93 Ga. 557.

In a prosecution for murder, where all the incriminating facts established, viewed in the most unfavorable aspect to the prisoner, do not exclude the natural conclusion that some other unknown person may have committed the crime, a verdict of guilty will be set aside. *State v. Goodson*, 107 N. Car. 798.

2. See *supra*, III. 11. *Newly Discovered Evidence.*

California. — Newly discovered evidence is not a ground for a new trial in criminal cases, as it is not one of the grounds enumerated in the Code of Criminal Procedure. *People v. Bernstein*, 18 Cal. 699.

Iowa. — Newly discovered evidence is not a ground for a new trial under the statute providing for new trials in criminal cases. *State v. Bowman*, 45 Iowa 418; *State v. Lee*, 80 Iowa 75; *State v. Watson*, 81 Iowa 380; *State v. Potts*, 83 Iowa 317; *State v. King*, 97 Iowa 440; *State v. Harris*, 97 Iowa 407; *State v. Graff*, 97 Iowa 568; *State v. Cater*, 100 Iowa 501; *State v. Whitmer*, 77 Iowa 558; *State v. Burgor*, 94 Iowa 33; *State v. Dimmitt*, 88 Iowa 551. See also decisions where this question was overlooked and the evidence was held insufficient. *State v. Foley*, 81 Iowa 36; *State v. Foster*, 37 Iowa 404; *State v. Wells*, 48 Iowa 671; *State v. Johnson*, 72 Iowa 393; *State v. Gunagy*, 84 Iowa 177.

But under Code Iowa, § 5424, permitting new trials in criminal cases "when from any other cause the defendant has not received a fair and impartial trial," a new trial may be

granted for newly discovered evidence of perjury at the trial. *State v. Foster*, 91 Iowa 164. See also *State v. Bailor*, 104 Iowa 1.

Texas. — Under Code Crim. Pro. Tex., art. 817 [777], a motion for a new trial for newly discovered evidence "shall be governed by the same rules as those which regulate civil suits," and all the essential elements of such evidence must appear. *Burns v. State*, 12 Tex. App. 269; *White v. State*, 10 Tex. App. 167; *Childs v. State*, 10 Tex. App. 183; *Burton v. State*, 9 Tex. App. 605; *Duval v. State*, 8 Tex. App. 370; *Hutto v. State*, 7 Tex. App. 44; *Williams v. State*, 7 Tex. App. 163; *Brown v. State*, 6 Tex. App. 286; *Darnell v. State*, 6 Tex. App. 482; *Walker v. State*, 6 Tex. App. 576; *Templeton v. State*, 5 Tex. App. 398; *Hutchinson v. State*, 6 Tex. App. 468; *Hasselmeyer v. State*, 6 Tex. App. 21; *Watson v. State*, 5 Tex. App. 11; *Toomey v. State*, 5 Tex. App. 163; *Boothe v. State*, 4 Tex. App. 202; *Harmon v. State*, 3 Tex. App. 51; *Terry v. State*, 3 Tex. App. 236; *Higginbotham v. State*, 3 Tex. App. 447; *Love v. State*, 3 Tex. App. 501; *West v. State*, 2 Tex. App. 209; *Johnson v. State*, 2 Tex. App. 456; *Thompson v. State*, 2 Tex. App. 289; *Gibbs v. State*, 1 Tex. App. 12; *Hauck v. State*, 1 Tex. App. 357; *Henderson v. State*, 1 Tex. App. 432; *Frazier v. State*, 18 Tex. App. 434; *Jackson v. State*, 18 Tex. App. 586; *De Olles v. State*, 20 Tex. App. 145; *Shaw v. State*, 27 Tex. 750; *Lewis v. State*, 15 Tex. App. 647; *Makinson v. State*, 16 Tex. App. 133; *McAdams v. State*, 24 Tex. App. 86; *Grate v. State*, 23 Tex. App. 458.

3. *Anderson v. State*, 43 Conn. 514.

Where the probable effect of the newly discovered evidence is doubtful or impossible to determine, a new trial should be granted. *Dennis v. State*, 103 Ind. 142.

the trial, as noted hereafter, but not for objections to the indictment.¹ Objections that the grand jury was not properly organized,² or that the prosecution is founded upon a void statute,³ cannot be raised by a motion for a new trial. The errors contemplated are those which occur at the trial, and not those which occur prior to or after the trial.⁴

Errors in Sentence and Rulings of Court. — A new trial will be granted for error of law in imposing a sentence for a longer or a shorter period than allowed by law,⁵ or in refusing to require an election of one of two counts in an indictment,⁶ or in refusing to order an officer to serve a process to compel the attendance of a material witness confined in the penitentiary.⁷

Harmless Errors. — As in civil cases, a new trial will not be granted if it is apparent that the error complained of is harmless.⁸

1. *State v. Taylor*, 37 La. Ann. 40; *Price v. State*, 67 Ga. 723; *State v. Duestoe*, 1 Bay (S. Car.) 377.

2. *Potsdamer v. State*, 17 Fla. 895.

3. *State v. Main*, 31 Conn. 572.

4. **The Refusal of a Court to Order a Transcript of the Reporter's Notes** on request of the defendant after trial is not an error of law occurring at the trial, nor is it one of the statutory grounds for a new trial. *Miller v. State*, (Ind. 1898) 49 N. E. Rep. 894.

5. **Sentence Contrary to Statute.** — *Brown v. State*, 47 Ala. 47. See also article SENTENCE.

A defendant found guilty of grand larceny is not entitled to a new trial on the ground that he was sentenced to two years' imprisonment when the minimum term fixed by statute was three years. *Wattingham v. State*, 5 Sneed (Tenn.) 64.

6. **Election of Counts.** — A new trial should be granted where the prosecuting attorney refused to elect on which of two counts of an indictment he would seek a conviction — one count charging a felony and the other a misdemeanor, the verdict being for the misdemeanor only — where the effect of the refusal was to deprive the defendant of his statutory right to testify. *Com. v. Toland*, 11 Phila. (Pa.) 433, 33 Leg. Int. (Pa.) 54.

7. *Roberts v. State*, 72 Ga. 673.

8. **Harmless Error** — *Alabama*. — *State v. Givens*, 5 Ala. 747; *Hill v. State*, 43 Ala. 335.

Arkansas. — *State v. Lawson*, 14 Ark. 114; *Wallace v. State*, 28 Ark. 531.

California. — *People v. Ah Who*, 49 Cal. 32; *People v. Keith*, 50 Cal. 137; *People v. Colmere*, 23 Cal. 631; *People*

v. Donahue, 45 Cal. 321; *People v. Rodundo*, 44 Cal. 538.

Connecticut. — *Lester v. State*, 11 Conn. 415; *State v. Andrews*, 29 Conn. 100.

Georgia. — *Rachels v. State*, 51 Ga. 374; *Hester v. State*, 17 Ga. 130; *Thurmond v. State*, 55 Ga. 600; *Boyd v. State*, 17 Ga. 194; *Bralswell v. State*, 42 Ga. 609; *Wheeler v. State*, 23 Ga. 292; *Thomas v. State*, 27 Ga. 287; *Sarah v. State*, 28 Ga. 576; *Jim v. State*, 15 Ga. 535; *Bird v. State*, 14 Ga. 43; *Beck v. State*, 57 Ga. 351.

Illinois. — *Clark v. People*, 31 Ill. 479.

Indiana. — *Watts v. State*, 33 Ind. 237; *Hall v. State*, 8 Ind. 439.

Iowa. — *State v. Guisenhouse*, 20 Iowa 227.

Kansas. — *State v. Potter*, 15 Kan. 302.

Kentucky. — *Com. v. Gill*, 14 B. Mon. (Ky.) 20; *Champ v. Com.*, 2 Metc. (Ky.) 17.

Louisiana. — *State v. Orsini*, 22 La. Ann. 93.

Maine. — *State v. Pike*, 65 Me. 111; *State v. Kingsbury*, 58 Me. 238.

Massachusetts. — *Com. v. Drew*, 4 Mass. 391; *Com. v. Churchill*, 2 Met. (Mass.) 118.

Michigan. — *People v. Scott*, 6 Mich. 287; *People v. Durfee*, 62 Mich. 487.

Minnesota. — *State v. Herrick*, 12 Minn. 132.

Mississippi. — *Lynes v. State*, 36 Miss. 617; *Garrard v. State*, 50 Miss. 147; *Ogle v. State*, 33 Miss. 383.

Missouri. — *State v. Jennings*, 18 Mo. 435; *State v. Floyd*, 15 Mo. 349.

New Hampshire. — *State v. Pike*, 20 N. H. 344.

Error in Admission or Rejection of Testimony.—A new trial will be granted for error in admitting or rejecting evidence, if proper objection was made at the trial,¹ and the error is prejudicial.²

Error in Instructions.—A new trial will be granted for error of law in instructions.³

New Jersey.—State v. Engle, 21 N. J. L. 347; State v. Fox, 25 N. J. L. 566.

New York.—People v. Vermilyea, 7 Cow. (N. Y.) 369; Myer v. People, 8 Hun (N. Y.) 528.

North Carolina.—State v. McCurry, 63 N. Car. 33; State v. Neville, 6 Jones L. (N. Car.) 423; State v. Frank, 5 Jones L. (N. Car.) 384.

Ohio.—Manson v. State, 24 Ohio St. 590; McHugh v. State, 42 Ohio St. 154.

Texas.—Ballew v. State, 36 Tex. 98; Henderson v. State, 12 Tex. 525; Boon v. State, 42 Tex. 237; Mitchell v. State, 1 Tex. App. 194.

Vermont.—State v. Camp, 23 Vt. 551; State v. Fuller, 39 Vt. 74.

Virginia.—Perkins's Case, 7 Gratt. (Va.) 651.

1. Error in Admitting Incompetent Testimony.—*Arkansas.*—Woodruff v. State, 61 Ark. 157.

California.—People v. Ah Who, 49 Cal. 32; People v. Dailey, 59 Cal. 600; People v. McNutt, 64 Cal. 116.

Florida.—Gallagher v. State, 17 Fla. 370.

Georgia.—Evans v. State, 33 Ga. 4; Halman v. Moses, 39 Ga. 708.

Illinois.—Adams v. People, 109 Ill. 444.

Massachusetts.—Com. v. Green, 17 Mass. 515; Com. v. Edgerly, 10 Allen (Mass.) 184.

Missouri.—State v. Blan, 69 Mo. 317.

New York.—People v. White, 14 Wend. (N. Y.) 111; Carter v. People, 2 Hill (N. Y.) 317; People v. Restell, 3 Hill (N. Y.) 289; People v. Spooner, 1 Den. (N. Y.) 343; People v. McGee, 1 Den. (N. Y.) 21; Stokes v. People, 53 N. Y. 164.

Oklahoma.—Watkins v. U. S., 5 Okla. 729.

Pennsylvania.—Com. v. Parr, 5 W. & S. (Pa.) 345.

Tennessee.—Luttrell v. State, 85 Tenn. 232.

Texas.—Williams v. State, 4 Tex. App. 255; Maines v. State, 23 Tex. App. 568; Montgomery v. State, 23 Tex. App. 650.

See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

Variance between allegations of the indictment and the proof may be sufficient ground for a new trial. State v. Hamilton, 17 S. Car. 462; State v. Herring, 1 Brev. (S. Car.) 159; State v. Windman, Cheves L. (S. Car.) 75; State v. Craige, 89 N. Car. 475.

2. Harmless Error.—A new trial will be refused if the error was harmless.

Dakota.—Territory v. Gay, 2 Dakota 125.

Georgia.—Bird v. State, 14 Ga. 43; Matthis v. State, 33 Ga. 24.

Illinois.—Clark v. People, 31 Ill. 479.

Indiana.—Powers v. State, 87 Ind. 144.

Kansas.—State v. Watson, 30 Kan. 281; Wise v. State, 2 Kan. 419.

Massachusetts.—Com. v. Bosworth, 22 Pick. (Mass.) 397; Com. v. Sumner, 124 Mass. 321.

Minnesota.—State v. Spaulding, 34 Minn. 361.

Mississippi.—Lynes v. State, 36 Miss. 617; Evans v. State, 44 Miss. 762; Garrard v. State, 50 Miss. 147.

Missouri.—State v. Owens, 79 Mo. 619.

Ohio.—Tarbox v. State, 38 Ohio St. 581.

Oregon.—Jackson v. Sharff, 1 Oregon 246.

New Jersey.—Hunter v. State, 40 N. J. L. 495.

New York.—Stephens v. People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 396, 19 N. Y. 549; People v. Fernandez, 35 N. Y. 49.

Pennsylvania.—Com. v. Eberle, 3 S. & R. (Pa.) 14; Com. v. Gallagher, 4 Pa. L. J. 58, 2 Clark (Pa.) 297; Com. v. McGowan, 2 Pars. Eq. Cas. (Pa.) 347.

Texas.—Evens v. State, 13 Tex. App. 225; Boon v. State, 42 Tex. 237.

West Virginia.—State v. Yates, 21 W. Va. 761; State v. Kinney, 26 W. Va. 141.

United States.—U. S. v. Jones, 32 Fed. Rep. 569.

England.—Rex v. Teal, 11 East 307.

³ See article INSTRUCTIONS, vol. 11, p. 47.

4. PRINCIPLES GOVERNING DECISION — Discretion of Trial Courts.

— The right to a new trial in criminal cases is not controlled by accurate and definite rules of law, but rests largely in the discretion of the trial court,¹ which has better opportunities for determining the merits of the application.

Where Substantial Justice Has Not Been Done, the trial court should not hesitate to grant a new trial.² The discretion confided in the trial court is almost the only protection of the accused from the mistakes and prejudice of the jury.³ As the consequences of refusing a new trial are serious and not fully corrected by a reversal, the trial courts have been admonished to be more liberal in granting new trials in criminal cases.⁴

Where There Is a Doubt as to the duty to grant a new trial it should be resolved in favor of the defendant.⁵

Greater Latitude in Criminal Cases. — While the rules relating to procedure and proof of the grounds for a new trial are the same in criminal as in civil cases, yet they are not enforced with the same degree of strictness in criminal cases, and especially in capital cases.⁶

VII. APPLICATION BY MOTION FOR NEW TRIAL — 1. Purposes and Objects of Motion — a. GENERALLY. — The office of a motion for a new trial is twofold: first, to present the errors complained

1. *State v. McCort*, 23 La. Ann. 326; *State v. Breckenridge*, 33 La. Ann. 310; *State v. White*, 35 La. Ann. 96; *State v. Fulford*, 33 La. Ann. 679; *State v. Washington*, 36 La. Ann. 341; *State v. Bird*, 38 La. Ann. 499; *State v. Walker*, 39 La. Ann. 19; *Lindsay v. State*, 46 Neb. 177; *Lamb v. State*, 41 Neb. 356.

2. *Owens v. State*, 35 Tex. 361.

3. "The discretion of the District Court in granting new trials is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries, and we think the District Courts should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts. Under the law, this court, unlike the District Courts, has but limited authority over the verdicts of juries upon the facts." *Mullins v. State*, 37 Tex. 337.

4. "The refusal of a district judge to grant a new trial on a conviction of a felony is not fully corrected by a reversal in this court. Such reversal cannot reverse the confinement for months in a loathsome county jail of a man guiltless of any violation of law. Neither can it compensate for the loss sustained or sufferings endured during

such confinement." *State v. Webb*, 41 Tex. 67.

5. Where the court has denied a continuance, on the motion for a new trial for such error a doubt as to the defendant's right to a new trial should be resolved in his favor. *Miller v. State*, 18 Tex. App. 232.

But a doubt as to diligence to discover the evidence alleged to be newly discovered will be resolved against the defendant. *Bronson v. State*, 2 Tex. App. 46.

6. *Bedford v. State*, 5 Humph. (Tenn.) 552; *Dains v. State*, 2 Humph. (Tenn.) 442; *State v. Jones*, 12 Mo. App. 93; *Anderson v. State*, 43 Conn. 514; *Falk v. People*, 42 Ill. 331; *U. S. v. Briggs*, 19 D. C. 585.

"We are inclined to the opinion that greater latitude should be allowed to the party claiming a new trial in this court in a criminal than in a civil cause; and all the reasoning that could apply in favor of an interference with the verdict in a civil cause would apply with still greater force to criminal trials. The latter are certainly the more important, affecting, as they do, personal liberty, character, and perhaps life. The sole object of interfering with a verdict in any case is the prevention of injustice. As the haz-

of to the trial court for review and correction or to secure a new trial;¹ second, to preserve the same errors in the record, so that the ruling of the trial court in granting or refusing a new trial may be reviewed by the appellate court.² It is a general rule that all errors correctible by motion for a new trial and not so assigned are deemed to have been waived by the applicant for a new trial.³ Unless the motion for a new trial has been presented and considered by the lower court and its ruling preserved, the errors assigned in such motion will not be reviewed by the appellate court.⁴

b. TO OBTAIN REVIEW BY TRIAL COURT. — To secure a review in the trial court of errors committed at the trial, the complaining party must except to the errors and irregularities at the time when the rulings of the court thereon are made,⁵ and must call the attention of the trial court to such rulings by assigning them as errors and as grounds for a new trial, otherwise such errors will be deemed waived.⁶

c. TO OBTAIN REVIEW BY APPELLATE COURT — (1) *Necessity of Motion and Ruling Thereon.* — It is a well-known rule of appellate courts that errors of the trial court occurring during the trial will not be reviewed unless such errors have been called to the attention of the trial court and an opportunity given to correct them.⁷ It is necessary, therefore, to present such error to the trial court by a motion for a new trial and to secure a ruling on the motion.⁸

Decision in Intermediate Court of Appeal from Justice's Court. — In proceed-

ards of pecuniary loss are proportionably of less consequence than the loss of reputation, liberty, or life, so greater scrutiny and greater latitude in granting a new trial should be allowed in the latter than in the former." *State v. Tomlinson*, 11 Iowa 401.

1. *The Lower Court Must Have an Opportunity to Correct Errors* that have occurred during the trial. *Nave v. Nave*, 12 Ind. 1; *Rhorer v. Brockhage*, 15 Mo. App. 16.

"Primarily, the office of a motion for a new trial is to afford the court an opportunity to correct errors in the proceedings before it without subjecting parties to the expense and inconvenience of appeal or petition in error." *Weber v. Kirkendall*, 44 Neb. 766.

2. "It is not the province of such a motion to bring upon the record irregularities that occur in the course of a trial. The facts constituting the error complained of, together with the exceptions to the ruling of the court, should be made to appear by bill of exceptions, and the motion for a new trial

can serve no other purpose than to assign the ruling or action of the court as error." *Werner v. State*, 44 Ark. 122.

3. For waiver of errors not assigned in a motion for a new trial see article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 168.

4. See *infra*, VII. 1. *c. To Obtain Review by Appellate Court.*

5. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 162.

6. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 168.

7. See generally article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

8. *Review of Equity Case — Motion Necessary under Codes.* — A motion for a new trial is necessary to secure a review of the evidence on appeal in an equity case. *Gray v. Disbrow*, 36 Neb. 857; *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Gaughran v. Crosby*, 33 Neb. 33; *Farmers' L. & T. Co. v. Davis*, 42 Neb. 46; *Turner v. Turner*, 17 Ohio St. 449; *Spangler v. Brown*, 26 Ohio St. 389.

ings in error or in decisions relating to appeals from judgments of justices of the peace which do not require a review of questions of fact in the intermediate court, the decisions of the intermediate court may be reviewed without a motion for a new trial.¹ But if a trial was had in the intermediate court its rulings will not be reviewed without a motion for a new trial.²

(2) *Review of Evidence* — *Sufficiency of Evidence* — *To Support Verdict*. — The invariable rule is that the sufficiency of the evidence to sustain a verdict will not be reviewed unless such question has been first presented to the trial court by a motion for a new trial and a ruling obtained on such motion.³

1. *Leach v. Sutphen*, 11 Neb. 527; *Dryfus v. Moline, etc., Co.*, 43 Neb. 233; *Clafin v. American Nat. Bank*, 46 Neb. 884; *Newlove v. Woodward*, 9 Neb. 502; *Lyons v. Osborn*, 45 Kan. 650. See *contra*, *Mockler v. Skellett*, 36 Mo. App. 174; *Lewis v. Moxey*, 9 Mo. App. 597.

2. *Motion Necessary After Trial in Appellate Court*. — *Dahash v. Flanders*, 2 Thomp. & C. (N. Y.) 445; *Carter v. Werner*, 27 How. Pr. (N. Y. Supreme Ct.) 385; *Simmons v. Sherman*, 30 How. Pr. (N. Y. Supreme Ct.) 4; *Tallman v. American Express Co.*, 6 Hun (N. Y.) 377.

New York. — On appeal to the Supreme Court from a judgment of the County Court rendered on appeal from a justice of the peace, exceptions may be reviewed if made part of the record, although not presented to the County Court by a motion for a new trial. *Dixon v. Buck*, 42 Barb. (N. Y.) 70; *Broughton v. Mitchell*, 19 Abb. Pr. (N. Y. Supreme Ct.) 163, 29 How. Pr. (N. Y.) 68; *Bliss v. Schaub*, 48 Barb. (N. Y.) 339; *Monroe v. Monroe*, 27 How. Pr. (N. Y. Supreme Ct.) 208.

Necessity of Motion in County Court. — An appeal will not lie from a judgment entered in a County Court on the report of a referee upon a case and exceptions settled by the referee, when it does not appear that such judgment has not been reviewed by the County Court on motion for a new trial. *Hacker v. Ferrill*, 66 Barb. (N. Y.) 559.

But under Code Civ. Pro. N. Y., § 1002, such judgment cannot be reviewed on a motion for a new trial in the County Court, and an appeal will lie to the general term without such motion. *Kilmer v. O'Brien*, 13 Hun (N. Y.) 224.

Review of Judgment in Action for New Trial. — A motion by plaintiff for a

new trial is not necessary to secure a review of a judgment granting defendant a new trial in proceedings filed after term. *Reinke v. Morse*, (Ky. 1889) 10 S. W. Rep. 468.

3. *Alabama*. — *Alabama G. S. R. Co. v. Powers*, 73 Ala. 244.

Arkansas. — *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350; *State v. Jennings*, 10 Ark. 428; *Ringo v. Field*, 6 Ark. 43; *Carr v. Crain*, 7 Ark. 241; *Lafferty v. Day*, 7 Ark. 258.

California. — *Liening v. Gould*, 13 Cal. 598; *Allen v. Fennon*, 27 Cal. 68; *Reed v. Bernal*, 40 Cal. 628, *overruling* *Treadwell v. Davis*, 34 Cal. 601.

Georgia. — *Wright v. Georgia R., etc., Co.*, 34 Ga. 330; *Fish v. Van Winkle*, 34 Ga. 339; *Ellington v. Coleman*, 34 Ga. 425; *Farris v. State*, 35 Ga. 241; *McRae v. Adams*, 36 Ga. 442; *Crim v. Sellars*, 37 Ga. 324; *Stanford v. Treadwell*, 69 Ga. 725; *Sanders v. State*, 84 Ga. 217; *Ford v. Wilson*, 85 Ga. 109.

Illinois. — *Daniels v. Shields*, 38 Ill. 197; *Reichwald v. Gaylord*, 73 Ill. 503; *Law v. Fletcher*, 84 Ill. 45; *Rock Island v. Riley*, 26 Ill. App. 171; *Mueller v. Grant*, 26 Ill. App. 585; *Wehrheim v. Gilbert*, 158 Ill. 542, *affirming* 55 Ill. App. 378.

Indiana. — *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146; *Galbreath v. Doe*, 8 Blackf. (Ind.) 366; *Swarts v. State*, 9 Ind. 293.

Iowa. — *Brayton v. Boone*, 19 Iowa 506.

Kansas. — *Decker v. House*, 30 Kan. 614; *McNally v. Keplinger*, 37 Kan. 556.

Kentucky. — *Humphreys v. Walton*, 2 Bush (Ky.) 580.

Louisiana. — *Woolsey v. Paulding*, 9 Martin (La.) 285; *Lepretre v. Mioton*, 1 Martin N. S. (La.) 713; *Morgan v. Bickle*, 2 Martin N. S. (La.) 388; *Carter*

To Support Finding or Decision of Court.—Although the cause was tried to the court without a jury, an appellate court will not

v. Cooper, 5 La. 446; *Hughes v. Lee*, 3 Rob. (La.) 429; *Denton v. Murdock*, 5 Rob. (La.) 127; *Hogan v. Nicholson*, 6 Rob. (La.) 362; *Wright v. Ferrin*, 10 La. Ann. 91; *Nixon v. Bozeman*, 11 La. Ann. 750.

Michigan.—*Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163.

Minnesota.—*Byrne v. Minneapolis, etc.*, R. Co., 29 Minn. 200; *Barringer v. Stoltz*, 39 Minn. 63.

Mississippi.—*Gale v. Lancaster*, 44 Miss. 413.

Missouri.—*Montgomery v. Blair*, 2 Mo. 189; *Rhodes v. White*, 11 Mo. 623; *Lyle v. White*, 11 Mo. 624; *Fox v. Young*, 22 Mo. App. 386; *Thompson v. Child*, 6 Mo. 162; *Blakely v. Hannibal, etc.*, R. Co., 79 Mo. 388; *Brun v. Dumay*, 2 Mo. 125; *Million v. Ohnsorg*, 10 Mo. App. 432.

Montana.—*Porter v. Clark*, 6 Mont. 246; *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247; *Broadwater v. Richards*, 4 Mont. 52, 80.

Nebraska.—*Long v. Clapp*, 15 Neb. 417; *Hoke v. Halverstadt*, 22 Neb. 421; *Boldt v. Budwig*, 19 Neb. 739.

Nevada.—*Colquhoun v. Wells*, 21 Nev. 459; *Beck v. Truckee Lodge No. 14*, 18 Nev. 246; *Whitmore v. Shiverick*, 3 Nev. 288.

New Hampshire.—*Rockingham Bank v. Claggett*, 29 N. H. 292.

New York.—*Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 236; *Moorehead v. Holden*, 7 Civ. Pro. Rep. (N. Y. City Ct.) 188; *Maas v. Ellis*, 12 Civ. Pro. Rep. (N. Y. City Ct.) 323, 9 N. Y. St. Rep. 512; *Morange v. Morris*, 12 Abb. Pr. (N. Y. Supreme Ct.) 164; *Morrison v. New York, etc.*, R. Co., 32 Barb. (N. Y.) 568; *Beatty v. Myers*, 4 Hun (N. Y.) 265; *Lobach v. Hotchkiss*, 17 Abb. Pr. (N. Y. Supreme Ct.) 88; *Magee v. Osborn*, 32 N. Y. 669; *Wagner v. Jones*, 7 Daly (N. Y.) 375; *Third Ave. R. Co. v. Ebling*, 100 N. Y. 98; *Peil v. Reinhart*, 127 N. Y. 381; *Passey v. Craighead*, 89 Hun (N. Y.) 76.

Ohio.—*Everett v. Sumner*, 32 Ohio St. 562; *Cincinnati, etc.*, R. Co. v. Kassen, 49 Ohio St. 230; *Westfall v. Dungan*, 14 Ohio St. 276.

Pennsylvania.—*Inman v. Kutz*, 10 Watts (Pa.) 90; *Carpenter v. Allemania F. Ins. Co.*, 156 Pa. St. 37.

South Dakota.—*Pierce v. Manning*, 2 S. Dak. 517; *Hawkins v. Hubbard*, 2

S. Dak. 631; *Evenson v. Webster*, 3 S. Dak. 382; *Jones Lumber, etc.*, Co. v. Faris, 5 S. Dak. 348; *Gade v. Collins*, 8 S. Dak. 322; *Norwegian Plow Co. v. Bellon*, 4 S. Dak. 384; *Barnard, etc.*, Mfg. Co. v. Galloway, 5 S. Dak. 205; *Miller v. Way*, 5 S. Dak. 468; *Baird v. Gleckler*, 7 S. Dak. 284.

Tennessee.—*Wells v. Moseley*, 4 Coldw. (Tenn.) 401.

Texas.—*Foster v. Smith*, 1 Tex. 70; *Reynolds v. Williams*, 1 Tex. 311; *Wright v. Wright*, 6 Tex. 3; *Hart v. Ware*, 8 Tex. 115; *Pyron v. Grinder*, 25 Tex. Supp. 159; *Cain v. Mack*, 33 Tex. 135; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612; *Clarendon Land Invest., etc.*, Co. v. McClelland, (Tex. Civ. App. 1895) 31 S. W. Rep. 1088; *International, etc.*, R. Co. v. Ryan, 82 Tex. 565; *Bugbee Land, etc.*, Co. v. Brents, (Tex. Civ. App. 1895) 31 S. W. Rep. 695; *Sanborn v. Murphy*, 5 Tex. Civ. App. 509; *Ft. Worth, etc.*, R. Co. v. Osborne, (Tex. Civ. App. 1894) 26 S. W. Rep. 274; *Western Union Tel. Co. v. Apple*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1022; *Dockery v. Tyler Car, etc.*, Co., (Tex. Civ. App. 1896) 34 S. W. Rep. 660; *Texas, etc.*, R. Co. v. Bingham, 2 Tex. Civ. App. 278; *International, etc.*, R. Co. v. Douglas, 7 Tex. Civ. App. 554.

Washington.—*Tingley v. Fairhaven Land Co.*, 9 Wash. 34.

Wisconsin.—*Kirch v. Davies*, 55 Wis. 287; *Hayward v. Ormsbee*, 11 Wis. 3; *Reed v. Madison*, 85 Wis. 667; *Plankinton v. Gorman*, 93 Wis. 560.

Wyoming.—*U. S. v. Trabing*, 3 Wyoming 144.

United States.—*Hedden v. Iselin*, 142 U. S. 676.

Ruling on Motion to Direct Verdict.—Where the court has ruled upon the sufficiency of the evidence on a motion that a verdict be directed for the defendant, the sufficiency of the evidence may be reviewed on appeal although there was no motion for a new trial. *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471.

New York.—The sufficiency of the evidence to sustain the verdict cannot be raised on appeal to the general term without a motion for a new trial. *Benedict v. New York, etc.*, R. Co., 8 N. Y. Leg. Obs. 168; *Collins v. Albany, etc.*, R. Co., 5 How. Pr. (N. Y.

determine the sufficiency of the evidence to support a finding or decision of the trial court unless such question has been first decided by the trial court on a motion for a new trial.¹

Supreme Ct.) 435; *Wright v. Hunter*, 46 N. Y. 409.

In the absence of a motion for a new trial and a ruling thereon, only exceptions taken at the trial will be considered on appeal from the judgment. *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Bedell v. Commercial Mut. Ins. Co.*, 3 Bosw. (N. Y.) 147; *Jones v. Sparks*, (Supreme Ct.) 2 N. Y. St. Rep. 139; *Hatch v. Spooner*, 1 N. Y. App. Div. 408; *Marquart v. La Farge*, 5 Duer (N. Y.) 559.

1. *Arizona*. — *Putnam v. Putnam*, (Arizona 1887) 14 Pac. Rep. 356.

Arkansas. — *Camp v. Gullett*, 7 Ark. 524; *Sandefur v. Mattingley*, 16 Ark. 237; *Strayhorn v. Giles*, 22 Ark. 517; *Campbell v. Thruston*, 6 Ark. 441; *Mitchell v. State Bank*, 13 Ark. 358; *Cottrell v. Oliver*, 22 Ark. 546; *Obermier v. Core*, 25 Ark. 562; *Taylor v. Van Meter*, 53 Ark. 204; *Griffith v. McPherrin*, (Ark. 1893) 22 S. W. Rep. 29; *Smith v. Hollis*, 46 Ark. 17. *Contra*, *State v. Jennings*, 10 Ark. 428; *Farrelly v. Cross*, 10 Ark. 404.

California. — *Griswold v. Sharpe*, 2 Cal. 17; *Brown v. Graves*, 2 Cal. 118; *Rhine v. Bogardus*, 13 Cal. 73; *Allen v. Fennon*, 27 Cal. 68; *Gagliardo v. Hoberlin*, 18 Cal. 394; *People v. Banvard*, 27 Cal. 470; *James v. Williams*, 31 Cal. 211; *Rice v. Inskeep*, 34 Cal. 224; *Gay v. Moss*, 34 Cal. 125; *Pio Pico v. Cuyas*, 47 Cal. 174; *Perkins v. Cooper*, (Cal. 1890) 24 Pac. Rep. 377; *Steen v. Hendy*, (Cal. 1894) 38 Pac. Rep. 718; *Thompson v. White*, 76 Cal. 381.

Idaho. — *Toulouse v. Burkett*, 2 Idaho 170.

Indiana. — *Stump v. Fraley*, 7 Ind. 679; *Doe v. Herr*, 3 Ind. 24; *Spencer v. Russell*, 9 Ind. 157; *Gates v. Meredith*, 10 Ind. 275; *Dearborn County v. Tufts*, 10 Ind. 421; *Filson v. Bleeker*, 10 Ind. 544; *Whitinger v. Nelson*, 29 Ind. 441; *Caldwell v. Asbury*, 29 Ind. 451; *Roberts v. Smith*, 34 Ind. 550; *Ritter v. Mendenhall*, 38 Ind. 383; *Banner Cigar Co. v. Kamm*, etc., *Brewing Co.*, 145 Ind. 266; *Gardner v. Case*, 111 Ind. 494; *Little v. Waller*, 14 Ind. 447; *Nelson v. Hart*, 14 Ind. 448.

Iowa. — *Warner v. Pace*, 10 Iowa 391; *Kelso v. Ely*, 11 Iowa 501; *Gillett*

v. Foreman, 11 Iowa 512; *Reynolds v. Miller*, 14 Iowa 97.

Kansas. — *Ortman v. Giles*, 9 Kan. 324.

Missouri. — *Brun v. Dumay*, 2 Mo. 125; *Davis v. Scripps*, 2 Mo. 187; *Polk v. State*, 4 Mo. 544; *Hughes v. Fitzpatrick*, 18 Mo. 254; *Freeland v. Eldridge*, 19 Mo. 325; *Putnam v. Hannibal*, etc., R. Co., 22 Mo. App. 589; *Hobain v. Murphy*, 33 Mo. 43; *Mahan v. School Dist. No. 1*, 29 Mo. App. 269.

Montana. — *Chumasero v. Vial*, 3 Mont. 376; *Largey v. Sedman*, 3 Mont. 472; *Twell v. Twell*, 6 Mont. 19; *Alder Gulch Consol. Min. Co. v. Hayes*, 6 Mont. 31; *Blessing v. Sias*, 7 Mont. 103.

Nebraska. — *Lichty v. Clark*, 10 Neb. 472; *Miller v. Antelope County*, 35 Neb. 237; *Brown v. Ritner*, 41 Neb. 52; *Appleget v. McWhinney*, 41 Neb. 253; *Hansen v. Kinney*, 46 Neb. 207; *Losure v. Miller*, 45 Neb. 465; *Losure v. Thompson*, 45 Neb. 466; *Home F. Ins. Co. v. Murray*, 40 Neb. 597.

Nevada. — *Bassett v. Monte Christo Gold*, etc., Min. Co., 15 Nev. 293; *State v. Sadler*, 21 Nev. 13.

New Mexico. — *Sierra County v. Dona Ana County*, 5 N. Mex. 190.

Ohio. — *Kepner v. Snively*, 19 Ohio 296; *Choteau v. Raitt*, 20 Ohio 132; *Turner v. Turner*, 17 Ohio St. 449; *Spangler v. Brown*, 26 Ohio St. 389; *Werk v. Voss*, 6 Cinc. Wkly. L. Bul. 271.

Oregon. — *Fulton v. Earhart*, 4 Oregon 61.

South Dakota. — *Pierce v. Manning*, 2 S. Dak. 517; *Evenson v. Webster*, 3 S. Dak. 382; *Norwegian Plow Co. v. Bellon*, 4 S. Dak. 384; *Gade v. Collins*, 8 S. Dak. 322.

Texas. — *Texas*, etc., R. Co. v. *Wood*, (Tex. Civ. App. 1893) 24 S. W. Rep. 569. But see *Bell County v. Alexander*, 22 Tex. 350.

Wisconsin. — *Hutchinson v. Eaton*, 9 Wis. 226; *Woodward v. Howard*, 10 Wis. 512; *Davis v. Judd*, 11 Wis. 11; *Jewett v. Whalen*, 11 Wis. 124. But see *North Hudson Mut. Bldg.*, etc., *Assoc. v. Childs*, 82 Wis. 460; *Walsh v. Dart*, 23 Wis. 334.

Wyoming. — *Seibel v. Bath*, 5 Wyoming 409.

Illinois. — Where an action is tried

Taking Case from Jury. — It has been held that a ruling on a demurrer to the evidence is a decision occurring at the trial, and therefore a motion for a new trial is necessary to secure a review.¹ The weight of authority, however, is that such decision is a judgment which may be reviewed without a motion for a new trial,² except as to error in the assessment of damages.³

Agreed Statement of Facts. — Where the case is presented on an agreed statement of facts there is a conflict of authority as to whether the decision of the court may be reviewed on the record proper without a motion for a new trial or a bill of exceptions.⁴

by the court without a jury, exceptions that the findings of the court are not sustained by evidence will be reviewed without a motion for a new trial and an exception to the ruling thereon. *Mahony v. Davis*, 44 Ill. 288; *Hyde Park v. Cornell*, 4 Ill. App. 602; *Sands v. Wacaser*, 149 Ill. 530; *Jones v. Buffum*, 50 Ill. 277; *Brettman v. Braun*, 37 Ill. App. 17. But see *Gilmore v. Ballard*, 2 Ill. 252; *Stringer v. Smith*, 2 Ill. 295; *Barnes v. Barber*, 6 Ill. 401; *Bills v. Stanton*, 69 Ill. 51.

The question whether an order confirming a special assessment is sustained by the evidence, in a case tried by the court, will not be reviewed where there is no exception and no motion for a new trial. *Cochran v. Park Ridge*, 138 Ill. 295.

Minnesota. — The sufficiency of the evidence to sustain the findings of the court may be determined on appeal although there was no motion for a new trial. *St. Paul F. & M. Ins. Co. v. Allis*, 24 Minn. 75; *Jordan v. Humphrey*, 31 Minn. 495.

1. *Norris v. Evans*, 39 Kan. 668; *Lott v. Kansas City, etc., R. Co.*, 42 Kan. 293; *Buck v. Kelley*, 37 Kan. 19.

2. *Norfolk, etc., R. Co. v. Dunnaway*, 93 Va. 29 [*overruling* *Richmond, etc., R. Co. v. Scott*, (Va. 1894) 20 S. E. Rep. 826]; *Fidelity, etc., Co. v. Chambers*, 93 Va. 138.

3. *Strough v. Gear*, 48 Ind. 100; *Proufoot v. Clevenger*, 33 W. Va. 267.

Motion for Nonsuit. — An order granting a nonsuit on the failure to sustain the allegations by sufficient evidence presents a question of law which may be reviewed without a motion for a new trial. *Cravens v. Dewey*, 13 Cal. 40; *Darst v. Rush*, 14 Cal. 81; *William Mercantile Co. v. Fussy*, 13 Mont. 401; *Burns v. Commencement Bay Land, etc., Co.*, 4 Wash. St. 558. See *contra*, *Donahue v. Gallavan*, 43 Cal. 573; *Toulouse v. Pare*, 103 Cal. 251.

Directing Verdict. — Error in refusing to submit the issues to the jury or in directing a verdict may be reviewed without a motion for a new trial. *Plankinton v. Gorman*, 93 Wis. 560; *Jones Lumber, etc., Co. v. Faris*, 6 S. Dak. 112; *Sanford v. Duluth, etc., Elevator Co.*, 2 N. Dak. 6; *Smith v. Gillett*, 50 Ill. 290. See *contra*, *Klotz v. Perteet*, 101 Mo. 213; *Peden v. Mail*, 118 Ind. 556.

4. **Agreed Statement of Facts — Motion Unnecessary.** — Where a case has been tried on agreed statement of facts, no motion for a new trial is necessary, since the facts are agreed upon, and the only questions to be decided are matters of law. The proceeding is like a demurrer to the evidence or a special verdict. *Fisher v. Purdue*, 48 Ind. 323; *State v. Newton County*, 66 Ind. 216; *Lofton v. Moore*, 83 Ind. 112; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Brown v. Mott*, 22 Ohio St. 159. But where the agreed statement of facts is used merely as evidence, a motion for a new trial is necessary. *Slessman v. Crozier*, 80 Ind. 487; *Lofton v. Moore*, 83 Ind. 112; *Zeller v. Crawfordsville*, 90 Ind. 262.

A new trial being a re-examination of an issue of fact in the same court, there is no necessity for a motion for a new trial, since there was no issue of fact in an agreed case. *Gregory v. Gregory*, 102 Cal. 50; *Schnitzler v. Green*, 5 Kan. App. 656; *Noble v. Harter*, 6 Kan. App. 823.

Motion Necessary. — A motion for a new trial is necessary to secure a review although the case was submitted on an agreed statement of facts.

Arkansas. — *Gardner v. Miller*, 21 Ark. 398; *Walker v. Swigart*, 21 Ark. 404; *Baker v. State*, 21 Ark. 405; *Arrington v. Smith*, 22 Ark. 425.

Colorado. — *Clayton v. Smith*, 1 Colo. 95.

Indiana. — *Slessman v. Crozier*, 80

(3) *Errors of Law Occurring at the Trial* — *Necessity of Presenting to Lower Court for Review.* — It may be stated generally that any error of law occurring at the trial must be first presented to the lower court for review by obtaining a ruling on a motion for a new trial, if such error of law is a ground for a new trial. Rulings on demurrers and on motions relating to the pleadings, or relating to proceedings after judgment, do not constitute grounds for a new trial, and will be reviewed without a motion for a new trial.¹

Errors Appearing in the Record. — A motion for a new trial is not necessary to secure the review of errors of law which appear in the record without the aid of a bill of exceptions.²

Error in Evidence and Instructions. — In order to obtain a review of

Ind. 487; *Lofton v. Moore*, 83 Ind. 112; *Zeller v. Crawfordsville*, 90 Ind. 262; *Addleman v. Erwin*, 6 Ind. 494; *Martin v. Martin*, 74 Ind. 207. But see *Manchester v. Dodge*, 57 Ind. 584; *McDonald v. Stader*, 10 Ind. 171.

1. To determine what errors of law are grounds for a new trial, see *supra*, III. 12. *Errors of Law Occurring at the Trial.*

Limiting Number of Witnesses. — An order limiting the number of witnesses must be presented to the trial court by a motion for a new trial, or such order will not be reviewed on appeal. *Burnaus v. Norwood Park*, 138 Ill. 147.

Exclusion of Witnesses. — An order excluding witnesses will not be reviewed unless brought to the attention of the trial court by a motion for a new trial. *Long v. Story*, 13 Mo. 4; *Hill v. Alexander*, 77 Mo. 296.

2. *Arkansas.* — *Union County v. Smith*, 34 Ark. 684; *Steck v. Mahar*, 26 Ark. 536; *Ward v. Carlton*, 26 Ark. 662; *Worthington v. Welch*, 27 Ark. 464; *Hanf v. Ford*, 37 Ark. 544; *Clark v. Hare*, 39 Ark. 258; *Norman v. Fife*, 61 Ark. 33; *Smith v. Hollis*, 46 Ark. 17.

California. — *State Nat. Bank v. Ginty*, 108 Cal. 148.

Iowa. — *Drefahl v. Tuttle*, 42 Iowa 177.

Kansas. — *Stapleton v. Orr*, 43 Kan. 170; *Phelps, etc., Windmill Co. v. Buchanan*, 46 Kan. 314; *Columbia Land, etc., Co. v. Daly*, 46 Kan. 504; *Crawford v. Shaft*, 46 Kan. 704. But see *Waterson v. Devoe*, 18 Kan. 223.

Kentucky. — *Humphreys v. Walton*, 2 Bush (Ky.) 580; *Neff v. Burch*, 15 Ky. L. Rep. 812.

Missouri. — *McIntire v. McIntire*, 80 Mo. 470; *Peltz v. Eichele*, 62 Mo. 171; *Bevin v. Powell*, 83 Mo. 365, 11 Mo. App. 216; *Carr v. Edwards*, 1 Mo. 137;

Hannibal, etc., R. Co. v. Mahoney, 42 Mo. 467; *Ancell v. Cape Girardeau*, 48 Mo. 80; *Funkhouser v. Mallen*, 62 Mo. 555; *Benton v. Lindell*, 10 Mo. 557; *Bagby v. Emberson*, 79 Mo. 139; *Finney v. State*, 9 Mo. 634; *Halsey v. Meinrath*, 54 Mo. App. 335; *Pratt v. Rogers*, 5 Mo. 53; *Matter of Gerstacker*, 57 Mo. App. 71; *Rankin v. Lawton*, 17 Mo. App. 574; *Lewis v. Moxey*, 9 Mo. App. 597.

Nebraska. — *Farris v. State*, 46 Neb. 857.

Tennessee. — *Wells v. Moseley*, 4 Coldw. (Tenn.) 401.

Washington. — *Kennedy v. Derrickson*, 5 Wash. 289.

West Virginia. — *Spence v. Robinson*, 35 W. Va. 313.

Wyoming. — *Seibel v. Bath*, 5 Wyoming 409.

A motion for a new trial is not necessary to secure a review on error of an order refusing to permit a third person to intervene in an action, where such refusal is based upon the pleadings alone without issues joined on trial. *Deere v. Eagle Mfg. Co.*, 49 Neb. 385.

Contra — *Error Appearing in Bill of Exceptions.* — No motion for a new trial is necessary in some states where errors concerning instructions or evidence or errors noted during the trial are made to appear in the bill of exceptions. *Carpentier v. Williamson*, 25 Cal. 154; *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251; *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.) 447; *Mendota v. Fay*, 1 Ill. App. 418; *Mercantile Trust Co. v. Aetna Iron Works*, 4 Ohio Cir. Ct. Rep. 579; *Wells v. Moseley*, 4 Coldw. (Tenn.) 401; *Harvey v. Hill*, 7 Tex. 591. But see *Anderson v. Benjamin*, 27 Ark. 26; *Merriweather v. Erwin*, 27 Ark. 37; *Hunt v. Milligan*, 57 Ind. 141; *De Berry v. Smith*, 2 Okla. 1.

errors in the evidence,¹ in the admission or exclusion of depositions,² or in the giving or refusing of instructions,³ such errors must be first presented to the lower court for review.

Errors in Verdict. — Error in the amount of the verdict, or in the assessment of damages, or in awarding excessive damages will not be corrected where there is no assignment of such error in the motion for a new trial.⁴

1. See *supra*, III. 12. *c. Errors in Evidence.*

2. **Depositions.** — Error in orders admitting or excluding depositions or parts thereof will not be reviewed unless assigned as a cause for new trial. *Booth v. Wood*, 5 Ky. L. Rep. 763; *Louisville, etc., R. Co. v. Rogers*, 10 Ky. L. Rep. 726; *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 569; *Dannhauer v. Hilton*, 82 Ind. 531; *Ohio, etc., R. Co. v. Judy*, 120 Ind. 397; *Morningstar v. Hardwick*, 3 Ind. App. 431.

3. See *supra*, III. 12. *d. Errors in Instructions.*

4. **Arkansas.** — *Crump v. Starke*, 23 Ark. 131; *St. Louis, etc., R. Co. v. Branch*, 45 Ark. 524; *Glasscock v. Rosengrant*, 55 Ark. 376; *Wilson v. State*, 51 Ark. 212.

California. — *Livermore v. Stine*, 43 Cal. 274.

Illinois. — *Jones v. Jones*, 71 Ill. 562; *Ottawa, etc., Valley R. Co. v. McMath*, 1 Ill. App. 429; *Chicago, etc., R. Co. v. Glinny*, 19 Ill. App. 639; *Springfield v. Scheevers*, 21 Ill. App. 203; *Larson v. Johnson*, 42 Ill. App. 198; *Rice v. Heap*, 46 Ill. App. 448; *Peoria, etc., R. Co. v. Booth*, 11 Ill. App. 358; *Dressel v. Lonsdale*, 46 Ill. App. 454; *Leyenberger v. Rebanks*, 55 Ill. App. 441; *Stern v. Tuch*, 55 Ill. App. 445; *Crooks v. Hibbard*, 58 Ill. App. 568; *Stewart v. Butts*, 61 Ill. App. 483; *Emory v. Addis*, 71 Ill. 273; *Rosenberg v. Barrett*, 2 Ill. App. 386; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157; *Vanliew v. Galesburg Second Nat. Bank*, 21 Ill. App. 126; *McCord v. Mechanics' Nat. Bank*, 84 Ill. 49; *Western Union Tel. Co. v. De Golyer*, 27 Ill. App. 489; *Linck v. Scheffel*, 32 Ill. App. 17; *Hansen v. Miller*, 44 Ill. App. 550; *Memory v. Niepert*, 33 Ill. App. 131, 131 Ill. 623. See *contra*, *Metcalf v. Fouts*, 27 Ill. 110.

Indiana. — *Smith v. Elsas*, 17 Ind. 201; *Westcott v. Huff*, 18 Ind. 245; *Dix v. Akers*, 30 Ind. 431; *Walpole v. Carlsle*, 32 Ind. 415; *Indianapolis v. Parker*, 31 Ind. 230; *Floyd v. Maddux*, 68 Ind. 124; *Marks v. Purdue University*,

56 Ind. 288; *Baldwin v. Webster*, 68 Ind. 133; *Lawson v. Hilgenberg*, 77 Ind. 221; *Warner v. Curran*, 75 Ind. 309; *Langohr v. Smith*, 81 Ind. 495; *Chicago, etc., R. Co. v. Linard*, 94 Ind. 319; *Bake v. Smiley*, 84 Ind. 212; *Thompson v. Marion, etc., Gravel Road Co.*, 98 Ind. 449; *Queen Ins. Co. v. Studebaker Bros. Mfg. Co.*, 117 Ind. 416; *Michigan City v. Ballance*, 123 Ind. 334; *Carico v. Moore*, 4 Ind. App. 20; *Ft. Wayne, etc., R. Co. v. Beyerle*, 170 Ind. 100; *Campbell v. Swasey*, 12 Ind. 70; *Hunt v. Milligan*, 57 Ind. 141; *Rout v. Menifee*, 59 Ind. 525; *Mackison v. Clegg*, 95 Ind. 373.

Kansas. — *Anderson v. Connecticut Mut. L. Ins. Co.*, 55 Kan. 81.

Maryland. — *Baltimore Belt R. Co. v. McColgan*, 83 Md. 650.

Minnesota. — *Hennepin County v. Jones*, 18 Minn. 199.

Mississippi. — *Kelly v. Brown*, 32 Miss. 202.

Missouri. — *Alexander v. Relfe*, 74 Mo. 495; *Chicago, etc., R. Co. v. Vivian*, 33 Mo. App. 583; *Witte v. Quinn*, 38 Mo. App. 681; *McNichols v. Nelson*, 45 Mo. App. 446; *Weese v. Brown*, 102 Mo. 299; *Blanton v. Dold*, 109 Mo. 64; *Joyce v. Murnaghan*, 17 Mo. App. 11; *Bridges v. Russell*, 30 Mo. App. 258; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

Nebraska. — *Everett v. Tidball*, 34 Neb. 803; *Volker v. First Nat. Bank*, 26 Neb. 602.

New York. — *Houghton v. Starr*, 4 Wend. (N. Y.) 175; *Bulkeley v. Keteltas*, 4 Sandf. (N. Y.) 450.

Texas. — *Seele v. Neumann*, (Tex. 1886) 1 S. W. Rep. 274.

Virginia. — *Western Union Tel. Co. v. Virginia Paper Co.*, 87 Va. 418.

West Virginia. — *Riddle v. Core*, 21 W. Va. 530.

Wisconsin. — *Lumsden v. Cross*, 10 Wis. 282; *Newton v. Allis*, 16 Wis. 197.

A Verdict Exceeding the Amount Claimed must be corrected by a motion for a new trial. Such objection cannot be raised for the first time in the appellate court. *Houghton v. Starr*, 4 Wend. (N.

2. In What Proceedings — Must Be a Trial of Issue of Fact. — A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings.¹ It must be distinguished from a rehearing by an appellate court of the entire record.²

Relief from Default. — Where a judgment has been rendered without a trial the proper remedy is by motion to vacate the judgment, not by motion for a new trial.³

Trial of Issue of Law — Demurrers — Motion. — Where there has been a trial of an issue of law arising on a demurrer or motion, a motion for a new trial is improper and not necessary to secure a review of the final order.⁴

Trial of Issue of Fact on Motion. — Where an issue of fact is tried on a motion, a motion for a new trial is improper and unnecessary,⁵ as the law contemplates such motion only after an issue of fact has been tried upon the pleadings.⁶

3. To What Court Motion Must Be Made. — The general rule is that the motion for a new trial must be made before the court which tried the case,⁷ but in some states the power to entertain such motions has been conferred upon other courts than that in which the trial took place.⁸ Where two courts have concurrent

Y.) 175; *Fox v. Graves*, 46 Neb. 812; *Flannagan v. Heath*, 31 Neb. 776.

Error in the Computation of Interest can be corrected only by motion for new trial. *Lambeth v. Burney*, 3 Rob. (La.) 251; *Edelin v. Richardson*, 4 La. Ann. 502; *Youmans v. Heartt*, 34 Mich. 397; *Turner v. Johnson*, 95 Mo. 431.

1. A motion for a new trial is not an appropriate remedy where the judgment is rendered by default and there has been no trial upon issues of fact. *Foley v. Foley*, 120 Cal. 33; *Savings, etc., Soc. v. Meeks*, 66 Cal. 371; *Gregory v. Gregory*, 102 Cal. 50; *Matter of Heldt*, 98 Cal. 553.

After Dismissal of Appeal. — Where an appeal from a justice's court was dismissed for want of a duly executed bond, the defendant is not entitled to a new trial, since there was no trial in the appellate court. *Brayton v. Dexter*, 16 R. I. 70.

After Trial in Appellate Court. — But a new trial may be granted after a trial in the District Court on appeal. *State v. Second Judicial Dist.*, 23 Nev. 343.

2. California — New Trial in Supreme Court. — The proper method to obtain a reconsideration of an original proceeding in the Supreme Court is to move for a new trial. *People v. Coon*, 25 Cal. 635; *People v. Holloway*, 41 Cal. 409; *Nevada Bank v. Steinmetz*, 65 Cal. 219.

But under the Constitution of 1879, the only method is by a petition for rehearing. *Matter of Philbrook*, 108 Cal. 14 [*citing Matter of Tyler*, 71 Cal. 353; *Grangers' Bank v. San Francisco*, 101 Cal. 198]. See, in general, article REHEARING.

3. See article DEFAULTS, vol. 6, p. 152; and see also *Corwin v. Thomas*, 83 Ind. 110; *Savings, etc., Society v. Meeks*, 66 Cal. 371; *Adams v. Howard*, 14 Vt. 158.

4. See *supra*, III. 12. *Errors of Law Occurring at the Trial*.

5. See *supra*, III. 12. *Errors of Law Occurring at the Trial*.

6. *Beach v. Spokane Ranch, etc., Co.*, (Mont. 1898) 52 Pac. Rep. 560; *Harper v. Hildreth*, 99 Cal. 265.

7. *Minkler v. Minkler*, 14 Vt. 558; *Blodgett v. Royalton*, 16 Vt. 497; *Adams v. Kellogg*, 1 Root (Conn.) 255.

The Supreme Court cannot entertain a motion for a new trial in the Surrogate's Court. *Howell v. Howell*, 30 Hun (N. Y.) 625.

8. **Rhode Island.** — The Supreme Court of Rhode Island has no power to grant a new trial of a case decided at a special Court of Common Pleas, in which a full trial has been had. *Vaughan v. Allen*, 3 R. I. 122. But such court may grant a new trial where the Court of Common Pleas has erroneously granted a nonsuit, as in such case the applicant has

jurisdiction to entertain motions for a new trial, after a new trial

been deprived of a full and fair trial. *Thurston v. Schroeder*, 6 R. I. 272.

North Dakota.—A new trial for "error in law occurring at the trial" cannot be granted by the District Court, as Rev. Code N. Dak., § 5630, provides for a trial anew in the Supreme Court. *McKenzie v. Bismarck Water Co.*, 6 N. Dak. 361.

New York.—Motions for new trials are generally heard at a special term of court. See Civ. Code N. Y., §§ 999, 1000, 1001, 1002. See also *Lusk v. Lusk*, 4 How. Pr. (N. Y. Supreme Ct.) 418; *Lusk v. Smith*, 8 Barb. (N. Y.) 570; *Graham v. Milliman*, 4 How. Pr. (N. Y. Supreme Ct.) 435; *Ball v. Syracuse*, etc., R. Co., 6 How. Pr. (N. Y. Supreme Ct.) 198; *Droz v. Lakey*, 2 Sandf. (N. Y.) 681; *Leggett v. Mott*, 2 Sandf. (N. Y.) 720; *Clarke v. Ward*, 4 Duer (N. Y.) 206; *Seeley v. Chittenden*, 10 Barb. (N. Y.) 303; *Anderson v. Dickie*, 17 Abb. Pr. (N. Y. Super. Ct.) 83; *Matter of Clark*, 40 Hun (N. Y.) 233; *Giraudat v. Korn*, 8 Daly (N. Y.) 406; *Meyer v. Fiegel*, 38 How. Pr. (N. Y. Super. Ct.) 428; *Hastings v. McKinley*, 3 Code Rep. (N. Y. C. Pl.) 10.

Under Code Civ. Pro. N. Y., § 1001, where a decree rendered by a court or referee directs an interlocutory judgment and directs further proceedings before a final judgment can be entered, a motion for a new trial upon one or more exceptions may be made at general term after such interlocutory judgment and before final judgment. *Cook v. Darrow*, 22 Hun (N. Y.) 306; *Hathaway v. Russell*, 7 Abb. N. Cas. (N. Y. Super. Ct.) 138; *Bennett v. Austin*, 10 Hun (N. Y.) 451; *Moore v. Oviatt*, 35 Hun (N. Y.) 216; *Bolles v. Duff*, 55 Barb. (N. Y.) 580, 38 How. Pr. (N. Y.) 504; *Toms v. Greenwood*, (Buffalo Super. Ct.) 30 N. Y. St. Rep. 478, 9 N. Y. Supp. 666.

Under Code Civ. Pro. N. Y., § 1002, motions for new trials on the ground of newly discovered evidence or surprise must be made at special term, and cannot be made at general term. *Newhall v. Appleton*, 46 N. Y. Super. Ct. 6; *Seeley v. Chittenden*, 10 Barb. (N. Y.) 303; *Clarke v. Ward*, 4 Duer (N. Y.) 206; *Tracey v. Altmyer*, 46 N. Y. 598; *Blydenburg v. Johnson*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 459; *Raphael-sky v. Lynch*, 34 N. Y. Super. Ct. 31, 43 How. Pr. (N. Y.) 157; *Luddington v.*

Miller, 36 N. Y. Super. Ct. 1; *Merse-reau v. Pearsall*, 6 How. Pr. (N. Y. Supreme Ct.) 293; *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231; *Anderson v. Dickie*, 26 How. Pr. (N. Y. Super. Ct.) 199, 17 Abb. Pr. (N. Y.) 83.

When Exceptions Heard at General Term.—Under Code Civ. Pro. N. Y., § 1000, exceptions taken at a jury trial may be heard at any time during term by the trial judge, or he may direct that they be heard at the general term upon a motion for a new trial. *Morrison v. New York*, etc., R. Co., 32 Barb. (N. Y.) 568; *Garner v. Mangam*, 46 N. Y. Super. Ct. 365; *Morris v. Brower*, 4 Sandf. (N. Y.) 701; *Quinlan v. Stratton*, (Supreme Ct.) 28 N. Y. St. Rep. 385, *affirmed* 121 N. Y. 705; *Roosa v. Snyder*, 12 How. Pr. (N. Y. Supreme Ct.) 285; *Webster v. Cole*, 17 Hun (N. Y.) 507; *MacNaughton v. Osgood*, 114 N. Y. 574; *Mason v. Breslin*, 40 How. Pr. (N. Y. Super. Ct.) 436; *Price v. Keyes*, 1 Hun (N. Y.) 177, *reversed* on other grounds in 62 N. Y. 378; *Post v. Hathorn*, 54 N. Y. 147, *overruling* *Beat-tie v. Niagara Sav. Bank*, 41 How. Pr. (N. Y. Supreme Ct.) 137.

No question of fact can be so reviewed, as the general term is limited to exceptions taken at a jury trial. It must be first heard at special term. *Ross v. Harden*, 42 N. Y. Super. Ct. 427; *Dickerson v. Wason*, 48 Barb. (N. Y.) 412; *Morange v. Morris*, 32 Barb. (N. Y.) 650, 20 How. Pr. (N. Y.) 257; *Cronk v. Canfield*, 31 Barb. (N. Y.) 171; *Schwarz v. Family Fund Soc.*, 58 N. Y. Super. Ct. 515; *Hoxie v. Greene*, 37 How. Pr. (N. Y. Supreme Ct.) 97; *Collins v. Albany*, etc., R. Co., 5 How. Pr. (N. Y. Supreme Ct.) 435. See also article CERTIFIED CASES, vol. 3, p. 950 *et seq.*

In the District of Columbia the legal effect of an order that a motion for a new trial be heard at general term in the first instance is equivalent to a refusal of the presiding justice to entertain the motion upon his minutes of the trial, and the case can only be heard at the general term upon a bill of exceptions to be settled by the justice. *Dod-drige v. Gaines*, 1 MacArthur (D. C.) 335.

Federal Courts may follow the practice of state courts as to motions for new trials in actions at law, and when a motion is required to be made at a

is refused in one court the other court will not entertain another application on the same grounds.¹

Courts of General Jurisdiction. — Only courts of general jurisdiction have the inherent power to grant new trials.² Such courts had that power at common law, and statutory provisions relating to new trials should be considered as a limitation upon rather than an extension of such power.³

Courts of Inferior or Limited Jurisdiction have no inherent power to grant new trials, and possess only such powers as have been conferred upon them by statute.⁴

New Trial in Equity of Law Case. — Under extraordinary and unusual circumstances a court of equity may grant a new trial of a law case⁵ where it appears that injustice has been done and no remedy can be obtained at law.⁶ If the application has been refused at

special term by the laws of the state, it may be made at a stated term of a federal court. *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411.

1. *Newby v. Territory*, 1 Oregon 163.

After a trial judge has refused an application for a new trial on the ground of excessive damage, and an appeal has been dismissed by the Supreme Court for want of jurisdiction, another judge of the same trial court has no power to grant a new trial on the same grounds as before. *Steele v. Charlotte, etc., R. Co.*, 14 S. Car. 324.

After Docketing in Another Court. — A District Court has the power to grant a new trial in a case in which it has rendered judgment, although such judgment has been docketed in the Court of Common Pleas. *Baisley v. Universal Drier, etc., Co.*, (N. J. 1898) 39 Atl. Rep. 657.

2. *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Bartling v. Jamison*, 44 Mo. 141; *Arellano v. Chacon*, 1 N. Mex. 269; *Horn v. Queen*, 4 Neb. 108; *Eufaula Home Ins. Co. v. Plant*, 37 Ga. 672; *Holbert v. Montgomery*, 5 Dana (Ky.) 11.

3. *Bartling v. Jamison*, 44 Mo. 141; *Com. v. McElhaney*, 111 Mass. 439; *Com. v. Green*, 17 Mass. 515.

4. *McDaniel v. Coleman*, 14 Ark. 545; *Helmich v. Johnson*, 1 Morr. (Iowa) 89; *Booth v. Stamper*, 6 Ga. 172; *Stewart v. State*, 98 Ga. 202; *People v. Chenango*, 2 Cal. Cas. (N. Y.) 319; *Downing v. Garner*, 1 Mo. 751.

Justices of the Peace have only such power to grant new trials as is conferred by statute. The only remedy in cases not provided for by statute is by appeal. See article JUSTICES OF THE PEACE, vol. 12, p. 664.

Probate Courts. — Although probate courts may vacate their own orders, they have no power to set aside verdicts unless authorized to do so by statute, since such courts are of inferior and limited jurisdiction. *Bartling v. Jamison*, 44 Mo. 141.

In the District of Columbia a motion for a new trial on a bill of exceptions will be heard in the Supreme Court of the District at its general term although the issues have been sent to the Orphans' Court to be tried by a jury. *Coughlan v. Poulson*, 2 MacArthur (D. C.) 208.

Marine Court of New York. — In the absence of statutory permission the Marine Court was held to have no power to grant a new trial, as it was not a court of general jurisdiction. *Williams v. Tradesmen's F. Ins. Co.*, 1 Daly (N. Y.) 437; *People v. Justices*, 18 Wend. (N. Y.) 220. Subsequently this power was conferred by the Act of 1867, c. 784, § 5; *Herzig v. Metzger*, 62 How. Pr. (N. Y. Marine Ct.) 355; *Murphy v. Long*, 1 Hilt. (N. Y.) 309, 4 Abb. Pr. (N. Y.) 476; *Schwab v. Elias*, 2 Civ. Pro. Rep. (N. Y. Marine Ct.) 340.

5. See article BILLS OF REVIEW, vol. 3, p. 569; *Reid v. Defendorf*, 87 Hun (N. Y.) 40.

6. *Faulkner v. Harwood*, 6 Rand. (Va.) 125; *Pleasants v. Clements*, 2 Leigh (Va.) 474; *Dixon v. Graham*, 16 Iowa 310; *Barrow v. Jones*, 1 J. J. Marsh. (Ky.) 470; *Taylor v. Bradshaw*, 6 T. B. Mon. (Ky.) 145; *Glover v. Hedges*, 1 N. J. Eq. 113; *Green v. Robinson*, 5 How. (Miss.) 80; *Harrison v. Harrison*, 1 Litt. (Ky.) 140; *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 487; *Veech v. Pennebaker*, 2 Bibb (Ky.) 326; *Cairo, etc., R. Co. v. Titus*, 32 N. J. Eq. 397.

law, it will not be entertained by a court of equity.¹

4. To What Judge Motion Must Be Made — Trial Judge or Successor. — The general rule is that the motion for a new trial must be decided, if possible, by the judge who tried the case,² because he has heard the evidence and is better qualified to pass upon questions of fact.³

1. *Bush v. Craig*, 4 Bibb (Ky.) 168; *Davis v. Bass*, 4 Ind. 313; *Davis v. Staples*, 45 Mo. 567; *Eyster's Appeal*, 65 Pa. St. 473; *Folsom v. Ballard*, 36 U. S. App. 75, 70 Fed. Rep. 12.

2. *Giraudat v. Korn*, 8 Daly (N. Y.) 406; *Ryle v. Harrington*, 14 How. Pr. (N. Y. Supreme Ct.) 59, 4 Abb. Pr. (N. Y.) 421; *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y. Supreme Ct.) 8; *Reich v. McCrea*, (City Ct.) 26 N. Y. St. Rep. 926, 7 N. Y. Supp. 600.

It is the duty of the judge who tries a case to go through with it and hear a motion for new trial if made; and he cannot refuse to hear such motion, or transfer the case and motion to any one of his colleagues for final disposition. *Voullaire v. Voullaire*, 45 Mo. 602.

Where a motion for a new trial is made before a judge other than the one who presided at the trial, the general term will assume that a direction had been given by the trial judge, allowing the motion to be so made. *Martin v. Platt*, (Supreme Ct.) 40 N. Y. St. Rep. 761.

Under Code Civ. Pro. N. Y., § 1002, a motion for a new trial cannot be heard at a special term held by another judge unless the judge who presided at the trial is dead or his term of office has expired, or he specially directs the motion to be heard before another judge. *Tunstall v. Winton*, 31 Hun (N. Y.) 222.

In Illinois another judge of the same district may entertain a motion for a new trial although he did not preside at the trial of the case. If the applicant for a new trial desires to secure the advantage of rehearing before the judge who tried the case, he should apply for a continuance, otherwise he cannot complain, as in some cases it is the duty of the associate judge to dispose of such motions before the close of the term. *Chicago, etc., R. Co. v. Marseilles*, 107 Ill. 313.

New Trial Before Referee. — Where a new trial is granted in a case tried before referee, and the order directs that the evidence taken on the former trial

shall stand as evidence on the new trial, and no order is made vacating the reference, the new trial must be before the referee. *Owen v. Cawley*, 36 N. Y. 600.

On a motion for new trial in a case tried by referee, the court may hear the motion, or may refer it back to the referee and subsequently review the ruling of the referee as to a new trial, or the court may make its own findings from the evidence taken before the referee, merely treating the findings of the referee as advisory. *Wasatch Min. Co. v. Jennings*, 14 Utah 221.

3. Ruling of Successor on Conflicting Evidence. — Where a motion for new trial is made in a case which has been tried before another judge, on the ground that the evidence is insufficient, it is the duty of the successor to exercise the same discretion in granting the motion as if the cause had been tried before himself. If, in his judgment, the evidence is not sufficient, or the verdict is contrary to the evidence, he may grant a new trial although the evidence is conflicting. The rule of the appellate court that a verdict on conflicting evidence will not be disturbed is not applicable in such case, although it is true that the successor did not have the advantage of hearing the evidence at the trial. *Hughley v. Wabasha*, 69 Minn. 245; *Wilson v. California Cent. R. Co.*, 94 Cal. 166.

Where a case was tried by the court without jury, and findings were returned, on a motion for a new trial before a successor of the trial judge it is the duty of the successor to examine the evidence, even though it is conflicting, and if dissatisfied with the conclusions reached, to grant a new trial. The rule is the same whether the motion is heard by the judge who tried the case or by some other judge whose only knowledge of the facts is obtained from the record. *Jones v. Sanders*, 103 Cal. 678; *Reynolds v. Reynolds*, 44 Minn. 132.

If the new judge is embarrassed by the question of the sufficiency of the evidence which he has not heard, he

Successor or Incoming Judge. — When the trial judge dies or goes out of office the motion for a new trial may be decided by the successor or incoming judge.¹

Change of District — Judge Not Trying Cause. — Where a cause is in effect transferred from one district to another by a change of boundaries, the motion may be heard in the new district before a judge who did not try the cause.²

5. Time When Motion Must Be Made — a. RULE AT COMMON LAW. — At common law the time within which a motion for a new trial was required to be made was fixed by rule of court. In chancery the application was made before the enrollment of the decree.³ In the common-law courts the rule required the motion to be made within the first four days of the next succeeding term after the trial.⁴

should direct a new trial, as the applicant has the same right to have his motion for a new trial heard as he has to defend a suit. *Woodfolk v. Tate*, 25 Mo. 597; *Cocker v. Cocker*, 56 Mo. 180; *Bass v. Swingley*, 42 Kan. 729; *Bremen Bank v. Umrath*, 55 Mo. App. 43; *American Cent. Ins. Co. v. Neff*, 43 Kan. 457.

1. *Watkins v. Paine*, 57 Ga. 50; *Field v. Thornton*, 1 Ga. 306; *Hugins v. Veal*, 98 Ga. 137; *American Cent. Ins. Co. v. Neff*, 43 Kan. 457; *Reynolds v. Reynolds*, 44 Minn. 132; *State v. Perkins*, 139 Mo. 106; *New York L. & F. Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291; *Edwards v. James*, 13 Tex. 52; *Ott v. McHenry*, 2 W. Va. 73.

A motion for new trial is more properly considered by the judge before whom the trial was had; but a judge sitting subsequently at the same term is not precluded from considering such motion. *Malone v. Eastin*, 2 Port. (Ala.) 182.

A subsequent judge may hear and determine a motion to set aside a verdict of a jury and grant a new trial, where such motion was made before a preceding judge and left undetermined; but in doing so he must act upon the evidences upon which the verdict was founded. What that evidence was may be ascertained by the notes of the judge who presided at the trial, by his affidavit, or that of the counsel in the case, by a re-examination of the witnesses, or by any other mode that may be lawful. *Ott v. McHenry*, 2 W. Va. 73.

After Trial by Judge of Another District. — A judge of the District Court, within his own judicial district, may hear and determine a motion for a new

trial in a case wherein the judge of another district presided during the trial, but ceased to preside before the hearing of such motion. *State v. Gaslin*, 32 Neb. 291; *Lauder v. State*, 50 Neb. 140.

Failure to Settle Bill of Exceptions — Missouri. — Where the trial judge dies after having overruled a motion for new trial, and before settling the bill of exceptions, his successor is authorized by statute to settle the bill of exceptions and therefore has no power to grant a new trial for want of a proper bill of exceptions. *State v. Walls*, 113 Mo. 42.

"Formerly an incoming judge's only course when called upon to pass upon a motion for a new trial, filed before his predecessor, but undisposed of, was to grant such motion. *Cocker v. Cocker*, 56 Mo. 180; *Woodfolk v. Tate*, 25 Mo. 597. Since then, however, section 2171, Revised Statutes 1886, has been passed, which enables an incoming judge to sign a bill of exceptions." *State v. Perkins*, 139 Mo. 106.

2. *Manufacturers' Mut. F. Ins. Co. v. Daball*, 79 Mich. 241; *Jeansch v. Lewis*, 1 S. Dak. 609; *Woodfolk v. Tate*, 25 Mo. 597; *Bass v. Swingley*, 42 Kan. 729.

Where a Court Is Abolished and the business transferred to an appellate court, the appellate court has no power to set aside the verdict and grant a new trial in a cause transferred to it after verdict and before judgment. *Cummings v. White Mountains R. Co.*, 43 N. H. 114.

3. *Daniell Ch. Pr.* 1554; *Clapp v. Thaxter*, 7 Gray (Mass.) 384; *Thompson v. Goulding*, 5 Allen (Mass.) 81.

4. 3 Black. Com. 387; *Conklin v. Hinds*, 16 Minn. 457; *Jackson v. Chace*,

Where There Is No Rule of Court, it is for the judge before whom the motion is made to decide in each instance whether or not it is made too late.¹

§ TIME FIXED BY STATUTE. — Statutes in many states² fix the time within which a party may move for a new trial for errors

15 Johns. (N. Y.) 354; *Birt v. Barlow*, 1 Doug. 171; *Rex v. Bell*, 2 Stra. 995; *Graddy v. Hightower*, 1 Ga. 252.

In *Birt v. Barlow*, 1 Doug. 171, the rule of court required the motion to be made within four days of the beginning of the term, including the first day.

In the absence of a rule of court the motion may be filed at any time during the term at which the verdict is found. *Gant v. Shelton*, 3 B. Mon. (Ky.) 420.

Practice at Common Law — Time for New Trial. — In *Heiskell v. Rollins*, 81 Md. 397, the practice at common law is outlined as follows: "At common law it was incumbent on the plaintiff, after verdict, to enter a rule for judgment *nisi causa*, and this rule expired in four days. Within the four days the defendant had the right to move for new trial or arrest of judgment, and unless the motion was made within that time the right was gone." In *Clerk v. Rowland*, 1 Salk. 399, it is said: "So where there is a verdict there must be four days between the verdict and the judgment." "Therefore, after verdict or writ of inquiry, the course is for the plaintiff to give a rule to enable him to enter his judgment *nisi causa*." In the Court of King's Bench, the day on which the verdict was entered was not reckoned one of the four days, and the four days were computed exclusive of the day on which the rule was made. In the Court of Common Pleas, however, the practice was to include the day on which the rule was made. * * * And in *Standfast v. Chamberlaine*, 3 Salk. 215, the judgment was set aside because it had been entered before the expiration of the four days, as required by law."

1. **Motion Within Reasonable Time — Discretion of Court.** — Where the statute fixes no time within which a motion for a new trial must be made, the court may in its discretion grant a new trial although the motion was filed after judgment, it appearing that the delay was caused by an application for supplemental findings and that the motion for a new trial was made at the next

term after such findings were filed. *Conklin v. Hinds*, 16 Minn. 457.

Where no time is fixed by statute or by rule of court, the motion must be made before judgment, if the applicant has a reasonable opportunity to make it at that time, but if not he may make the motion at any reasonable time within the time for taking an appeal. *Kimball v. Palmerlee*, 29 Minn. 302; *Deering v. Johnson*, 33 Minn. 97. This appears to be the rule in *New York* also. See *Baumann v. Moseley*, 63 Hun (N. Y.) 492; *Croner v. Farmers' F. Ins. Co.*, 18 N. Y. App. Div. 263.

Where no time is fixed by the statute giving a new trial as a matter of right, the motion should be denied where it was not made until a writ of possession was applied for, more than one year after judgment and after two terms of court, as such motion was not made within a reasonable time. *Snider v. Rinehart*, 18 Colo. 18.

Extension of Time. — A rule of court permitting an extension of the time for preparing and settling a bill of exceptions carries with it the power to extend the time for granting a new trial. *Evans v. Humphreys*, 9 App. Cas. (D. C.) 392.

After Judgment Entered. — New trials were granted by the common-law courts, in peculiar and extraordinary cases, by the court on its own motion, although a judgment had been entered. *Rex v. Holt*, 5 T. R. 436; *Rex v. Teal*, 11 East 308; *Rex v. Waddington*, 1 East 146.

After Motion in Arrest. — In extraordinary cases a motion may be entertained after a motion in arrest of judgment. *Candler v. Hammond*, 23 Ga. 493; *Graddy v. Hightower*, 1 Ga. 252.

2. **Federal Courts.** — A motion for a new trial may be filed at any time during the term at which the verdict was rendered. Section 987, Rev. Stat. U. S., relates only to the method of staying execution pending a new trial, and does not limit the time for filing the motion. *Felton v. Spiro*, 47 U. S. App. 402, 78 Fed. Rep. 576.

pertaining to the trial, verdict, or decision. Generally it is two,¹

Court of Claims.—By Rev. Stat. U. S., § 1088, the Court of Claims has power to stay the payment of a judgment and grant a new trial "at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim," and may grant a new trial at a subsequent term. *Belknap v. U. S.*, 150 U. S. 588 [citing *U. S. v. Ayres*, 9 Wall. (U. S.) 608; *U. S. v. Crusell*, 12 Wall. (U. S.) 175; *Ex p. Russell*, 13 Wall. (U. S.) 664; *Ex p. U. S.*, 16 Wall. (U. S.) 699; *Young v. U. S.*, 95 U. S. 641].

Michigan.—A rule of the Circuit Court requiring a motion for a new trial to be made in two days does not interfere with the common-law discretion of the court to entertain motions made after that time. *People v. Wayne Circuit Judge*, 20 Mich. 220; *People v. Sackett*, 14 Mich. 243.

Rule 21, Revised Rules of Michigan Circuit Courts, requires that motions for new trials and motions in arrest of judgment, with the reasons on which they are founded, shall be filed and a copy thereof served on the opposite party within five days after the rendition of a verdict or decision of the court, or within such further time as shall be allowed by the court or judge. *Manufacturers' Mut. F. Ins. Co. v. Daball*, 79 Mich. 241; *Fort Wayne, etc., R. Co. v. Donovan*, 110 Mich. 173.

Minnesota.—Under Minn. Stat. 1894, § 5399 a motion upon the minutes of the judge or of the stenographic reporter must be made and heard at the trial term. *Larson v. Ross*, 56 Minn. 74.

Within Time for Appeal.—A motion for a new trial made after the time for appeal has expired is too late and will not be considered. *Kimball v. Palmerlee*, 29 Minn. 302; *Deering v. Johnson*, 33 Minn. 97; *Conklin v. Hinds*, 16 Minn. 457; *Richardson v. Rogers*, 37 Minn. 461.

New York—Interlocutory Judgment.—Under Code Civ. Pro., § 1001, a motion for a new trial on exceptions must be made within ten days after service of a copy of the decision or report and notice of the entry of the interlocutory judgment, and may be made at the general term after the entry of such judgment and before the commencement of the hearing directed therein. *Raynor v. Raynor*, 94 N. Y. 248; *Kel-*

sey v. Sargent, 104 N. Y. 663; *Dorchester v. Dorchester*, 121 N. Y. 156.

The decision of a referee cannot be reviewed by a motion for a new trial under this section. *Cook v. Darrow*, 22 Hun (N. Y.) 306. Where the decision of a referee is interlocutory a motion for a new trial is proper. *Applebee v. Duke*, (Supreme Ct.) 13 N. Y. Supp. 929.

Error of Judge as to Fact or Law.—Under N. Y. Code, § 1002, a motion for a new trial founded on allegations of error in a finding of fact or ruling upon the law, made by the judge upon the trial, must be made and notice given before the expiration of the time within which an appeal can be taken from the judgment. *Forstman v. Schulting*, 38 Hun (N. Y.) 482; *Atkinson v. Truesdell*, 57 N. Y. Super. Ct. 600; *Martin v. Platt*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 382; *Kehrley v. Shafer*, 92 Hun (N. Y.) 196.

A motion for a new trial upon errors and exceptions taken at the trial and upon the ground that there was no evidence to sustain certain findings must be made before the expiration of the time within which an appeal can be taken from the judgment; that is, within thirty days after service upon the attorney of the appellant of a copy of the judgment entered. *Heath v. New York Bldg. Loan Banking Co.*, 91 Hun (N. Y.) 170.

Where a motion for a new trial was filed after the expiration of the time allowed, it should be stricken from the files. *Gomer v. Chaffe*, 5 Colo. 383; *Clark v. Perry*, 17 Colo. 56; *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106; *Eddleman v. McGlathery*, 74 Tex. 280.

1. *Maine.*—Under the 17th Rule of Court, a motion for a new trial must be "filed within two days after verdict, unless the court for good cause, by special order, enlarge the time." Where it does not appear when such motion was filed, and the motion states that it was filed within three days after verdict, such motion will not be considered. *Bartlett v. Lewis*, 58 Me. 350.

Texas—Arizona.—By Rev. Stat. Tex. 1895, art. 1373, "all motions for new trials in arrest of judgment, or to set aside a judgment, shall be made within two days after the rendition of verdict, if the term of court shall con-

three,¹ or four² days after the verdict is returned or the decision is rendered, unless filing within such time is unavoidably prevented.³

c. MOTION DURING TERM. — In some states the statutes require the motion to be made during the term at which the verdict is returned or the decision is rendered,⁴ and if this occurs on the last

tinue so long; if not, then before the end of the term." *Gill v. Rodgers*, 37 Tex. 628; *Gammage v. Alexander*, 14 Tex. 414; *Goss v. McClaren*, 17 Tex. 107; *Aldridge v. Mardoff*, 32 Tex. 204; *Wells v. Melville*, 25 Tex. 337; *Shirley v. Byrnes*, 34 Tex. 625. The motion may be made within two days after the execution of a writ of inquiry. *Edwards v. James*, 13 Tex. 52; *Roseboro v. Thompson*, 1 Tex. App. Civ. Cas., § 19. Rev. Stat. Ariz. 1887, § 836, is identical with the above except for the addition of the words "or judgment" after "verdict."

1. *Arkansas*. — *Nichols v. Shearon*, 49 Ark. 75.

Iowa. — *Boardman v. Beckwith*, 18 Iowa 292; *Clinton Nat. Bank v. Graves*, 48 Iowa 228; *Patterson v. Jack*, 59 Iowa 632; *Byington v. Quincy*, 61 Iowa 480; *Stone v. Hawkeye Ins. Co.*, 68 Iowa 737.

Kansas. — A motion for a new trial not filed within three days, and not accompanied with a showing that the applicant was "unavoidably prevented" from filing the motion in time, will not be considered on appeal. *Odell v. Sargent*, 3 Kan. 80; *Mitchell v. Milhoan*, 11 Kan. 617; *Nesbit v. Hines*, 17 Kan. 316; *Mercer v. Ringer*, 40 Kan. 191; *Bubb v. Cain*, 37 Kan. 692; *McDonald v. Weeks*, 32 Kan. 58; *Osborne v. Hamilton*, 29 Kan. 1; *Dyal v. Topeka*, 35 Kan. 62; *Grayson v. Hinkle*, 29 Kan. 278; *Powers v. McCue*, 48 Kan. 477; *Dudley v. Barney*, 4 Kan. App. 122.

Kentucky. — The motion for a new trial must be made within three days after the verdict or decision, and at the same term, unless unavoidably prevented. *White v. Crutcher*, 1 Bush (Ky.) 472; *Long v. Hughes*, 1 Duv. (Ky.) 387; *Humphreys v. Walton*, 2 Bush (Ky.) 581.

Louisiana. — *McWillie v. Perkins*, 20 La. Ann. 168; *Carraby's Succession*, 23 La. Ann. 110; *State v. Judge*, 32 La. Ann. 207; *State v. Judge*, 35 La. Ann. 873.

Massachusetts. — A motion for a new trial must be filed and notice given to

the adverse party within three days after the verdict and before the adjournment of court, or, in actions tried without a jury, within three days after notice of the decision is given by the clerk. Pub. Stat. 1882, c. 153, §§ 8, 9.

For decisions under former rules of court, see *Gardner v. Gardner*, 68 Mass. 434; *Hannum v. Belchertown*, 19 Pick. (Mass.) 311.

Nebraska. — The motion must be filed within three days after the verdict or decision was rendered, unless unavoidably prevented from making the same in time. *Fox v. Meacham*, 6 Neb. 530; *Fitzgerald v. Brandt*, 36 Neb. 683; *Brown v. Ritner*, 41 Neb. 52; *Davis v. State*, 31 Neb. 240; *McDonald v. McAllister*, 32 Neb. 514; *Aultman v. Leahey*, 24 Neb. 286.

Ohio. — *Marknard v. Doriart*, 21 Ohio St. 637.

Oklahoma. — *Severy v. Chicago, etc., R. Co.*, (Okla. 1897) 50 Pac. Rep. 162; *U. S. v. Choctaw, etc., R. Co.*, 3 Okla. 459.

2. *Florida*. — "Every motion for a new trial shall be made by filing the motion and the reasons therefor in writing in the court, or by placing the motion and the reasons therefor on the motion docket, within four days after the verdict shall have been rendered, and during the same term." Rev. Stat. Fla. 1892, § 1180. See also *William H. T. v. State*, 18 Fla. 883; *Palatka, etc., R. Co. v. State*, 23 Fla. 546.

An entry on the motion docket is equivalent to filing. *Dupuis v. Thompson*, 16 Fla. 69.

3. See *infra*, VII. 5. d. *When Unavoidably Prevented* — *Extraordinary Cases*.

4. *Georgia*. — "All applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had, * * * but * * * may be heard, determined, and returned in vacation." Code Ga. 1895, § 5484; *Spann v. Clark*, 47 Ga. 369. See, to the same effect, *Robbe v. Hewitt*, 54 Ga. 260; *Duggar v. East Tennessee, etc., R. Co.*, 85 Ga.

day of the term, the motion must be filed on the first day of the next term.¹

d. WHEN UNAVOIDABLY PREVENTED — EXTRAORDINARY CASES. — In some states it is provided that in "extraordinary cases" a motion may be filed after the statutory time has elapsed where the applicant has been "unavoidably prevented" from filing his motion in time.² The latter term refers to circumstances

437. See also *Graddy v. Hightower*, 1 Ga. 252; *Spann v. Fox*, Ga. Dec. (pt. i.) 1.

"In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court." *Binkley v. Buchanan*, 55 Ga. 342.

Illinois. — A motion for a new trial shall be made "before final judgment be entered or during the term it is entered." *Starr & Curt. Annot. Stat. Ill.* 1896, c. 110, par. 57; *Campbell v. Conover*, 26 Ill. 64; *Hearson v. Graudine*, 87 Ill. 115; *Hibbard v. Mueller*, 86 Ill. 256; *Combs v. Steele*, 80 Ill. 101; *Windett v. Hamilton*, 52 Ill. 180; *Toledo, etc., R. Co. v. Eastburn*, 79 Ill. 140.

South Carolina. — Under section 286 of the code, a motion for a new trial on the minutes of the judge can only be heard at the same term at which the trial is had. *Molair v. Port Royal, etc., R. Co.*, 31 S. Car. 510.

Wisconsin. — A motion for a new trial, on the minutes, to set aside a verdict because it is contrary to law or contrary to evidence, or for excessive or inadequate damages, must be made and heard at the same term at which the trial was had. *Dunbar v. Hollinshead*, 10 Wis. 505; *Prentiss v. Danaher*, 20 Wis. 311; *Whitney v. Karner*, 44 Wis. 563.

1. Indiana. — "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then on the first day of the next term of such court, whether general, special, or adjourned." *Horner's Annot. Stat. Ind.* 1896, § 561; *Tillson v. Crim*, 22 Ind. 357; *Harvey v. Fink*, 111 Ind. 249; *Myers v. Jarboe*, 56 Ind. 57; *American White Bronze Co. v. Clark*, 123 Ind. 230; *Krutz v. Craig*, 53 Ind. 561; *Secor*

v. Souder, 95 Ind. 95; *Smith v. Little*, 67 Ind. 549; *Jones v. Jones*, 91 Ind. 72; *Higgins v. Kendall*, 73 Ind. 522; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Evansville v. Martin*, 103 Ind. 206. See also *Thwing v. Doye*, 2 Okla. 608, under a similar statute.

The motion may be made at any time during term although the judgment has been entered. *Hinkle v. Margerum*, 50 Ind. 240; *Cox v. Baker*, 113 Ind. 62; *Beals v. Beals*, 20 Ind. 163. But see *contra*, *Smith v. Thornburgh*, 7 Ind. 144; *Willis v. State*, 62 Ind. 391.

Although trial was had at a prior term the motion may be filed at the term when the finding is made. *Kendel v. Judah*, 63 Ind. 291.

The term "decision" in the above statute means finding. *Christy v. Smith*, 80 Ind. 573; *Wilson v. Vance*, 55 Ind. 394.

Motion After Report of Commissioner for Partition. — Where the statute requires the motion for a new trial to be filed "during the term at which the verdict or decision is rendered," such motion must be filed during the term when a decree of partition was rendered, and not after the report of the commissioners was filed. *Jones v. Jones*, 91 Ind. 72.

Failure to File Statement of Grounds. — Where a motion is made in time, but the statement of grounds for the motion is not filed in time, the motion is imperfect and will not be considered. *Secor v. Souder*, 95 Ind. 95.

2. Unavoidably Prevented. — *Roggenkamp v. Dobbs*, 15 Neb. 620; *Fudge v. St. Louis, etc., R. Co.*, 31 Kan. 146; *Hemme v. School Dist. No. 4*, 30 Kan. 377; *Odell v. Sargent*, 3 Kan. 80; *Ward v. Morrison*, 6 Kan. App. 54; *Douglass v. Anthony*, 45 Kan. 439; *Mitchell v. Milhoan*, 11 Kan. 617; *Nesbit v. Hines*, 17 Kan. 316; *Fowler v. Young*, 19 Kan. 150; *Houston v. Kidwell*, 83 Ky. 301; *U. S. v. Choctaw, etc., R. Co.*, 3 Okla. 459; *Kent v. Upton*, 3 Wyoming 43; *McLaughlin v. Upton*, 3 Wyoming 48.

When a motion is filed out of time, it

beyond the control of the moving party, and does not excuse negligence of the applicant or his attorney.¹

c. PREMATURE MOTION. — The motion is premature if filed before the verdict is rendered or before the trial is terminated, and while the records show that no decision has been reached.²

must be supported by a showing that the applicant was unavoidably prevented from filing it in time. *McDonald v. McAllister*, 32 Neb. 514; *Dyal v. Topeka*, 35 Kan. 62; *U. S. v. Choctaw, etc.*, R. Co., 3 Okla. 459.

If a party is unavoidably prevented, the motion may be made after three days, but not after the term. *Ex p. Holmes*, 21 Neb. 324; *Dudley v. Barney*, 4 Kan. App. 122.

1. *Roggencamp v. Dobbs*, 15 Neb. 620.

Court Not in Session. — A party is not unavoidably prevented from filing a motion for a new trial because the court was not in session for a few days after trial, as the motion could be filed during recess. *Pratt v. Kelley*, 24 Kan. 112.

A Party Mailed His Motion for a new trial to the clerk, who did not receive it on the last day for filing the motion, although it was received at the post-office on that day. The clerk called for and received the letter and filed the motion on the next day. It was held that the circumstances did not show that the party was "unavoidably prevented" from filing the motion in time. *Mercer v. Ringer*, 40 Kan. 189.

To What Cases Provision Applies. — The term "unavoidably prevented" applies only to cases in which the party has newly discovered evidence, and to cases where the errors assigned are that the decision is not sustained by the evidence and is contrary to law, and for errors of law occurring at the trial. *Missouri Glass Co. v. Bailey*, 51 Kan. 192.

"Extraordinary Cases" — *Georgia*. — Under Code Ga. 1895, § 5484, "all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had, * * * but * * * may be heard, determined, and returned in vacation." The court may in its discretion grant new trials in extraordinary cases after the term where the applicant has shown due diligence. *Hudgins v. Veal*, 98 Ga. 137; *Hays v. Westbrook*, 96 Ga. 219; *East Tennessee, etc., R. Co. v. Whitlock*, 75 Ga. 77; *Spann v. Clark*,

47 Ga. 369; *Candler v. Hammond*, 23 Ga. 493; *Western, etc., R. Co. v. Johnson*, 59 Ga. 626; *Fambles v. State*, 97 Ga. 625.

The abandonment of the cause by the defendant's attorney because his fees are not paid does not constitute an extraordinary ground, where the motion was delayed two terms after the facts were known. *Cobb v. State*, 78 Ga. 801.

In *East Tennessee, etc., R. Co. v. Whitlock*, 75 Ga. 77, it was said: "The motion for new trial in extraordinary cases, as provided for in sections 3719 and 3721 of the code, was intended in a great degree to take the place of a bill in equity for a new trial. The parties are allowed by this motion to do at law what could only have been done in equity before that time, and hence it must follow that such a motion must contain clearly and specifically all the grounds necessary to have been averred in a bill for new trial."

An "extraordinary case," such as would permit the granting of a second motion for a new trial after the first has been overruled, must be one in which the facts set up were unknown and could not have been discovered by the exercise of reasonable diligence before the hearing of the first motion, and such as would probably produce a different result. *Malone v. Hopkins*, 49 Ga. 221.

Failure to Obtain Services of Attorney. — The failure of a party to apply within a reasonable time for a new trial is not excused by his failure through poverty to obtain the services of an attorney, where he knew all the facts and did not apply to the court to have counsel assigned him. *McGloin v. McGloin*, 70 Tex. 634.

2. When Motion Premature. — Where the court entered a decree of divorce and found that the wife was entitled to a division of the community property, and appointed a referee to take testimony as to the community property, a motion for a new trial filed after notice of such decree and before the referee reported is not premature, as the decree was final as to the issues for

Whether Harmless Error. — A motion filed before the time fixed by the statute is sometimes disregarded because not filed in time.¹ But a more equitable rule is to consider the motion as if filed in time and after the verdict or decision complained of,² as the premature filing is merely a harmless error, without injury to the adverse party.

f. MOTION AFTER JUDGMENT IS ENTERED. — At common law the judgment was not entered and signed until after the time for filing a motion for a new trial had expired, so that if the motion was filed after the judgment was entered it was not in time, and the judgment could not be vacated.³ But at present a different practice prevails in many of the states, as the statutes often permit the motion to be filed at any time during the term,

divorce. *Sharon v. Sharon*, 79 Cal. 101.

Where the statute requires two verdicts in favor of the plaintiff before a divorce can be rendered, a motion by the defendant for a new trial may be filed after the first verdict is rendered. *Gholston v. Gholston*, 31 Ga. 625.

Where findings are requested in a trial without a jury, and the judgment is entered before they are made, such judgment is merely provisional, and a motion for a new trial before the findings are completed is premature. *O'Blinskie v. Kent Circuit Judge*, 34 Mich. 62.

1. Motion After Verdict in Suit in Equity. — Where an issue in an injunction suit has been referred by the court to a jury, the verdict is only advisory, and until a finding is made by the court a motion for a new trial is premature. It is held that "the motion for a new trial is to be made after, and not before, the verdict or finding. The motion has reference to the former trial as a whole. Errors committed upon the trial of questions of fact before a jury in a suit in equity may constitute cause for a new trial, so far as the finding of the court has been affected thereby. Whether the giving of an improper instruction to the jury, or the refusal to give a proper one, would be cause for a new trial in such a case, would perhaps depend on whether the conclusion reached by the jury was adopted by the court." *Pence v. Garrison*, 93 Ind. 345.

Motion Before Findings Are Made. — A motion for a new trial made before the court has made its findings is premature and presents no question for consideration on appeal. *Ikerd v. Beavers*, 106 Ind. 483 [citing *Pence v.*

Garrison, 93 Ind. 345; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515].

2. Premature Motion Sufficient. — A motion for a new trial in a partition suit designated as "exceptions to the report of sale" is not premature because filed before the sale was confirmed, where the errors assigned in the motion are concerning the errors of law occurring at the trial as well as in the conduct of the sale. To the objection that such motion was premature the court said: "A motion for new trial must be made within four days after final judgment, and usually it is not filed until after such judgment is pronounced, but it does not follow that it must be disregarded because filed earlier than the practice requires. It was certainly good and sufficient to preserve errors committed at and prior to the time when it was filed; and hence good to preserve the rulings of the court in giving and refusing instructions." *Goode v. Lewis*, 118 Mo. 357.

3. Spanagel v. Dellinger, 34 Cal. 476; *Jackson v. Chace*, 15 Johns. (N. Y.) 354; *Smith v. Thornburgh*, 7 Ind. 144; *Heiskell v. Rollins*, 81 Md. 397.

In Criminal Cases. — In criminal cases the motion for a new trial must be made before judgment is rendered, although in civil cases it may be made either before or after judgment. *Willis v. State*, 62 Ind. 391.

Premature Entry of Judgment Not a Bar. — The right to a new trial on a motion filed within time is not lost by the premature entry and signing of a judgment before the time had expired for filing such motion. *McWillie v. Perkins*, 20 La. Ann. 168; *Carraby's Succession*, 23 La. Ann. 110; *State v. Judge*, 32 La. Ann. 207; *State v. Judge*

decision is rendered.¹

When Time Commences to Run. — Where the cause has been tried by the court, the time commences to run when the special findings are made and filed, although a judgment or decree is not entered.²

Whether from Date of Entry or End of Term. — Where it is provided by statute that the application for a new trial shall be made within a specified time after judgment,³ the time begins to run from the day on which the judgment was entered, and not from the last day of the term.⁴

Sundays Not Included. — In estimating the statutory days Sundays are not to be included, the clerk's office not being open for filings.⁵

Recess or Pendency of Appeal Not Excluded. — But the time consumed by a recess of court during term,⁶ or the time during the

judgment. *Severy v. Chicago, etc., R. Co.*, (Okla. 1897) 50 Pac. Rep. 162.

1. When Judgment Imperfect or Not Final. — Under Rev. Stat. Wisconsin, § 3092, permitting a new trial in ejectment within one year from the rendition of the judgment, conditioned that all costs be first paid, the time for a motion for a new trial commences to run when the costs have been taxed and inserted in the judgment. *Haseltine v. Simpson*, 61 Wis. 427.

Where written findings by the court were requested, but the judgment was entered before such findings were filed, the judgment is not perfected or final until the findings are filed, and the time for filing a motion for a new trial commences to run when the judgment becomes thus perfected. *O'Blinskie v. Kent Circuit Judge*, 34 Mich. 62.

The time commences to run when a decree is entered setting aside certain conveyances, although the decree also directs an accounting upon a basis fixed therein, as the issues submitted are determined by such decree, and it may be attacked by a motion for a new trial. *Ashton v. Thompson*, 28 Minn. 330.

Objections to Report of Sale in Partition. — The order of distribution in partition is the final order from which an appeal lies, and objections to a report of sale and to rulings of the court at the trial will be considered as a motion for a new trial, where they were filed before the order of distribution. *Goode v. Lewis*, 118 Mo. 357.

2. Christy v. Smith, 80 Ind. 573; *Wilson v. Vance*, 55 Ind. 394.

3. Pugh v. Reat, 107 Ill. 440.

4. Whether Computed from End of Term. — The time within which a mo-

tion for a new trial must be made commences to run from the date of the verdict or judgment, and not from the last day of the term. *Emmons v. Bishop*, 14 Ill. 152.

But in *Vermont* it is held that, under a statute requiring a petition for a new trial to be brought within two years next after the rendition of the original judgment, the time is to be computed from the last day of the term at which the judgment is rendered, and not from the date of the judgment, as under the decisions of this state a judgment is regarded as taking effect from the last day of the term. *Bradish v. State*, 35 Vt. 452.

5. Sundays Not Included. — Clerks' Sav. Bank *v. Thomas*, 2 Mo. App. 367; *National Bank v. Williams*, 46 Mo. 17; *Lewis v. Schwenn*, 15 Mo. App. 342; *Hosli v. Yokel*, 57 Mo. App. 622; *Long v. Hughes*, 1 Duv. (Ky.) 387.

Where a verdict was rendered on Saturday a motion filed on the following Thursday is within the statutory period of four days, as the court will take notice that the intervening Sunday must be excluded. *State v. Harris*, 121 Mo. 445.

In *Cattell v. Dispatch Pub. Co.*, 88 Mo. 356, it was held that "as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for a new trial, or in arrest, the party is entitled to four working days, if the term shall so long continue."

6. Court Not in Session. — The fact that the trial court is not in session does not excuse the failure to file the motion for a new trial within the statutory period, since the motion is to be filed with the clerk of the court, and

pendency of an appeal¹ or writ of error,² is not excluded.

Pendency of Motion for Judgment. — If the verdict is special and contains answers to interrogatories submitted by the court, the time is not extended by a motion for judgment on such verdict.³

Pendency of Motion for Modification of Judgment. — The time is not extended by a motion for a correction or amendment of the findings to conform to the evidence.⁴

not in court. *Beckmann v. Phoenix Ins. Co.*, 49 Mo. App. 604; *State v. McGowan*, 62 Mo. App. 625; *Shewalter v. McGrew*, 60 Mo. App. 288; *Pratt v. Kelley*, 24 Kan. 112; *Maloney v. Missouri Pac. R. Co.*, 122 Mo. 106; *East Tennessee, etc., R. Co. v. Whitlock*, 75 Ga. 77.

The fact that the court is not in session for a few days after the verdict, in the midst of a term, does not excuse the filing of a motion within the statutory period, *i. e.*, "at the term and within three days of the verdict." *Ewaldt v. Farlow*, 62 Iowa 212.

After Adjournment. — A motion for a rehearing filed after adjournment but on the same day is in time, as the practice does not require the motion to be filed in open court, but merely with the clerk. *State v. Stillman*, 31 La. Ann. 162.

1. *Gibson v. Manly*, 15 Ill. 140; *Jacks v. Adair*, 33 Ark. 161.

By taking an appeal the plaintiff admits that the judgment is final and waives his right to apply for a new trial. After affirmance on appeal a new trial cannot be granted in the lower court. *Gray v. Coan*, 48 Iowa 424; *Bond v. Epley*, 48 Iowa 600.

2. *Chautauqua County Bank v. White*, 23 N. Y. 347.

Refusal to Enter Verdict. — Where error is taken from an order refusing to receive and record a verdict and special findings, and said order was reversed, a motion for a new trial may be filed within three days after the mandate is presented to the court. *Kansas City, etc., R. Co. v. Berry*, 55 Kan. 186.

Pendency of Mandamus to Enter Verdict. — Where the trial court erroneously refuses to enter a verdict, and a mandamus is granted to compel such entry, the plaintiff will have the usual time after the entry of the verdict to file a motion for a new trial. *State v. Knight*, 46 Mo. 83.

Trial as of Right — Pendency of Writ of Error. — Where a plaintiff in eject-

ment has a right to a new trial, the time within which the application must be made commences to run on the affirmance or entry of the judgment in the Supreme Court, and not from the rendition of the judgment on the verdict in the lower court. *Boyce v. Judkins*, 79 Mich. 154; *Clark v. Green*, 62 Mich. 355. But see *contra*, *Chautauqua County Bank v. White*, 23 N. Y. 347.

The opposite view is taken in *Illinois* under a similar statute giving a party in ejectment a new trial upon motion within one year. "The statute," it was said, "has made no provision for excluding from the computation the time during which the case was pending in this court for review, and if the statute does not exclude it, the court has no power to do so, notwithstanding an appeal may be taken or writ of error prosecuted; the statute still gives the Circuit Court the power to vacate the judgment within the year." *Gibson v. Manly*, 15 Ill. 140.

3. **Pendency of Motion for Judgment.** — The pendency of a motion for judgment on special findings or on special verdicts or answers to special interrogatories does not extend the time for filing a motion for a new trial, as such motion may be filed after the motion for a new trial. *Jacquay v. Hartzell*, 1 Ind. App. 500; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Osborne v. Hamilton*, 29 Kan. 1.

4. **Motion to Modify Findings.** — Under the *California* Code Civ. Pro., § 659, requiring a motion for a new trial to be made within ten days after the filing of the findings of the court, the time is not extended by a motion to modify or amend the findings, since such practice would permit a party to extend the time at his own volition. *California Imp. Co. v. Baroteau*, 116 Cal. 136.

The time for filing a motion for a new trial is not extended by a motion to modify the findings, as a ruling on the latter would not present a ground for a new trial. If the findings are not supported by the evidence, or are con-

j. **EXTENSION OF TIME** — **Whether Statutes Mandatory or Imperative.** — The courts have not agreed as to the power to consider motions filed after the time fixed by the statute. In many states the statutes are held to be mandatory, and to prevent an extension of time unless by agreement of the parties.¹ In other states the statutes are construed to be merely directory, leaving it to the discretion of the court to consider applications not made in time where their consideration would be in furtherance of justice.²

trary to the evidence, the proper remedy is by motion for a new trial. *Radabaugh v. Silvers*, 135 Ind. 605.

Pendency of Motion for Judgment on Findings. — The fact that the defendant filed a motion for judgment on the special findings, and immediately after this motion was overruled filed his motion for a new trial, does not excuse his failure to file the latter motion within the statutory time. *Osborne v. Hamilton*, 29 Kan. 1.

Order Staying Judgment. — An order staying judgment pending an application to set aside findings does not extend the time within which the motion for a new trial must be made. *California Imp. Co. v. Baroteau*, 116 Cal. 136.

Findings Filed in Vacation. — Where the judge files his findings in vacation, they become effective as findings or as a decision at the next succeeding term, and a motion for a new trial filed on the second day of such term is in time. *Bush v. Barkman*, 15 Ind. App. 407.

Motion for a New Trial After Judgment upon Confirmation of Report of Referee. — The usual practice is for the defeated party to move for a new trial at the same time that a motion is made for a confirmation of the referee's report, in order that all questions may be determined at the same time on a case and exceptions. If necessary, the hearing of a motion for a new trial will be suspended to enable a case and exceptions to be prepared. But the motion for a new trial may, however, be made after judgment has been entered, at any reasonable time, to determine from the circumstances of the case. *Baumann v. Moseley*, 63 Hun (N. Y.) 492, following *Eighmie v. Strong*, 49 Hun (N. Y.) 18.

Under the code definition of a new trial as a "re-examination, in the same court, of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court," the time for filing a motion for a new trial commences to run when the decision of the

court is rendered on the report of the referee and exceptions thereto. *Blevins v. Morledge*, 5 Okla. 141.

1. *California.* — *Bunell v. Stockton*, 83 Cal. 319.

Florida. — *Palatka, etc., R. Co. v. State*, 23 Fla. 546.

Indiana. — *McNiel v. Farneman*, 37 Ind. 203; *Krutz v. Craig*, 53 Ind. 561; *Wilson v. Vance*, 55 Ind. 394; *Cut-singer v. Nebeker*, 58 Ind. 405.

Michigan. — *Frazer v. Chapin*, Judge, 112 Mich. 469.

Missouri. — *Saxton Nat. Bank v. Bennett*, 138 Mo. 494; *Richmond v. Wardlaw*, 36 Mo. 313.

Nebraska. — *McDonald v. McAllister*, 32 Neb. 514; *Fitzgerald v. Brandt*, 36 Neb. 683; *Fox v. Meacham*, 6 Neb. 530; *Brown v. Ritner*, 41 Neb. 52.

Nevada. — *Killip v. Empire Mill Co.*, 2 Nev. 34.

Texas. — *Gill v. Rodgers*, 37 Tex. 628; *Maloy v. State*, 33 Tex. 599.

Wyoming. — *Kent v. Upton*, 3 Wyoming 43.

"When a Trial Is Pending at the Close of the Term, the court may progress with it until it is concluded, and the additional time thus required will be held to be within the legal term." *Krutz v. Craig*, 53 Ind. 571.

Motion for Leave to File Out of Time. — A motion for leave to file a motion for a new trial is an anomalous motion, not known to the law, and should be overruled. Such motion cannot extend the time within which a motion for a new trial can be filed. *Odell v. Sargent*, 3 Kan. 80; *Roggencamp v. Dobbs*, 15 Neb. 620; *McLaughlin v. Upton*, 3 Wyoming 48; *Kent v. Upton*, 3 Wyoming 43.

2. The statute fixing the time when motions for new trials must be made and decided is merely directory, and not mandatory. *Gomer v. Chaffe*, 5 Colo. 383 (but see *contra*, *Clark v. Perry*, 17 Colo. 56); *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411; *Williams v. Circuit Ct.*, 5 Mo. 248;

The latter construction seems to be more in conformity with the common-law practice.¹

Statutory Power to Extend Time. — The power to extend the time is sometimes conferred by express provisions of the statute.²

Extension by Agreement of Parties. — Although the statutes are construed to be mandatory and imperative, so that the court is powerless to grant an extension against the objection of the adverse party, the parties may stipulate for further time in which to move for a new trial.³ Such stipulation must be in writing⁴ and entered into before the statutory time has expired, but it may be filed and notice may be given after such time.⁵ The motion will not be considered if such stipulation is not complied with, as time is of the essence of such agreement.⁶

Johnson v. Jackson, 60 Ga. 57; *De Pauw v. Kaiser*, 77 Ga. 176; *Linn v. Le Compte*, 47 Tex. 440; *Burton v. Todd*, 68 Cal. 485; *overruling Brichman v. Ross*, 67 Cal. 601.

Although a rule of practice requires a motion to be filed within four days the court may in its discretion extend the time to any day during the term and allow the motion *nunc pro tunc*. *Lance v. Bonnell*, 105 Pa. St. 46.

1. **For Discretion of Courts at Common Law**, see *supra*, VII. 5. *a. Rule at Common Law*.

2. **Statutes Permitting Time to Be Extended.** — Section 1054 of the *California Code Civ. Pro.*, permitting the court to extend the time for filing pleadings, giving notice, etc., applies to notice of intention to move for a new trial. *Simpson v. Budd*, 91 Cal. 488; *Burton v. Todd*, 68 Cal. 485; *Harper v. Minor*, 27 Cal. 113. But if the time to give the notice has expired, the right to an extension is lost and cannot be restored by the court. *Thompson v. Lynch*, 43 Cal. 482; *Clark v. Crane*, 57 Cal. 629; *Burton v. Todd*, 68 Cal. 485.

Under *Washington Laws of 1893*, c. 127, § 24, empowering the court to extend the time within which by statute an act is required to be done, or to "permit the same to be done or supplied after the time therefor has expired," the court may hear and consider a motion not filed in time. *Bailey v. Drake*, 12 Wash. 99.

3. **Time May Be Extended by Agreement of Parties.** — *Simpson v. Budd*, 91 Cal. 488; *Eckel v. Walker*, 48 Iowa 225; *Wilson v. Vance*, 55 Ind. 394; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571; *Sweeney v. Great Falls, etc., R. Co.*, 11 Mont. 34, 523; *Beems v. Chicago, etc., R. Co.*, 58 Iowa 150.

In *Simpson v. Budd*, 91 Cal. 488, the court said: "It is undoubtedly true * * * that the right to move for a new trial is statutory, and unless the prescribed steps are taken within the time allowed, the right does not exist as against a party who stands upon the statute and insists upon strict compliance with every provision of the law relating thereto and intended for his benefit; but it has never been held that such provisions may not be waived by the party otherwise entitled to claim their benefit."

4. *American White Bronze Co. v. Clark*, 123 Ind. 230; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

5. *Simpson v. Budd*, 91 Cal. 488, in which case a stipulation extending the statutory time of giving notice of intention to move for a new trial, made without order or permission of court, was held to have been filed in time where it was filed before submission of the motion for new trial, though not within the statutory period.

6. *Beems v. Chicago, etc., R. Co.*, 58 Iowa 150.

Where a party failed to make and file a brief of the evidence and a motion for a new trial within the stipulated time the court held that "time was of the essence of the agreement, and that, without providential cause or some overpowering necessity, the defendant could not substitute a different time for that fixed by the consent order." *Western, etc., R. Co. v. Johnson*, 59 Ga. 626.

Order of Extension — When Entered. — Section 218 of the *Colorado Civil Code*, requiring that the motion for a new trial, together with the reasons therefor and affidavits in support thereof, shall be filed within five days after the

k. WAIVER OF OBJECTION TO TIME OF MAKING MOTION — Extension by Waiver. — Where the adverse party fails to object at the hearing of a motion for a new trial that the motion or other proceeding was not taken in time, such party waives his rights and the motion will be considered as if filed in time.¹

6. Parties to Motion. — **Persons Not Parties to the Suit** are not entitled to make an application for a new trial, although their rights may be affected by the order or judgment.² Such persons should, by

verdict is rendered, but in any event before the adjournment of the term, is peremptory, although the court may extend the time. "If the motion be not filed within five days after verdict, or in any event before adjournment of the term, it cannot be heard, unless prior to such adjournment an extension of time has been obtained." *Clark v. Perry*, 17 Colo. 56, *followed in* *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, and *Mason v. Sieglitz*, 22 Colo. 320.

1. Waiver by Failure to Object. — Where leave is granted to file additional causes for a new trial, and no objection is entered to such order, the adverse party waives the right to insist that such filing was not in time. *Northcutt v. Buckles*, 60 Ind. 577.

Error in filing the motion after the regular term and before the adjourned term is cured by a consent order continuing the hearing to the next term. *Duggar v. East Tennessee, etc., R. Co.*, 85 Ga. 437.

Where the adverse party admits "due and timely service" of notice of the motion for a new trial, the objection that the motion was not filed in time is thereby waived. *Byrnes v. Palmer*, 18 N. Y. App. Div. 1.

Where the court has no power to extend the time, but enters an order to that effect without objection or exception, such order will be treated as entered by consent. *Wilson v. Vance*, 55 Ind. 394; *Trentman v. Swartzell*, 85 Ind. 443.

Motion Withdrawn — Right of Adverse Party at Subsequent Term. — Where a motion for a new trial was filed during the term as required by the statute, was continued by the applicant until the next term, and was then withdrawn by him, it was held that when such motion was withdrawn the adverse party had a right to move for a new trial although it was after the trial term. The case having been continued for the benefit of the applicant, it

remained open for either party to obtain a new trial. *Constantine v. Foster*, 57 Ill. 36.

Objection After New Trial Is Granted. — Where a motion for a new trial has been submitted and sustained it is too late to raise the objection that such motion was not filed in time. *Geiss v. Franklin Ins. Co.*, 123 Ind. 172. The objection should be made at the time when the motion is heard. *Radabaugh v. Silvers*, 135 Ind. 605; *Harvey v. Fink*, 111 Ind. 249.

2. Central R., etc., Co. v. Craig, 59 Ga. 185; *Rogers v. Hoenig*, 46 Wis. 361; *Aveline's Estate*, 53 Cal. 259; *Sacia v. O'Connor*, 58 How. Pr. (N. Y. Ct. App.) 420; *Coleman v. Case*, 66 Iowa 534.

Husband and Wife. — Where a husband is not a party to a suit against his wife, he has no standing to make a motion for a new trial. *Marion v. Regenstein*, 98 Ala. 475.

Principal and Agent. — In *Rogers v. Hoenig*, 46 Wis. 361, a principal who was insolvent, and who had not indemnified his agent, the defendant, against the expense of further litigation, nor ever applied to be made a defendant in the suit, obtained an order for a new trial in the defendant's name but against his will. It was held that the order was improperly granted.

Motion by Attorney's Clerk as Agent. — A demand for a new trial as of right in an ejectment case is sufficient where the plaintiff's name and the names of his attorneys are subscribed by the clerk of the attorneys by direction of the plaintiff, as the statute permits the party himself to make such demand. *West v. St. Paul, etc., R. Co.*, 40 Minn. 189.

Motion by Garnishee. — A garnishee in attachment has no right to move for a new trial on alleged errors committed by the court in trying the attachment case as between the plaintiff and the defendant therein. *Exchange Bank v. Freeman*, 89 Ga. 771.

appropriate proceedings, be made parties to the suit,¹ or obtain relief by independent action or suit to annul or avoid such judgment.²

Motion by Both Parties. — It frequently occurs that both parties to the suit are dissatisfied with the verdict or finding, and both file their motions for a new trial. In such case the court is not bound to grant a new trial.³ But if a new trial is granted as to all issues, neither party can complain.⁴

Revivor — Motion by Legal Representative. — The motion may be made by the representative of a deceased party.⁵ And if a party dies after filing a motion for a new trial, the motion may be prosecuted by his representative.⁶ This rule applies in actions which do not survive, if the motion is made by the representative of a party who has died since judgment.⁷

7. Joint and Separate Motions — Joint Motion. — Motions for a new trial may be made jointly by all the parties plaintiff or defendant. But such practice should be avoided in all cases except where it is clear that the grounds for the motion will be sustained as to all parties joining in the motion.⁸ It is the rule in some states that

Where the garnishee refuses to move for a new trial the debtor who is not a party to the suit is not entitled to make such motion. *Foster v. Haynes*, 88 Ga. 240.

Motion by Surviving Partner. — Where one partner dies after verdict and pending a motion for a new trial, the surviving partner may prosecute the motion in the interest of the late firm. *State v. Stratton*, 110 Mo. 426.

1. When a person not a party to a suit is interested in the subject-matter, or will be affected by the proceedings, he must make himself a party in some way by petition or by supplemental bill for the investigation and protection of his rights. He must procure a status in court by petition or bill, as the nature of the case may require, and then he may proceed as his interests and the practice of the court may allow. *Ward v. Clark*, 6 Wis. 509.

2. *Ward v. Clark*, 6 Wis. 509; *Hauer's Appeal*, 5 W. & S. (Pa.) 473.

3. See *infra*, XV. 3. *Refusal Where Both Parties Consent.*

4. **Motion by Both Parties.** — Where both parties move for a new trial, assigning different causes in their separate motions, neither can appeal from an order granting a new trial, as such order is granted at request of both. *Clallam County v. Clump*, 15 Wash. 593.

5. *State v. Stratton*, 110 Mo. 426.

6. *Turner v. Booker*, 2 Dana (Ky.) 334.

In *Gates v. Treat*, 25 Conn. 71, the court, in sustaining the right to a new trial, said: "According to the rules of practice which prevail in the Superior Court, that is the only mode in which he can revise the proceedings on the trial of the case. To refuse to allow him to prosecute this motion would, therefore, be to establish the principle that the creditors and heirs of a deceased person, and those otherwise interested in his estate, would be remediless against any errors which may have intervened on the trial; a doctrine which would be palpably most unjust, and opposed to the principles of the common law, by which, in all personal actions, an erroneous judgment may be reversed by the representative of either party who is prejudiced by it."

7. *Turner v. Booker*, 2 Dana (Ky.) 334.

Judgment Nunc pro Tunc After Death of Party. — Where the plaintiff dies pending a motion for a new trial, and such motion is subsequently overruled, the judgment may be entered *nunc pro tunc* as of the time when the trial terminated. *Fitzgerald v. Stewart*, 53 Pa. St. 347.

8. **Effect of Motion by "Attorney for Defendants."** — Where both defendants are represented by one attorney and

a joint motion must be overruled if it appears that the findings or verdict are justified as to any one of the parties joining in the motion.¹

Rule that Separate Motions Are Necessary. — It is held that where parties are sued jointly and there is a verdict against them, if either party desires to raise a question peculiar to himself in the motion for a new trial he should file a separate motion.² Such a rule has proved to be harsh, and has often deprived some of the parties

have preserved exceptions to the instructions, they are both entitled to a new trial on a motion signed by the attorney or attorneys for "defendants," although the motion was entitled in behalf of only one defendant. *Tillett v. Lynchburg, etc., R. Companies*, 116 N. Car. 937.

1. *Indiana*. — *Feeney v. Mazelin*, 87 Ind. 226; *Boyd v. Anderson*, 102 Ind. 217; *Wolfe v. Kable*, 107 Ind. 565; *Kelley v. Kelley*, 8 Ind. App. 606; *Heberd v. Wines*, 105 Ind. 237; *Edmonds v. Mounsey*, 15 Ind. App. 399; *Gray v. Elzroth*, 10 Ind. App. 587.

If the motion should not be granted as to all, or if the assignment is not well made as to all, there is no error in overruling the motion. *Boyd v. Anderson*, 102 Ind. 217 [citing *Carver v. Carver*, 97 Ind. 498; *Robertson v. Garshwiler*, 81 Ind. 463].

The first time this rule was announced in Indiana appears to have been in *Cambridge City First Nat. Bank v. Colter*, 61 Ind. 153, where the court said: "It is claimed in argument that, while the motion for a new trial may have been rightly overruled as to the president of the bank, it should have been sustained as to the bank. No such question appears to have been presented to the court below. The verdict was a joint one against both defendants; the motion for a new trial was joint, asking a new trial for both defendants. The court was not asked to grant a separate new trial to the bank, and did not err in failing to grant it." Citing *Estep v. Burke*, 19 Ind. 87, and *Teter v. Hinders*, 19 Ind. 93, both of which relate to joint demurrer.

Where a finding and judgment are for one defendant and against another a joint motion for a new trial will avail neither of them. *Robertson v. Garshwiler*, 81 Ind. 463.

Minnesota. — Where two defendants make a joint motion for a new trial, it is not error to deny the motion if the

verdict is justified as to either defendant. *Miller v. Adamson*, 45 Minn. 99.

Nebraska. — A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all. *Minick v. Huff*, 41 Neb. 516; *Dorsey v. McGee*, 30 Neb. 657; *Boldt v. Budwig*, 19 Neb. 739; *Atwood v. Marshall*, 50 Neb. 173; *Long v. Clapp*, 15 Neb. 417; *Real v. Hollister*, 17 Neb. 661; *Hagler v. State*, 31 Neb. 144; *Dutcher v. State*, 16 Neb. 30.

Where there is a verdict against all the defendants, a motion for a new trial made by the defendants jointly must be overruled if the verdict was correct as against any one of them. *Scott v. Chope*, 33 Neb. 41; *Porter v. Sherman County Banking Co.*, 40 Neb. 274; *McDonald v. Bowman*, 40 Neb. 269.

Wyoming. — *North Platte Milling, etc., Co. v. Price*, 4 Wyoming 293.

2. *Wiggenhorn v. Kountz*, 23 Neb. 690.

In an action against liquor sellers and their sureties on certain bonds a joint motion for a new trial by all the defendants on the ground that the evidence was insufficient to support the verdict will be overruled as to all, although it appears that the evidence is sufficient as to some of the defendants, doubtful as to some, and clearly insufficient as to a few. In such case a new trial will not be granted as to the latter, as the motion for a new trial is indivisible. *Scott v. Chope*, 33 Neb. 41.

Although section 429 of the *Nebraska Civil Code* provides that "in an action against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others," in case the verdict is against all of the defendants, and those against whom the evidence is insufficient made no motion for a new trial, the verdict will not be disturbed. *Hoke v. Halverstadt*, 22 Neb. 421.

of their legal rights by a mere technicality. The rule more in consonance with the code practice is that a joint motion for a new trial will be sustained if the grounds are sufficient as to any of the defendants, as the mere joinder of the parties in one motion is a harmless error not affecting the substantial rights of the parties.¹

Separate Motions. — As a general rule each party should file a separate motion for a new trial where the errors are not prejudicial as to all parties or where the evidence is insufficient as to the applicant but sufficient as to others.²

One Joint Tortfeasor. — The weight of authority is that one of several joint tortfeasors may move for a new trial, and that a new trial may be granted as to one and a judgment rendered on the verdict against the others.³ On such motion the other defend-

1. **A Joint Motion Is Harmless Error — Code Procedure.** — In a case of first impression in *California* the foregoing authorities are criticised as follows: "Appellant further contends that the order appealed from must be reversed because the motion for a new trial was made by all the defendants, while the individuals named as defendants, having disclaimed all interest in the controversy, were not affected or injured by the findings or judgment; in other words, that 'a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all.' Appellant cites six or seven cases from Nebraska, about the same number from Indiana, one from Minnesota, and one from Wyoming, which sustain his said proposition. The early Indiana cases — which seem to have been the pioneers of this line of decisions — adopted it in analogy to the ruling that a joint demurrer will be overruled unless it is well taken as to all the demurrants jointly; and *Asevado v. Orr*, 100 Cal. 293, and *Rogers v. Schulenberg*, 111 Cal. 281, are cited to the point that a joint demurrer by all the defendants is properly overruled if the complaint is good against either of them. The question here presented has not before been considered or decided by this court so far as I have been able to find. Whether the cases cited by appellant were rightly decided under the practice prevailing in those states we need not consider. Obviously it is one of those questions which should be determined in harmony with the principles governing our own practice. It is true that the individual

defendants, having disclaimed all personal interest in the controversy, were not injured by the findings or judgment, and were not 'aggrieved' thereby. But the order granting a new trial having been rightly made as to one of the defendants — the irrigation district — the plaintiff was not injured by the joinder of the individual defendants in the motion, nor by the granting of the motion as to all, and he should not be permitted to profit by findings which do not accord with the facts which he has stipulated to be true if it can be avoided. Section 475 of the Code of Civil Procedure provides: 'The court must in every stage of an action disregard any error or defect in the proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.' In the face of this provision appellant's contention cannot be sustained." *Boehmer v. Big Rock Irrigation Dist.*, 117 Cal. 19.

Joint Motion Sustained as to One Party. — In an action against joint defendants, where a judgment is entered by default as to one defendant and on trial as to the other, it is not error to sustain a joint motion as to the latter and refuse a new trial as to the defendant in default. *Ex p. Lowman Stationery, etc., Co.*, 2 Wash. 427.

2. *Brown v. Burrus*, 8 Mo. 26; *Palmer v. Kennedy*, 7 J. J. Marsh. (Ky.) 498; *Sprague v. Childs*, 16 Ohio St. 107; *Loudon v. Coleman*, 59 Ga. 653; *Sperry v. Dickinson*, 82 Ind. 135; *Gordon v. Pitt*, 3 Iowa 385; *Western Assur. Co. v. Way*, 98 Ga. 746.

3. *Terpenning v. Gallup*, 8 Iowa 74;

ants should be joined and notified as adverse parties.¹

When New Trial Can Be Granted as to One Party. — Whether separate motions should be sustained and a new trial granted as to some of the parties depends to some extent upon the question whether a new trial should be granted as to some of the issues only.²

8. Notice of Intention to Move for a New Trial — *a. NATURE AND OBJECT OF.* — In *California* and other states which have adopted the same code provision relating to new trials³ the motion for a new trial must be preceded by a notice, served upon the adverse party and filed with the clerk, to the effect that the applicant intends to move for a new trial. The object of this cumbersome procedure is not to notify the adverse party of the time and place of the hearing of the motion, but to give him notice of the errors complained of and the evidence to be introduced, and thus give him time to prepare for the hearing.⁴ This object is effected in other states by the filing of the motion for a new trial and notice of such motion.⁵

b. FORM AND CONTENTS. — The notice under such code provisions should indicate that the applicant will move for a new trial,⁶ and should be directed against the verdict or findings, and

Hayden v. Woods, 16 Neb. 306; Heffner v. Moyst, 40 Ohio St. 112; Smith v. Foster, 3 Coldw. (Tenn.) 147; Albright v. McTighe, 49 Fed. Rep. 817, reviewing and approving the above cases, and citing the following authorities *contra*: Bond v. Spark, 12 Mod. 275; Parker v. Godin, 2 Stra. 813; Doe v. Martin, 13 M. & W. 811, 2 Tidd Pr. 911.

1. Clark v. Austin, 38 Minn. 487.

2. See *infra*, XVI. 3. *New Trial as to Part of the Issues.*

3. Code Civ. Pro. Cal., §§ 657, 659; Rev. Stat. Idaho 1887, § 4441; Annot. Codes Mont., § 1173; Comp. Laws S. Dak., § 5089; Rev. Codes N. Dak., § 5473; Hill's Annot. Codes Wash., § 404; Rev. Stat. Utah 1898, § 3294.

Whether Notice Jurisdictional. — Under the statutes requiring a notice of intention to move for a new trial, such notice is not jurisdictional. Johnson v. Northern Pac. R. Co., 1 N. Dak. 354; Volmer v. Stagerman, 25 Minn. 244. But see *contra*, Bear River, etc., Co. v. Boles, 24 Cal. 354.

If the notice is not served within the statutory time the court loses jurisdiction, which cannot be restored by an order allowing the notice to be filed *nunc pro tunc*. Killip v. Empire Mill Co., 2 Nev. 34; State v. Nevada First Nat. Bank, 4 Nev. 358.

4. Pierre First Nat. Bank v. Comfort, 4 Dakota 167.

5. **Washington — Service of Motion Itself Sufficient.** — Section 404 of Hill's Annot Stat. Wash. is substantially the same as section 659 Code Civ. Pro. Cal., and requires the applicant for a new trial to serve and file a notice of intention to move for a new trial within two days after the verdict. In Boarman v. Hinckley, 17 Wash. 126, the applicant, instead of filing such notice, served and filed his motion for a new trial, in which the grounds were specified. This was held sufficient notice. The court said: "The motion for a new trial filed by plaintiff in this case fully advised the defendant of plaintiff's intention to move for a new trial, and specified the grounds. The motion itself here fulfils the function of the notice required by the statute."

6. A notice of motion "to set aside and vacate the judgment rendered and entered herein, and to grant a new trial," etc., is sufficient, as it indicates that a new trial will be asked for. Locke v. Moulton, 96 Cal. 21.

A Notice of Intention to Set Aside a Judgment will not be construed to be a notice of intention to move for a new trial, and cannot be amended after the statutory time. Little v. Jacks, 67 Cal. 165.

not against the decision¹ or judgment.²

Form and Direction. — The notice of intention to move for a new trial must be in writing,³ and directed to all the adverse parties who have an interest in the subject-matter and who will be affected by the granting of the motion.⁴

c. ASSIGNMENT OF ERRORS. — The notice must designate the grounds upon which the motion will be made.⁵ The specification or assignment of errors in the notice is substantially the same as in the motion for a new trial in other states.⁶ The grounds may be stated in the language of the statute, and only such grounds as are stated can be considered by the lower court on the

Notice of Motion Instead of Intention. — A notice of a motion for "a rehearing or new trial" will be construed to be a notice of intention to move for a new trial. *Kimple v. Conway*, 69 Cal. 71.

A notice of a motion for a new trial, if sufficient in form, will be construed to operate as a notice of intention to move for a new trial. *Fletcher v. Nelson*, 6 N. Dak. 94.

1. An assignment that the evidence does not justify or warrant the decision is improper, but is sufficient as an assignment that the evidence is insufficient to support the findings. *Hibernia Sav., etc., Soc. v. Moore*, 68 Cal. 156; *Donohoe v. Mariposa Land, etc., Co.*, 66 Cal. 317.

2. A notice of intention to move to "set aside the judgment and to ask for a new trial upon the following grounds: (1) Insufficiency of the evidence to justify the judgment, and that the judgment is against law," etc., is insufficient because not directed to the decision or findings, and the order granting a new trial will be reversed. *Sawyer v. Sargent*, 65 Cal. 259 [followed in *Little v. Jacks*, 67 Cal. 165; *Mazkewitz v. Pimentel*, 83 Cal. 450]. See similar assignments held insufficient in *Martin v. Matfield*, 49 Cal. 42; *Quinn v. Smith*, 49 Cal. 163; *Froman v. Patterson*, 10 Mont. 107.

But where it appears from the entire notice that the applicant intends to move for a new trial upon specified statutory grounds, the adverse party cannot have the proceedings dismissed for defects in the notice, which states that the applicant will move to set aside the judgment. *O'Connell v. Main, etc., Streets Hotel Co.*, 90 Cal. 515; *Locke v. Moulton*, 96 Cal. 21, citing *Sawyer v. Sargent*, 65 Cal. 259, as overruled.

Notice that a Motion to Vacate Judg-

ment Will Also Be Made. — The notice need not state that the applicant will move to vacate the decision, as the order granting a new trial will in effect vacate the decision, and such recital is mere surplusage. *Heinlen v. Heilbron*, 71 Cal. 557; *Bauder v. Tyrrel*, 59 Cal. 99; *Locke v. Moulton*, 96 Cal. 21. 3. *Flateau v. Lubeck*, 24 Cal. 364; *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 354.

4. Where the name of one of the plaintiffs was omitted from the caption of the notice, but the notice was served upon the attorneys for all the plaintiffs, it is sufficient, it not appearing that the attorneys were misled. *Cook v. Sudden*, 94 Cal. 443.

The Failure to Serve the Notice on All the Adverse Parties having an interest in the motion or affected by it is ground for overruling the motion. *Herriman v. Menzies*, 115 Cal. 16; *U. S. v. Crooks*, 116 Cal. 43.

5. It is not sufficient to state that the defendant will move the court for a new trial upon grounds to be set forth in the motion; the grounds must be set forth in the notice. *State v. Fry*, 10 Mont. 407.

Language of Statute. — The grounds need not be in the language of the statute if the error is pointed out specifically. *Barnard, etc., Mfg. Co. v. Galloway*, 5 S. Dak. 205.

The reasons for which a motion for a new trial will be made may be stated, in the notice of intention to move for a new trial, in the language of the statute, without a particular specification of the errors complained of. *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 427; *O'Connell v. Main, etc., Streets Hotel Co.*, 90 Cal. 515; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485.

6. See *infra*, VII. 9. *d. Assignment of Errors.*

hearing of the motion or upon appeal.¹

Specification of Insufficiency of the Evidence. — When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of intention must specify the particulars in which the evidence is alleged to be insufficient.²

Specification of Errors of Law. — If the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely.³ If the notice does not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied.⁴

Specification of Evidence to Sustain Motion. — The notice must specify upon what evidence the motion will be made, whether upon affidavits, minutes of the court, bill of exceptions, or a statement of the case.⁵

1. *Moddie v. Breiland*, 9 S. Dak. 506.

2. *California*. — *Buckley v. Althorf*, 86 Cal. 643; *Neale v. Depot R. Co.*, 94 Cal. 425; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202; *Baird v. Peall*, 92 Cal. 235; *Menk v. Home Ins. Co.*, 76 Cal. 50; *Harnett v. Central Pac. R. Co.*, 78 Cal. 32; *Newell v. Desmond*, 63 Cal. 242; *Salisbury v. Burr*, 114 Cal. 451.

It is not necessary that the specifications should state what the evidence does show. Such a statement is insufficient if standing alone, and surplage if joined to a proper specification. *Haight v. Tryon*, 112 Cal. 4; *Kumle v. Grand Lodge, etc.*, 110 Cal. 204; *Parker v. Reay*, 76 Cal. 103; *Spotts v. Hanley*, 85 Cal. 155; *Dawson v. Schloss*, 93 Cal. 194; *Eddelbuttel v. Durrell*, 55 Cal. 279; *Adams v. Helbing*, 107 Cal. 298.

Object of Statute. — The object of the statute is to direct the court and counsel to the particular error relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court. *Matter of Yoakam*, 103 Cal. 503; *Eddelbuttel v. Durrell*, 55 Cal. 279.

Montana. — *State v. Fry*, 10 Mont. 407; *State v. Black*, 15 Mont. 143; *State v. Whaley*, 16 Mont. 574; *State v. Pilgrim*, 17 Mont. 311; *Bardwell v. Anderson*, 18 Mont. 528; *Zickler v. Deegan*, 16 Mont. 198; *Helena First Nat. Bank v. Roberts*, 9 Mont. 323.

The error in failing to specify the particular errors in the notice of intention to move for a new trial is not cured by filing the motion at the same

time, the errors being sufficiently specified therein. The motion will not be construed as a notice, and the proceedings will be dismissed for want of notice. *State v. Whaley*, 16 Mont. 574; *State v. Fry*, 10 Mont. 407.

North Dakota. — *Pickert v. Rugg*, 1 N. Dak. 230; *Henry v. Maher*, 6 N. Dak. 413.

South Dakota. — *Gaines v. White*, 2 S. Dak. 410; *Mattoon v. Fremont, etc., R. Co.*, 6 S. Dak. 196; *Pierce v. Manning*, 1 S. Dak. 306; *National Cash Register Co. v. Pfister*, 5 S. Dak. 143; *Billingsley v. Hiles*, 6 S. Dak. 445; *Parrott v. Hot Springs*, 9 S. Dak. 202.

3. *Packer v. Doray*, 98 Cal. 315; *Salisbury v. Burr*, 114 Cal. 451; *Gill v. Hecht*, 13 Utah 5.

4. *Neale v. Depot R. Co.*, 94 Cal. 425.

5. *Code Civ. Pro. Cal.*, § 659; *Comp. Laws S. Dak.*, § 5090; *Rev. Codes N. Dak.*, § 5474; *Rev. Stat. Utah* 1898, § 3294. This provision is omitted from *Annot. Codes Mont.* 1895, § 1173.

The applicant may specify all of the above kinds of evidence and rely upon one kind at the hearing. *Hart v. Kimball*, 72 Cal. 284; *Hall v. Harris*, 1 S. Dak. 279; *Gamer v. Glenn*, 8 Mont. 371.

If no specification as to the evidence is made, the motion will not be considered. *Hughes v. Alsip*, 112 Cal. 587; *Hill v. Beatty*, 61 Cal. 292.

Waiver. — Where the notice of intention fails to specify whether the motion would be "made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case," as required by section 298 of the *Montana Code Civ. Pro.* 1887, and such ob-

d. SERVICE AND FILING OF NOTICE — Parties to Be Served. — The statutes require the notice of intention to move for a new trial to be served upon all the adverse parties affected by the motion.¹

e. TIME OF SERVING AND FILING — Time of Filing with Clerk. — Such notice must be both served upon the adverse party and filed with the clerk² within the time fixed by the statute. The notice is premature if filed before the trial is completed and the verdict rendered or the findings of the court filed.³

jection is not waived at the hearing of the motion, the appeal will be dismissed although the record does not show that an objection to such defect was made at the hearing or that the court overruled the motion on such ground. *Gregg v. Garrett*, 13 Mont. 10.

The right to object that no specification of the kind of evidence to be used on the hearing was made in the notice is not waived by proposing amendments to the bill of exceptions or procuring settlement of the bill, as the adverse party has a right to a correct bill to use on appeal from the judgment. *Hughes v. Alsip*, 112 Cal. 587.

1. *Cook v. Sudden*, 94 Cal. 443; *Sowden v. Idaho Quartz Min. Co.*, 55 Cal. 443; *Wittenbrock v. Bellmer*, 57 Cal. 12.

Adverse Party Defined. — "Section 659 of the Code of Civil Procedure * * * requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The Superior Court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it." *Herri-man v. Menzies*, 115 Cal. 16, *quoted* in *U. S. v. Crooks*, 116 Cal. 43.

Where Several Attorneys Represent All the adverse parties, a notice served upon one or more of such attorneys

is sufficient. *Walsh v. Mueller*, 14 Mont. 76.

2. Code Civ. Pro. Cal., § 659; *Sutton v. Symons*, 100 Cal. 576.

3. **When Premature.** — Proceedings for a new trial are premature until a final decision is reached by the court or jury. *People v. Majors*, 65 Cal. 100; *Bell v. Marsh*, 80 Cal. 411.

A notice of intention to move for a new trial is not premature because it was served before the receipt of notice of the decision. *Symons v. Bunnell*, 80 Cal. 330.

But a notice given before the findings of the court or referee are signed is premature and ineffectual. *Dominguez v. Mascotti*, 74 Cal. 269; *Careaga v. Fernald*, 66 Cal. 351.

Where findings of fact are made and filed by the court, and the case is then referred for an accounting, proceedings to secure a new trial should not be commenced until the report of the referee is filed. *Crowther v. Rowlandson*, 27 Cal. 376.

Proceedings for a new trial commenced before the filing of a referee's report are premature. *Mahoney v. Caperton*, 15 Cal. 313; *Hinds v. Gage*, 56 Cal. 486.

Where an interlocutory judgment is entered decreeing to the plaintiff a right of specific performance and ordering a reference to take the account on principles fixed in the order, a notice of intention to move for a new trial need not be given until ten days after the confirmation of the report of the referee. *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393.

Where the court files findings of fact on all the issues in a divorce suit, and renders a decree of divorce and a division of the community property, a notice of intention to file a motion for a new trial is not premature as to such decree although it further provides for a reference to take testimony as to community property. *Sharon v. Sharon*, 79 Cal. 633.

When the Time Commences to Run. — The time for serving and filing notice commences to run when the verdict is returned.¹ Where the cause is tried to the court, the time commences to run when the adverse party serves upon the applicant for a new trial notice that a decision has been rendered.² In *California* the amended provision now reads "within ten days * * * after notice of the decision," and it is held that the time commences to run after

1. *Ellsasser v. Hunter*, 26 Cal. 279.

The notice must be given within two days after a special verdict has been rendered, or all proceedings on such notice will be disregarded. *Allen v. Hill*, 16 Cal. 113.

Where a special verdict is returned by a jury in an equity case, it is merely advisory; the applicant for a new trial must wait until the judgment is rendered by the court before giving notice. *Bates v. Gage*, 49 Cal. 126; *Bell v. Marsh*, 80 Cal. 411; *Warring v. Freear*, 64 Cal. 54; *Spottiswood v. Weir*, 66 Cal. 525; *James v. Superior Ct.*, 78 Cal. 107.

2. *Roussin v. Stewart*, 33 Cal. 208; *Biagi v. Howes*, 66 Cal. 469; *Polhemus v. Carpenter*, 42 Cal. 377; *Carpentier v. Thurston*, 30 Cal. 125; *Sawyer v. San Francisco*, 50 Cal. 370; *Gumpel v. Castagnetto*, 97 Cal. 15.

Notice of Decision. — The notice of the decision must be in writing. *Roussin v. Stewart*, 33 Cal. 210; *Forni v. Yoell*, 99 Cal. 173.

When served by mail the adverse party is entitled to a longer time within which to file a notice of intention to move for a new trial. *Sullivan v. Wallace*, 73 Cal. 307.

It is not necessary to serve a notice of the decision where a notice of motion for a new trial is given after the findings of fact are filed. *Cottle v. Leitch*, 43 Cal. 320; *Thorne v. Finn*, 69 Cal. 251.

The applicant is not required to give notice of intention to move for a new trial although he was in court when the decision was rendered, waived findings, and asked for a stay of proceedings, as he may wait until a notice in writing of such decision is served upon him. *Biagi v. Howes*, 66 Cal. 469, followed in *Kelleher v. Creciat*, 89 Cal. 38. But this case is in effect overruled in *California Imp. Co. v. BarotEAU*, 116 Cal. 136, and in *Mullally v. Irish-American Benev. Soc.*, 69 Cal. 559.

When no findings were requested or filed, the time commences to run when

notice of the judgment is served. *Polhemus v. Carpenter*, 42 Cal. 377.

Where a cause is tried by the court and findings are filed upon which a judgment is entered, the time from the "notice of the rendering of the decision" commences to run from notice of the judgment, as the decision is distinct from the findings. *Elder v. Frevert*, 18 Nev. 283, cited in *Robinson v. Benson*, 19 Nev. 331.

Where no notice of additional findings of fact was given, a notice of intention filed eleven days after such findings were filed is in time, as the applicant could wait until notice of the filing of additional filings was served on him. *Duff v. Duff*, 71 Cal. 513.

A sufficient notice of a decision is given where the party in whose favor a judgment has been rendered serves a notice of intention on the adverse party, stating that a motion will be made "to set aside and vacate the decision and judgment heretofore rendered and entered herein." Such notice will require the adverse party to serve notice of intention if he so desires. *Waddingham v. Tubbs*, 95 Cal. 249.

Waiver of Notice of Decision. — A party giving notice to dismiss for failure to enter judgment within six months waives notice of the decision and must file notice of his intention to move for a new trial within ten days after the date of the notice to dismiss, as the motion to dismiss gives positive knowledge of the date of the judgment and becomes part of the record. *Forni v. Yoell*, 99 Cal. 173.

Mere presence in court and giving oral consent or direction as to the terms of the decision will not operate as a waiver of notice of the decision by a party applying for a new trial. *Forni v. Yoell*, 99 Cal. 173; *Biagi v. Howes*, 66 Cal. 469; *State v. Murphy*, 19 Nev. 89.

A written motion to set aside findings is a waiver of notice of decision. *California Imp. Co. v. BarotEAU*, 116 Cal. 136.

the applicant for a new trial has actual notice of the decision.⁴ After the notice of the decision is served the applicant must serve his notice of intention on the adverse party and file such notice with the clerk⁵ within the statutory time,⁶ or the right to move for a new trial is waived⁴ and the errors assigned will not be reviewed.

f. EXTENSION OF TIME FOR NOTICE. — The time for serving and filing the notice of intention to move for a new trial may be extended,⁵ but application for the extension must be made before the statutory time expires.⁶

1. *Mullally v. Irish-American Benev. Soc.*, 69 Cal. 559; *Gray v. Winder*, 77 Cal. 525; *California Imp. Co. v. Barotau*, 116 Cal. 136, *overruling Biagi v. Howes*, 66 Cal. 469.

2. *Time of Filing Notice of Intention to Move for a New Trial.* — The notice of intention to move for a new trial must not only be served but filed with the clerk within the ten days allowed by the statute. *Sutton v. Symons*, 100 Cal. 576.

3. *Code Provisions.* — "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case." Code Civ. Pro. Cal. 1897, § 659.

See, to the same general effect, Annot. Codes Mont. 1895, § 1173; Rev. Codes N. Dak. 1895, § 5474; Comp. Laws S. Dak. 1897, § 5090; Rev. Stat. Utah 1898, § 3294.

Pendency of Appeal. — A judgment for the defendant on findings of the court was reversed on appeal with directions to enter judgment on the findings for the plaintiff, and such entry was made. Within ten days from such entry the defendant duly served and filed notice of his intention to move for a new trial. It was held that if he was dissatisfied with the findings, which were not sufficient to support a judgment in his favor, he should have given the notice when the judgment was first entered and before appeal. *Brady v. Feisil*, 54 Cal. 180.

4. *Waiver of Right.* — If the notice is

not given in time the right to a new trial is lost.

California. — *Clark v. Crane*, 57 Cal. 629; *Burnett v. Stearns*, 33 Cal. 468; *Wright v. Snowball*, 45 Cal. 654; *Plateau v. Lubeck*, 24 Cal. 364; *Caney v. Silverthorne*, 9 Cal. 67; *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 354; *Ellsassar v. Hunter*, 26 Cal. 279; *Allen v. Hill*, 16 Cal. 113; *Clark v. Gridley*, 49 Cal. 105; *Coveny v. Hale*, 49 Cal. 552; *Brady v. Feisil*, 54 Cal. 180; *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81; *Sawyer v. San Francisco*, 50 Cal. 370.

Dakota. — *Pierre First Nat. Bank v. Comfort*, 4 Dakota 167; *Gould v. Duluth, etc., Elevator Co.*, 2 N. Dak. 216; *Gaines v. White*, 2 S. Dak. 410.

Idaho. — *Stevens v. North Western Stage Co.*, 1 Idaho 605.

Montana. — *Sullivan v. Helena*, 10 Mont. 134; *Walsh v. Mueller*, 14 Mont. 76; *Gregg v. Garrett*, 13 Mont. 10; *Gum v. Murray*, 6 Mont. 10.

Utah. — *Hamilton v. Dooley*, 15 Utah 280; *Cereghino v. Cereghino*, 4 Utah 100.

5. Under section 1054 of the California Code Civ. Pro., providing that the court may, for good cause shown, extend the time for pleading and serving notices, etc., the time for serving and filing notices of intention to move for a new trial may be extended for thirty days without the consent of the adverse party. *Simpson v. Budd*, 91 Cal. 488; *Harper v. Minor*, 27 Cal. 107; *Burton v. Todd*, 68 Cal. 485, *overruling Brichman v. Ross*, 67 Cal. 601.

The Time Allowed by the Extension Commences to Run at the expiration of the ten days allowed by the statute for filing notice of intention. *Emeric v. Alvarado*, 64 Cal. 529.

6. *Clark v. Crane*, 57 Cal. 629; *Burton v. Todd*, 68 Cal. 485; *State v. Mason*, 18 Mont. 362.

g. **WAIVER OF NOTICE OF INTENTION.** — Objections to the form or sufficiency of the notice or the fact that it was not served in time are waived unless made at the time of the hearing of the motion¹ or at the time of the settlement of the statement;² and if amendments to the statement are proposed such objections should be reserved therein.³

h. **AMENDMENT OF NOTICE.** — The notice may be amended, but after the time has expired no new specification of error can be brought in by amendment.⁴ A party desiring to assign errors not included in the original notice should obtain leave to amend. He cannot assign additional errors in a second notice after the time for the notice has expired.⁵

9. Form of Motion — a. ORAL OR WRITTEN. — A motion for a new trial must, as a general rule, be in writing.⁶

Under Comp. Laws S. Dak., § 5093, where an amended and substituted notice is not filed in time, the court may extend the time for filing such notice for good cause shown. *McKittrick v. Pardee*, 8 S. Dak. 39.

1. Want of proper notice must be raised by objection in the lower court. *Frost v. Meetz*, 52 Cal. 664.

2. *Christy v. Spring Valley Water Works*, 68 Cal. 73; *Quivey v. Gambert*, 32 Cal. 304; *Schieffery v. Tapia*, 68 Cal. 184.

3. *Hook v. Hall*, 68 Cal. 22.

Proposing Amendments to a statement on motion for a new trial is a waiver of a failure to serve a notice of intention to move for a new trial, unless the objection is made and reserved in such amendments. *Brundage v. Adams*, 41 Cal. 619.

Filing a Counter Statement is a waiver of the objection of want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76, approved in *Payne v. Davis*, 2 Mont. 381.

Consent of Parties. — Failure to file and serve a notice of intention is waived where the record discloses that the motion for a new trial was submitted upon a statement and affidavits by consent of the parties. *Millard v. Hathaway*, 27 Cal. 119.

4. *Little v. Jacks*, 67 Cal. 165; *Packer v. Doray*, 98 Cal. 315; *Neale v. Depot R. Co.*, 94 Cal. 425; *People v. Wessel*, 98 Cal. 352; *Gill v. Hecht*, 13 Utah 5.

In *Cooney v. Furlong*, 66 Cal. 520, the notice specified that the motion would be made upon a statement of the case, and after the time for filing a notice of intention had expired an amended notice was filed stating that

the motion would be made upon the minutes of the court. It was held that the amended notice was a nullity, and an order granting a new trial was reversed.

Amendment Permitted by Court After Time Has Expired. — Where an original notice of intention to move for a new trial specified no error in a particular instruction, the notice cannot be amended, after the time has expired, by an order of court permitting an amendment stating error in such instruction. Such amendment of the original notice is a new specification of error, and not an amendment of anything contained in such notice. *State v. Mason*, 18 Mont. 362.

5. **Second Motion After Time — Newly Discovered Evidence.** — After a notice has been filed and served in time a second motion filed after the time for notice has expired, setting up newly discovered evidence, will be stricken from the files. It cannot be considered as an amended motion. No notice of intention is required by the statute where the motion is made on the ground of newly discovered evidence. *Sullivan v. Helena*, 10 Mont. 134.

6. *California.* — *People v. Ah Sam*, 41 Cal. 645.

Indiana. — *Addleman v. Erwin*, 6 Ind. 494; *Madison, etc., R. Co. v. Franklin Tp.*, 8 Ind. 528; *Nutter v. State*, 9 Ind. 178; *Kirby v. Cannon*, 9 Ind. 371; *Thompson v. Shaefer*, 9 Ind. 500; *Lagro, etc., Plankroad Co. v. Eriston*, 10 Ind. 342; *Banks v. Hempstead*, 12 Ind. 618; *Howes v. Halliday*, 10 Ind. 339; *Fausett v. Voss*, 12 Ind. 525; *Nave v. Nave*, 12 Ind. 1; *Hollowell v. Check*, 12 Ind. 614; *Stevens v.*

b. **TITLE OF MOTION.** — The motion should be designated in the title as a motion for a new trial. But a motion containing a sufficient statement of grounds for a new trial will be construed to be a motion for a new trial though designated otherwise.¹

c. **INCORPORATION OF EVIDENCE.** — No evidence or portions

Nevitt, 15 Ind. 224; Davis *v.* Bolton, 16 Ind. 139; Shover *v.* Jones, 32 Ind. 141; Whaley *v.* Gleason, 40 Ind. 405; Krutz *v.* Craig, 53 Ind. 569; La Follette *v.* Higgins, 109 Ind. 241.

Kansas. — Douglass *v.* Insley, 34 Kan. 604; Clayton *v.* School Dist. No. 1, 20 Kan. 262.

Kentucky. — Goldsburly *v.* May, 1 Litt. (Ky.) 254; Reed *v.* Miller, 1 Bibb (Ky.) 142; Hopkins *v.* Com., 3 Bush (Ky.) 480; Taylor *v.* Giger, Hard. (Ky.) 595; McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 535.

Massachusetts. — Brown *v.* Swan, 1 Mass. 202.

Montana. — Wastl *v.* Montana Union R. Co., 13 Mont. 500; Wallace *v.* Lewis, 9 Mont. 399; Fabian *v.* Collins, 2 Mont. 510; Rutherford *v.* Talent, 6 Mont. 112.

Nebraska. — Phoenix Ins. Co. *v.* Readinger, 28 Neb. 587.

Ohio. — Hoffman *v.* Gordon, 15 Ohio St. 211.

Oklahoma. — Rogers *v.* Bonnett, 4 Okla. 90.

Pennsylvania. — Galloway *v.* Negle, 1 Yeates (Pa.) 103.

Utah. — East *v.* Mooney, 7 Utah 414; Needham *v.* Salt Lake City, 7 Utah 319.

Where All Motions Are Oral and the writing is confined to the notice of motion, or where no notice is necessary, as where the motion is made in open court on receipt of the verdict, the rule is of course different. See generally article MOTIONS, *ante*, p. 70.

Unless the record shows that the motion for a new trial was in writing, the insufficiency of the evidence to sustain the verdict is not available as error in the Supreme Court. Stevens *v.* Nevitt, 15 Ind. 224.

When the record is silent as to any written motion for a new trial, it will be presumed, for the purpose of upholding the judgment of the lower court, that all things have been done regularly there, and that no written motion, as provided in the statute, was filed, and the judgment will be affirmed. Rogers *v.* Bonnett, 4 Okla. 90; Douglass *v.* Insley, 34 Kan. 605; Clayton *v.* School Dist. No. 1, 20 Kan. 262.

New Trial as of Right — Oral Motion.

— A motion for a new trial as of right, as in actions to recover possession of real estate, need not be in writing. Zimmerman *v.* Marchland, 23 Ind. 474; Physio-Medical College *v.* Wilkinson, 89 Ind. 23; Heberd *v.* Wines, 105 Ind. 237; Stout *v.* Duncan, 87 Ind. 383; Doster *v.* Sterling, 33 Kan. 381.

Waiver of Written Motion. — Although the statute requires the moving party to "file the points in writing, particularly specifying the grounds of such motion," a written motion may be waived by the court or parties. Such written motion is waived by argument on the hearing of an oral motion without objection. Chicago, etc., R. Co. *v.* Goff, 158 Ill. 453; Ottawa, etc., Valley R. Co. *v.* McMath, 91 Ill. 104. See also Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375.

Where the statutes permit an oral motion it must be subsequently entered of record or noted in the minutes of the court. Bear River, etc., Water, etc., Co. *v.* Boles, 24 Cal. 354; Borland *v.* Thornton, 12 Cal. 440.

1. Motions Construed to Be Motions for New Trial. — A motion assigning grounds for a new trial and which in substance and effect is a motion for a new trial, will be so construed although called by the party making it a motion in arrest of judgment. Salinas *v.* Wright, 11 Tex. 572.

A motion designated "exceptions to the report of sale," but assigning as grounds therefor mainly errors occurring at the trial, will be construed to be a motion for a new trial. Goode *v.* Lewis, 118 Mo. 357.

A motion to set aside a judgment because the petition does not state a cause of action is not a motion for a new trial, and will not keep the cause open until the next term. Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414.

A motion to set aside the judgment and restore the cause to the calendar is equivalent to a motion for a new trial and will exclude another motion assigning grounds for a new trial. Neulander *v.* Rothschild, 67 Ill. App. 288.

of the record should be incorporated in the motion, except so much as is necessary to point out the error, as the province of the motion is merely to assign the error, not to prove it. The errors assigned must be made to appear by the record or by a bill of exceptions.¹

d. ASSIGNMENT OF ERRORS — (1) In General — Method of Assignment — Paragraphs. — The practice is to state the grounds for a new trial separately and in separate paragraphs. Each error complained of should be stated as a separate ground.²

Rule as to Specification of Error. — The general rule is that the grounds must be stated so specifically as to direct the attention of the court and opposing counsel to the precise errors complained of.³ A mere statement of the grounds, without further specifica-

A statute requiring that a demand for a new trial should appear on the record is not complied with by the record of an intention to appeal in a case where there might be a new trial but could be no appeal. *Huber v. Cherry*, 17 Ohio St. 562.

A bill to restrain the collection of a judgment at law will not be construed to be a petition for a new trial under Rev. Stat. U. S., § 987, where the bill is not manifestly framed on that theory and states no grounds for a new trial. *Edmanson v. Best*, 57 Fed. Rep. 531.

A notice of intention to move for a new trial is not a motion for a new trial and will not be so construed. *State v. Smith*, (Idaho 1897) 48 Pac. Rep. 1060.

A motion "to set aside and vacate the verdict of the jury" for certain errors which constitute grounds for a new trial will be construed as a motion for a new trial when treated as such by the parties and the trial court. *Hartley v. Chidester*, 36 Kan. 363.

A motion under Rev. Stat. D. C., § 806, "to set aside the verdict and grant a new trial on exceptions," will be construed to be a motion for a new trial on bill of exceptions although the words "bill of" were omitted. *Jones v. Pennsylvania R. Co.*, 18 D. C. 426.

Rehearing. — A motion for a new trial in an appellate court is essentially different from a motion for a rehearing. The latter is the proper motion for review. *Matter of Philbrook*, 108 Cal. 14.

1. "It is not the province of such a motion to bring upon the record irregularities that occur in the course of a trial. The facts constituting the error complained of, together with the exceptions to the ruling of the court,

should be made to appear by bill of exceptions, and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error." *Werner v. State*, 44 Ark. 122. See also *Chiles v. State*, 45 Ark. 143.

2. *Aultman v. Martin*, 49 Neb. 103.

Each particular proposition of fact excepted to should be so specified as to distinguish it from all others involved in the findings. *Dawson v. Schloss*, 93 Cal. 194.

To present an error in excluding evidence there must be an assignment of error as to sustaining an objection to the question and an assignment as to the exclusion of the offer of proof. But both rulings may be embraced in one assignment or specification. *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 493.

3. *Harnett v. Central Pac. R. Co.*, 78 Cal. 31; *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381; *Irwin v. Smith*, 72 Ind. 482; *Reese v. Caffee*, 133 Ind. 14; *Tucker v. Hyatt*, 144 Ind. 635; *Jones v. Layman*, 123 Ind. 569; *Louisville, etc., R. Co. v. McCoy*, 81 Ky. 403; *Combs v. Hargis*, 4 Ky. L. Rep. 446; *Ohio Valley R., etc., Co. v. Kuhn*, (Ky. 1887) 5 S. W. Rep. 419; *Illstad v. Anderson*, 2 N. Dak. 167.

The reasons assigned in a motion for a new trial must be so specific that on appeal the errors complained of may readily be found without compelling the court to search the record for the alleged error. *Beugnot v. State*, 11 Ind. App. 620; *Knisely v. Hire*, 2 Ind. App. 89.

Errors should be so specifically and definitely assigned [in the motion for new trial] in the court below as to chal-

tions, will therefore be insufficient.¹ "The purpose of the rule is to direct the attention of the trial court to the alleged erroneous ruling, and to present to the appellate court the precise question involved."² The safest course is to assign each error with the same particularity as in a petition in error or an assignment of errors on appeal.³

Stating Reasons — Argument. — It would seem that each assignment of error should be accompanied by a statement of the reason why the ruling complained of was erroneous.⁴ But this is not the

lenge the court's attention to each decision complained of, and thus give the trial judge an opportunity to review his own rulings and correct any errors therein. Each specification of error in a motion for a new trial should be complete in itself—so framed as to embrace a single ruling." *Aultman v. Martin*, 49 Neb. 103.

The Court Is Not Bound to Resort to Supposition or favorable construction in aid of assignments which lack particularity. *Hoey v. Hoey*, 36 Conn. 386; *Rooney v. Grant*, 40 Ga. 191; *Bartlett v. Lewis*, 58 Me. 350.

1. Statutory Language Insufficient. — It is insufficient to state as a ground "error of law occurring at the trial and excepted to," without further specification, as such an assignment would require the trial judge to review his entire action in the case. *Ohio Valley R., etc., Co. v. Kuhn*, (Ky. 1887) 5 S. W. Rep. 419.

A mere statement of the grounds for a new trial in the language of the statute is insufficient. *Dawson v. Baum*, 3 Wash. Ter. 464.

Montana. — The amendment to the code providing that an applicant for a new trial shall "give * * * the points in writing, particularly specifying the grounds of such motion," while relieving the applicant from preparing a statement, does not contemplate that such grounds shall be specified with any less particularity than formerly. *Taylor v. Holter*, 2 Mont. 476.

Nebraska. — Under section 317 Civil Code and section 491 Criminal Code, as amended in 1881, grounds for a new trial may be assigned "in the language of the statute and without further or other particularity." *McNamee v. State*, 34 Neb. 288; *Labaree v. Klosterman*, 33 Neb. 150. But see, prior to this act, *Uhl v. Robison*, 8 Neb. 272; *Walrath v. State*, 8 Neb. 88; *Shaffer v. Maddox*, 9 Neb. 205.

Texas. — Under District Court Rules

67 and 68 (20 S. W. Rep. xvi.), it is too vague and general to assign as error that the verdict is excessive and contrary to the charge, that the verdict is directly contrary to the evidence and against the law, or that there were no facts upon which to base a judgment against certain named defendants. *Connor v. Saunders*, 9 Tex. Civ. App. 56.

Wyoming. — An assignment that the verdict was rendered without sufficient evidence and against the law is not too general, but is sufficient to designate the error to both the trial and appellate courts. *Granger v. Lewis*, 2 Wyoming 231.

2. Dodge v. Morrow, 14 Ind. App. 542.

In *Beugnot v. State*, 11 Ind. App. 620, it was said: "It is a settled rule of both this court and of the Supreme Court that reasons assigned in a motion for a new trial must be sufficiently definite and specific that on appeal the error complained of may be readily found, so as not to impose upon the court the task of searching the record for the alleged error." *Citing Knisely v. Hire*, 2 Ind. App. 86; *Reese v. Caffee*, 133 Ind. 14.

3. See article ASSIGNMENT OF ERRORS, vol. 2, p. 920.

A reference in an assignment of errors on appeal to the assignments of error in the motion for a new trial will not be sufficient unless the assignments in the motion are precise and complete. *Koenigs v. Chicago, etc., R. Co.*, 98 Iowa 569; *Kitterman v. Chicago, etc., R. Co.*, 69 Iowa 440; *King v. Chicago, etc., R. Co.*, 88 Iowa 704.

4. Gilberson v. Miller Min., etc., Co., 4 Utah 46.

Georgia — Statement Why the Ruling Was Erroneous. — An assignment that the court erred in leaving to the jury the construction of a designated portion of a written contract in evidence is insufficient, as it fails to specify what

practice in most of the states, the courts holding that it is sufficient merely to assign error in the ruling complained of, as that the court erred in giving a certain instruction or in admitting certain evidence, without stating why such ruling was erroneous.¹

Effect of Failure to State Grounds. — If the grounds for a new trial are not stated in the motion it may be overruled by the court and disregarded on appeal.²

the error was. *Kehoe v. Hanley*, 95 Ga. 321.

Mere assignments that "the court refused to give pertinent legal instructions to the jury in the language requested by the defendant, such request having been submitted in writing," or "delivered to the jury erroneous instructions against the defendant on material points," are insufficient for failing to specify any error in the instructions. *Gate City Gas Light Co. v. Farley*, 95 Ga. 796.

An assignment that the charge does not fully cover the issues and evidence is too general and fails to indicate any error. *Whelan v. Georgia Midland, etc.*, R. Co., 84 Ga. 506.

1. "While it is a good and convenient practice to set out the grounds of exception to the judge's charge on the motion for a new trial before him, to the end that on fuller reflection he may have the opportunity to correct the errors, if any, committed by him, and save the parties the delay and expense of an appeal, this is not absolutely required, and it is sufficient if the exceptions to the charge are set out in the appellant's statement of the case on appeal." *Bernhardt v. Brown*, 118 N. Car. 700 [citing *McKinnon v. Morrison*, 104 N. Car. 364; *Lowe v. Elliott*, 107 N. Car. 718].

2. *Arkansas*. — *Danley v. Robbins*, 3 Ark. 144; *Ford v. Clark*, 12 Ark. 99; *Berry v. Singer*, 10 Ark. 483.

California. — *Walls v. Preston*, 25 Cal. 59; *Hutton v. Reed*, 25 Cal. 478; *Matter of Boyd*, 25 Cal. 511; *Coleman v. Gilmore*, 49 Cal. 340; *Millard v. Supreme Council*, 81 Cal. 340; *Hill v. Weisler*, 49 Cal. 146; *Calderwood v. Peyser*, 42 Cal. 110.

Georgia. — *Rooney v. Grant*, 40 Ga. 191.

Illinois. — *Ottawa, etc., Valley R. Co. v. McMath*, 91 Ill. 104; *May v. May*, 36 Ill. App. 77; *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 530.

Indiana. — *Humphries v. Marshall*, 12 Ind. 609; *Fausett v. Voss*, 12 Ind.

525; *Hollowell v. Chesk*, 12 Ind. 614; *Banks v. Hempstead*, 12 Ind. 618; *Kimball v. Whitney*, 15 Ind. 280; *Burt v. Hoettinger*, 28 Ind. 214; *Shover v. Jones*, 32 Ind. 141; *Mercer v. Patterson*, 41 Ind. 440; *Ward v. Patrick*, 41 Ind. 438; *Wilson v. Root*, 43 Ind. 486; *Vaughn v. Ferrall*, 57 Ind. 182.

Iowa. — *State v. Bevins*, 92 Iowa 765.

Kansas. — *Marbourg v. Smith*, 11 Kan. 554; *Osborne v. Ehrhard*, 37 Kan. 413.

Kentucky. — *Ohio Valley R., etc., Co. v. Kuhn*, (Ky. 1887) 5 S. W. Rep. 419; *Todd v. Louisville, etc., R. Co.*, (Ky. 1889) 11 S. W. Rep. 8; *Helm v. Coffey*, 80 Ky. 176; *McLain v. Dibble*, 13 Bush (Ky.) 297; *Burks v. McFela*, 4 Ky. L. Rep. 833; *Barclay v. Smallhouse*, 4 Ky. L. Rep. 894; *Prather v. Phelps*, 5 Ky. L. Rep. 184; *Bruen v. Grahn*, 5 Ky. L. Rep. 313.

Louisiana. — *State v. Gallagher*, 16 La. Ann. 388.

Missouri. — *Curtis v. Curtis*, 54 Mo. 351; *Thacker v. Tracey*, 8 Mo. App. 315; *Putnam v. Hannibal, etc., R. Co.*, 22 Mo. App. 589; *Huppert v. Weisgerber*, 25 Mo. App. 95; *Fox v. Young*, 22 Mo. App. 386; *Schultze v. Missouri Pac. R. Co.*, 32 Mo. App. 438. Compare *State v. Marshall*, 36 Mo. 400.

Montana. — *Helena First Nat. Bank v. McAndrews*, 5 Mont. 251; *Demers v. McCormick*, 5 Mont. 234; *Raymond v. Thexton*, 7 Mont. 299.

Nebraska. — *Spencer v. Thistle*, 13 Neb. 228; *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587; *Kent v. Green*, 43 Neb. 674; *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761.

Nevada. — *Neil v. Wynecoop*, 9 Nev. 46; *Street v. Lemon Mill, etc., Co.*, 9 Nev. 251; *Jones v. Adams*, 17 Nev. 84; *Lamance v. Byrnes*, 17 Nev. 197.

New York. — *George v. Jennings*, 4 Hun (N. Y.) 66; *Brunner v. Downs*, 63 Hun (N. Y.) 626, 17 N. Y. Supp. 633.

Ohio. — *Hoffman v. Gordon*, 15 Ohio St. 211.

Washington. — *Dawson v. Baum*, 3 Wash. Ter. 464.

Failure to Include All Errors Complained of. — All errors known at the time of filing the motion must be included therein,¹ or the errors omitted will be deemed to have been waived.² A party has no right to file a second motion to include the omitted errors,³ unless unavoidably prevented.⁴

(2) **Irregularity in the Proceedings.** — The particular irregularity complained of should be specified in the motion; the language of the statute, "irregularity in the proceedings of the court, jury, or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial," being too general to constitute an assignment of error.⁵ The errors which may be assigned as irregularities or as abuses of discretion have been treated as ground for a new trial.⁶

(3) **Misconduct of Jury or Prevailing Party — Specification.** — The

Wyoming. — *Wilson v. O'Brien*, 1 Wyoming 42; *Ivinson v. Alsop*, 1 Wyoming 251; *Mosher v. Hilliard Flume, etc., Co.*, 1 Wyoming 355; *Uinta County v. Hinton*, 1 Wyoming 355.

When a motion for a new trial does not set out the grounds upon which it is based, affidavits in support of it must be rejected. *Beal v. Stone*, 22 Iowa 447.

A motion in which no cause for a new trial is assigned, or a mere oral motion, will not justify the granting of a new trial, nor will the overruling of such motions be sufficient to present errors of law to either the trial or the appellate court. *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587.

Under the general assignment "various other reasons apparent of record" no errors can be reviewed, because they are not pointed out with such reasonable certainty as to apprise the opposite party of the grounds relied upon. *West Chicago St. R. Co. v. Krueger*, 168 Ill. 586.

District of Columbia. — Where the object of a motion for a new trial is to procure a review of all the exceptions noted, it is not necessary to enumerate or specify the grounds for a new trial. *Jones v. Pennsylvania R. Co.*, 18 D. C. 426.

Illinois. — A general motion for a new trial, without specifying the grounds relied upon, is sufficient unless a specification is required by the court or the adverse party. *Metropolitan West Side El. R. Co. v. White*, 166 Ill. 375.

1. *Murphy v. Gould*, 40 Neb. 728; *Houston v. Omaha*, 44 Neb. 63; *Risee v. Gasch*, 43 Neb. 287; *Kirkendall v.*

Davis, 41 Neb. 285; *Haverly v. Elliott*, 39 Neb. 201; *Moore v. Hubbard*, 43 Neb. 612.

2. Errors not assigned will be deemed to have been waived and will not be considered on appeal. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 168. See also *supra*, VII. 1. c. *To Obtain Review by Appellate Court*.

3. See *infra*, VII. 11. *Second Motion Including New Grounds*.

4. See *supra*, VII. 5. *Time When Motion Must Be Made*.

5. "Irregularities in the Proceedings of the Court," is not a sufficient specification of error. *Horton v. Wilson*, 25 Ind. 316; *Tomer v. Densmore*, 8 Neb. 384; *Lowrie v. France*, 7 Neb. 192.

"For irregularities in the proceedings of the court and abuse of the discretion of the court, by which the defendants were prevented from having a fair trial," is too vague and indefinite as a specification of error. *Scoville v. Chapman*, 17 Ind. 470.

An assignment of "irregularity in the proceedings of the jury" in that the jury was incompetent to try the issue in said cause for the reason that one of the jurors was insane at the time of the trial, is a sufficient assignment of irregularity. *Distad v. Shanklin*, (S. Dak. 1898) 75 N. W. Rep. 205.

Objections to the Competency of Jurors cannot be reviewed in the Supreme Court where such objections were not called to the attention of the trial court in the motion for a new trial. *Ford v. State*, 46 Neb. 390; *Mengedoh v. Van Dorn*, 48 Neb. 880; *Hastings, etc., R. Co. v. Ingalls*, 15 Neb. 123.

6. See *supra*, III. 3. *Irregularity in the Proceedings*.

nature of the misconduct must be specified, and names of the parties implicated must be stated.¹

Misconduct of Prevailing Party. — The misconduct which may be assigned under this ground has been treated elsewhere.² Such misconduct as fraud, attempts to manufacture or suppress evidence; bribing or packing the jury, or trying the case in the absence of a party, may be assigned as surprise.³ When in doubt as to the proper ground the safest course is to assign both grounds.

(4) *Accident or Surprise.* — The nature of the accident or mistake creating surprise must be specified.⁴

(5) *Excessive or Inadequate Damages.* — The assignment of excessive or inadequate damages appearing to have been given under the influence of passion or prejudice is a proper assignment of error only where the damages are in the discretion of the jury, as in actions in tort.⁵ In actions where the jury can award only actual damages it is held that the assignment should be that the verdict is not justified by the evidence,⁶ as under this assignment the excessiveness of the verdict may be questioned independently of the influence of passion and prejudice.⁷ But the prevailing

1. **Misconduct.** — A motion for a new trial on the ground of misconduct of the jury must specify the nature of the misconduct and the names of the jurors. *Lennox v. Knox*, etc., R. Co., 62 Me. 322.

2. See *supra*, III. 4. *Misconduct.*

3. See *supra*, III. 5. *Accident or Surprise.*

4. "Surprise at the Trial which ordinary prudence could not have guarded against," is too general as an assignment of error, and does not disclose the nature of the surprise. *Snodgrass v. Hunt*, 15 Ind. 274. To the same effect, *Scoville v. Chapman*, 17 Ind. 470.

5. "Excessive Damages." — Where the statute provides that "excessive damages" and "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property," shall be grounds for new trial, the first ground applies only where damages are allowed for torts. *Moore v. State*, 114 Ind. 414; *Lake Erie*, etc., R. Co. v. *Acres*, 108 Ind. 548; *Thomas v. Merry*, 113 Ind. 83; *Clark Civil Tp. v. Brookshire*, 114 Ind. 437; *McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 340; *Smith v. State*, 117 Ind. 167; *McKinney v. State*, 117 Ind. 26; *Hogshead v. State*, 120 Ind. 327; *Indiana Ins. Co. v. Glenn*, 13 Ind. App. 534; *Davis v. Montgomery*, 123 Ind. 587; *Milwaukee*

Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640; *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176.

6. *Lane v. Dayton*, 56 Minn. 90, wherein the court said: "A verdict in an action where the plaintiff is entitled to actual damages, as distinguished from those in which no fixed and definite rules are to control the jury, for too large or too small an amount, is certainly not justified by the evidence, and in such a case it ought not to be required by the moving party that he made it appear that passion or prejudice entered into and influenced the deliberation of the jury, as he would have to do should he be obliged to predicate his motion upon" this ground. See, however, *Du Brutz v. Jessup*, 54 Cal. 119.

7. *Nelson v. West Duluth*, 55 Minn. 497. But see criticism of this case in *State v. Shevlin-Carpenter Co.*, 66 Minn. 217.

An assignment that the verdict was not justified by the evidence is the proper assignment where the verdict is excessive or inadequate in actions in which only actual damages may be recovered. *Lane v. Dayton*, 56 Minn. 90; *Nelson v. West Duluth*, 55 Minn. 497.

Whether Error Can Be Assigned as Verdict or Decision Contrary to Evidence and Law. — In an action on contract where the defendant was entitled to have deducted from the contract price its

rule is that an assignment that the verdict is not sustained by the evidence is not a sufficient specification that the damages are excessive.¹

(6) *Error in the Assessment.* — This is a proper assignment of error in actions on contract or where there is a legal measure of damages.² The general assignment that the verdict is contrary

damages for incomplete performance of the contract, and it is claimed that sufficient damages were not deducted by the referees, a motion for a new trial is properly made on the ground that "the decision is not justified by the evidence and is contrary to law," and need not be made upon the ground of "inadequate damages appearing to have been given under the influence of passion or prejudice." *Minneapolis First Nat. Bank v. St. Cloud*, (Minn. 1898) 75 N. W. Rep. 1054.

The true theory of assignments in error, as will be seen by the authorities cited generally, is that a party must assign the particular statutory ground relied upon. Under an assignment that the verdict is contrary to law and the evidence, or that the evidence is not sufficient to support the verdict, an applicant cannot be heard to allege that damages are excessive or inadequate. *Frank v. Kessler*, 30 Ind. 8; *Dix v. Akers*, 30 Ind. 431.

Verdict Result of "Passion or Prejudice." — The objection that the verdict is excessive or that there was error in the assessment of the amount of recovery is not raised by the assignment that the verdict is the result of passion or prejudice. *Reynolds v. Iowa*, etc., Ins. Co., 80 Iowa 563; *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761.

An assignment of error that "the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of recovery by the jury, independently of or aside from the consideration of the influence of passion, prejudice, or undue means. *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761.

Specification that Damages Are Inadequate. — In an action for damages for personal injuries sustained by the plaintiff, a specification of errors in the statement on a motion for a new trial, to the effect that the injuries of the plaintiff were very serious, and that the sum found by the verdict was unrea-

sonably and grossly inadequate, is a sufficient specification. *Bennett v. Hobro*, 72 Cal. 178.

"That the damages are excessive" is proper only in cases of torts. *Lake Erie, etc., R. Co. v. Acres*, 108 Ind. 548 [citing *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8].

1. The assignments that "the verdict is not sustained by sufficient evidence" or "is contrary to law," do not embrace the assignment that the damages were excessive. *Cook v. Clary*, 48 Mo. App. 166; *Pierson v. Slifer*, 52 Mo. App. 273; *Ray v. Thompson*, 26 Mo. App. 431; *Spurrier v. Briggs*, 17 Ind. 529; *Hyatt v. Mattingly*, 68 Ind. 271; *Bradley v. Bradley*, 45 Ind. 67; *Payne v. McLean*, 44 Ill. App. 354; *Star Brewery v. Croake*, 57 Ill. App. 287; *Sloteman v. Thomas, etc., Mfg. Co.*, 69 Wis. 499; *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761; *St. Louis Southwestern R. Co. v. Smith*, 11 Tex. Civ. App. 550. See, *contra*, *Burkholder v. Burkholder*, 25 Neb. 270.

2. *Lake Erie, etc., R. Co. v. Acres*, 108 Ind. 548; *Mazkewitz v. Pimentel*, 83 Cal. 450; *Allgro v. Duncan*, 24 How. Pr. (N. Y. Supreme Ct.) 210.

That the court erred in assessing any amount is not a proper assignment. *McGrimes v. State*, 30 Ind. 140.

On motion for a new trial of an action upon a sheriff's bond, for breach of official duty in making an execution sale, where the fifth statutory cause for a new trial is not assigned, namely, "error in the assessment of the amount of recovery, * * * where the action is upon a contract;" an assignment of the fourth statutory cause, viz., "excessive damages," does not call in question the assessment of the amount of recovery, as the action is upon contract. *Moore v. State*, 114 Ind. 414.

Error in the Amount of Recovery must be specified. *Livermore v. Stine*, 43 Cal. 274; *Peoria, etc., R. Co. v. Booth*, 11 Ill. App. 358; *McElhoes v. Dale*, 81 Ind. 67. See, *contra*, *Metcalf v. Fouts*, 27 Ill. 110.

to the evidence or law does not embrace or sufficiently specify an error in the assessment.¹

(7) *Verdict Not Sustained by the Evidence or Contrary to the Evidence.* — This error cannot be assigned in the language of the statute, as the particulars in which the evidence is insufficient or adverse must be specified.² It is erroneous to assign that the evidence does not sustain the judgment, as the evidence is regarded as sustaining the verdict and not the judgment.³

(8) *Verdict or Decision Contrary to Law.* — While it may be sufficient to assign as a ground for a new trial that the verdict or decision is "contrary to law,"⁴ the safest course is to specify in

Where the amount of the verdict is not authorized by the evidence it will be reviewed without an assignment that the verdict was the result of passion or prejudice. *Button v. Dehoney*, (Ky. 1895) 29 S. W. Rep. 615.

In an Action on an Insurance Policy error in assessing the amount of recovery should be assigned as an error in assessing the amount of recovery or that the damages are excessive. The objection that the verdict was not supported by the evidence is not sufficient to raise an objection in the trial court to excessive damages. *Reynolds v. Iowa, etc., Ins. Co.*, 80 Iowa 563.

1. *An Assignment that the Verdict Is Contrary to the Evidence* does not embrace the ground that there was error in the assessment of the amount of recovery. *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Cook v. Clary*, 48 Mo. App. 166.

A motion for a new trial on the general ground that the verdict is contrary to law and evidence, no relief being asked against failure to allow interest which was due, will not justify the appellate court in altering the judgment to include interest. *Cochrane v. Murphy*, 4 La. Ann. 6.

An assignment that the damages were excessive is insufficient to point out the error that interest was improperly allowed. *Hopper v. Chicago, etc., R. Co.*, 91 Iowa 639.

2. *That the Verdict Is Contrary to the Evidence* is not a sufficient specification of error. *Halloran v. L. C. L. R. Co.*, 5 Ky. L. Rep. 245; *Wathen v. Byrne*, 10 Ky. L. Rep. 193; *Alt v. Chicago, etc., R. Co.*, 5 S. Dak. 20; *Cohen v. Grimes*, (Tex. Civ. App. 1898) 45 S. W. Rep. 210; *Connor v. Saunders*, 9 Tex. Civ. App. 56; *Sterling v. Parsons*, 9 Utah 81 (under statute). But see *Edmonds v. State*, 34 Ark. 720; *Weston*

v. Johnson, 48 Ind. 1; *Collins v. Maghee*, 32 Ind. 268; *Marsh v. Terrell*, 63 Ind. 363. For decisions under the California Code Civ. Pro., see *Parker v. Reay*, 76 Cal. 103; *Coleman v. Gilmore*, 49 Cal. 340.

Such assignment does not raise the objection that there was "error in the assessment of the amount of recovery," as such objection is made a separate ground for a new trial. *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761. See also *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590.

3. *Insufficiency of the Evidence to Justify the Judgment* is not a proper assignment of error, since the evidence supports the findings and the findings support the judgment. The assignment should be insufficiency of the evidence to justify the verdict or decision. *Martin v. Matfield*, 49 Cal. 42; *Sawyer v. Sargent*, 65 Cal. 259; *Little v. Jacks*, 67 Cal. 165; *Matter of Doyle*, 73 Cal. 564; *Quinn v. Smith*, 49 Cal. 163; *Kirman v. Hunnewell*, 93 Cal. 519; *Mazkewitz v. Pimentel*, 83 Cal. 450; *Curtis v. Walling*, 2 Idaho 383; *Marshall v. Golden Fleece Gold Min., etc., Co.*, 16 Nev. 156; *Welland v. Williams*, 21 Nev. 230.

The Objection that There Was a Failure of Proof is not raised by the assignment, "because the finding is for the plaintiff when it should have been for the defendant." *Putnam v. Hannibal, etc., R. Co.*, 22 Mo. App. 589.

That "the Finding of the Jury Is Against the Weight of the Evidence" is not a sufficient assignment of error. *Waggoner v. Liston*, 37 Ind. 357.

That the Verdict on Special Issue Was Error is not a valid objection though made to each of several special findings. *Kumle v. Grand Lodge, etc.*, 110 Cal. 204.

4. That the verdict is contrary to law and evidence is a sufficiently spe-

what particular it is contrary to law.¹ An assignment that the judgment is contrary to law is, of course, insufficient. The assignment should be that the verdict or decision is contrary to law, specifying the particulars.²

(9) *Errors of Law Occurring at the Trial*—(a) *Generally*.—Where error of law occurring at the trial is specified as a ground for new trial the particular error of law must be specified,³ as the court and adverse party would otherwise be compelled to search the entire record.⁴ In some states it is sufficient, however, merely to designate the errors of law as errors of law occurring at the trial and duly excepted to.⁵

clific assignment of error in a motion for a new trial; but under such assignment the evidence in the case must be considered as a whole; if it was intended to insist on any particular defect of proof, such defect ought to be specially assigned. *Hillebrant v. Brewer*, 5 Tex. 566.

"An assignment as a cause for a new trial * * * that the finding or decision of the court is contrary to law is a proper method of saving the point that a trial has been had without arraignment or plea." *Bowen v. State*, 108 Ind. 411 [*citing* *Tindall v. State*, 71 Ind. 314; *Shoffner v. State*, 93 Ind. 519].

1. *The Particular Error of Law Should Be Specified*.—Error of the court in entering a deficiency judgment against the wife in a suit to foreclose a mortgage securing her notes is not sufficiently presented by the assignment that "the judgment of the court is contrary to law and the evidence." *Buell v. Shuman*, 28 Ind. 464.

An assignment that the court erred in rendering judgment for the defendant, without stating the precise error complained of, is too general. *Stone v. Wolfskill*, 59 Mo. App. 441.

The Verdict "Was Contrary to Law," is too general and indefinite as an assignment of error. *Winter v. Judkins*, 106 Ala. 259. See also *Jones v. Worcher*, 90 Ky. 230; *Carlin v. Baird*, (Ky. 1890) 13 S. W. Rep. 434; *Sellars v. Cincinnati, etc., R. Co.*, (Ky. 1895) 29 S. W. Rep. 332; *Trent v. Colvin*, (Ky. 1896) 35 S. W. Rep. 914; *State v. Green*, 43 La. Ann. 402; *Connor v. Saunders*, 9 Tex. Civ. App. 56.

The assignment that the verdict is against law is too general, as there is no specification or indication why or in what way and for what reason it is against law. *Gilbertson v. Miller Min., etc., Co.*, 4 Utah 46.

2. *That the Judgment of the Court Was "Contrary to Law,"* or "against law," is not a sufficient specification of error. *Howcott v. Kilbourn*, 44 Ark. 213; *Ferguson v. Ehrenberg*, 39 Ark. 420; *Gilbertson v. Miller Min., etc., Co.*, 4 Utah 46; *Mazkewitz v. Pimentel*, 83 Cal. 450; *Martin v. Matfield*, 49 Cal. 42; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485. See also *supra*, VII. 8. c. *Assignment of Errors*.

3. *"Errors of Law Occurring at the Trial"* and "excepted to at the time," or "duly excepted to," is not a sufficient specification of errors of law. *Elliott v. Woodward*, 18 Ind. 183; *Snodgrass v. Hunt*, 15 Ind. 274; *Barnard v. Graham*, 14 Ind. 322; *Scoville v. Chapman*, 17 Ind. 470; *Horton v. Wilson*, 25 Ind. 316; *Ward v. Patrick*, 41 Ind. 438; *Meaux v. Meaux*, 81 Ky. 475; *Taylor v. Holter*, 2 Mont. 476; *Walter A. Wood Mowing, etc., Co. v. Farnham*, 1 Okla. 375.

4. *The Particular Error Must Be Specified*.—"It was intended by this code provision to enable a party to take advantage of all errors to which exception could be taken that were not embraced by the seven subsections preceding this one, provided he specified the particular error or errors relied on; and it has been repeatedly held by this court that the law-making power did not intend that a party could by a general statement, although it might be in the language of this subsection, open for the consideration of the trial judge every step that has been taken in the case, and compel him to review each and every one of his rulings." *Ohio Valley R., etc., Co. v. Kuhn*, (Ky. 1887) 5 S. W. Rep. 419.

5. *Kansas—Oklahoma*.—Under the assignment "error of law occurring at the trial" it is held that "all rulings of the court made during the trial, and excepted to at the time they were made

(b) **Error in Admission or Exclusion of Evidence.** — In order to assign errors in the admission or exclusion of evidence the particular evidence must be specified by some description,¹ as by giving the name of the witness, or by reference to questions and answers in the bill of exceptions, and the objections thereto.² It is not

by the defendant, should be again considered by the court." *Da Lee v. Blackburn*, 11 Kan. 190 [followed in *Shepard v. Haas*, 14 Kan. 443; *Richardson v. Mackay*, 4 Okla. 328].

Nebraska. — Under Code Neb., § 317, providing that grounds for a new trial may be stated in the language of the statute, without further particularity, all errors which must be preserved by a bill of exceptions are included in the assignment "errors of law occurring at the trial." Each error need not be specifically pointed out. *Labaree v. Klosterman*, 33 Neb. 150; *Cleveland Paper Co. v. Banks*, 15 Neb. 20.

"Errors of law occurring at the trial and duly excepted to," being in the language of the statute providing grounds for new trials, is sufficient to present for review the ruling of the court upon a demurrer *ore tenus* interposed before the introduction of any evidence at the trial. *Riverside Coal Co. v. Holmes*, 36 Neb. 858.

Under such assignment the court can review errors in admitting or excluding evidence. *Burke v. Brown*, 49 Neb. 723; *Labaree v. Klosterman*, 33 Neb. 150.

Minnesota. — Errors in the admission or exclusion of evidence will be examined under the assignment "error of law occurring at the trial and excepted to by plaintiff." *Nelson v. West Duluth*, 55 Minn. 497.

1. **Arkansas.** — *Edmonds v. State*, 34 Ark. 720.

Georgia. — *Trice v. Rose*, 80 Ga. 408; *Findley v. Johnson*, 84 Ga. 69; *Clark v. Empire Lumber Co.*, 87 Ga. 742; *Adams v. Franklin*, 82 Ga. 168; *Wheelwright v. Aiken*, 92 Ga. 394; *Boswell v. Patrick*, 92 Ga. 417; *Coleman v. Slade*, 75 Ga. 61; *Hoffer v. Gladden*, 75 Ga. 532; *Hicks v. Sharp*, 89 Ga. 311; *Phillips v. Dewald*, 79 Ga. 732; *Tompkins v. Compton*, 97 Ga. 375.

Indiana. — *Tucker v. Call*, 45 Ind. 31; *Eden v. Lingenfelter*, 39 Ind. 19; *Welch v. Bennett*, 39 Ind. 136; *Dorsch v. Rosenthal*, 39 Ind. 209; *Vankeuren v. Howard*, 39 Ind. 291; *Cass v. Krimbill*, 39 Ind. 357; *Call v. Byram*, 39 Ind. 499; *Pittsburgh, etc., R. Co. v.*

Hennigh, 39 Ind. 509; *Musselman v. Musselman*, 44 Ind. 106; *Sparks v. Davis*, 41 Ind. 526; *Holding v. Smith*, 42 Ind. 536; *Sparks v. Heritage*, 45 Ind. 66; *Ball v. Kronkwright*, 45 Ind. 148; *Parks v. Hill*, 45 Ind. 172; *Stitson v. Lawrence County*, 45 Ind. 173; *Grant v. Westfall*, 57 Ind. 121; *McGee v. Robbins*, 58 Ind. 462; *Long v. Zook*, 48 Ind. 125; *Brucker v. Kelsey*, 72 Ind. 51; *Miller v. Lebanon Lodge No. 48, etc.*, 88 Ind. 286; *Cheek v. State*, 37 Ind. 533; *Reeves v. Plough*, 41 Ind. 204; *Betson v. State*, 47 Ind. 54; *Bowers v. Bowers*, 53 Ind. 430; *Evans v. State*, 67 Ind. 68; *Bayless v. Glenn*, 72 Ind. 5; *Ball v. Balfe*, 41 Ind. 221; *Mercer v. Patterson*, 41 Ind. 440; *Burdge v. Lewis*, 43 Ind. 349; *Freitag v. Burke*, 45 Ind. 38; *Wolffington v. State*, 53 Ind. 343; *Sutherland v. Hankins*, 56 Ind. 343; *State v. Riggs*, 92 Ind. 336; *Ireland v. Emmerson*, 93 Ind. 1; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58; *Rogers v. Beach*, 115 Ind. 413; *Queen Ins. Co. v. Studebaker Bros. Mfg. Co.*, 117 Ind. 416; *Pence v. Waugh*, 135 Ind. 143; *Knisely v. Hire*, 2 Ind. App. 86; *Dodge v. Morrow*, 14 Ind. App. 534.

Kentucky. — *Bruen v. Grahn*, 5 Ky. L. Rep. 313.

Virginia. — *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34.

West Virginia. — *Hughes v. Frum*, 41 W. Va. 451; *Gregory v. Ohio River R. Co.*, 37 W. Va. 606; *Halstead v. Horton*, 38 W. Va. 727.

2. *Ball v. Balfe*, 41 Ind. 221.

Sufficiency—References Illustrated. — An assignment that the court erred in admitting the affidavit of one G. is unavailing when no such affidavit appears in evidence. Although the record shows an affidavit of M., verified before G. as a notary, this will not be regarded as a clerical mistake where the same appears in both the brief and the motion for a new trial. *Indiana Imp. Co. v. Wagner*, 138 Ind. 663.

An assignment, "for error of law occurring at the trial in the court, over the objection and exception of the defendant, permitting D. to read the plaintiff's books of account in evi-

necessary to set out an exact copy of the evidence or the objection to it, but it will be sufficient if the evidence and objection are so pointed out that the judge could not mistake the ruling complained of.¹

dence," is sufficiently specific to present the rulings of the court on numerous objections to questions asked of a witness preparatory to introducing the books. *Dodge v. Morrow*, 14 Ind. App. 534.

Error in excluding evidence cannot be considered on appeal where the assignment in a motion for a new trial includes merely the sustaining of the objection to the question and not the exclusion of the offer. *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

Contra — No Specification Where Exceptions Preserved in Record. — "Where exceptions and objections have been made to the admission of testimony during the trial, or the instructions given at its termination, it has been held sufficient to state in the motion for a new trial that the court erred in admitting incompetent testimony, and erred in its instructions given for the plaintiff, or in refusing to give those asked by the defendant." *Newton v. Field*, 98 Ky. 186.

Designated by Bill of Exceptions. — A designation of the evidence excluded, "as set out and designated by the bill of exceptions," without otherwise identifying it by reference to page, question, or name of the witness, is so indefinite as to present no question for review. *Rogers v. Beach*, 115 Ind. 413.

Missouri. — A general assignment of error that "the court excluded from the jury proper, competent, and relevant testimony offered by the defendant," is sufficient without further specification of the evidence. *State v. Noland*, 111 Mo. 473, *overruling Woolner v. Levy*, 48 Mo. App. 469, and *Churchman v. Kansas City*, 49 Mo. App. 366. And see *Payne v. Payne*, 57 Mo. App. 130.

Reference to Reporter's Notes. — An assignment of error in a motion for a new trial, was as follows: "For errors of law occurring during the trial, and which were by defendant excepted to at the time, which exceptions appear in the shorthand reporter's notes, and cannot now be more specifically pointed out until said notes can be transcribed. Said errors relate to the receipt of evi-

dence against the defendant and the refusal to receive evidence offered by him." It was held that "such an exception, which is in general terms, and fails specifically to call the court's attention to any alleged error, and requires the court to examine the entire record, is insufficient upon which to base error in this court. It is due to trial courts that their attention should be directly called to any alleged errors that may have been committed, to the end that they may correct the error, if any; but such duty is not discharged by imposing upon the court the necessity of taking counsel's place and searching the entire record for the discovery of supposed errors. That is a burden counsel cannot impose upon the trial court." *Feister v. Kent*, 92 Iowa 1 [*citing* *Bauder v. Hinckley*, 60 Iowa 185; *Michael v. Longman*, 42 Iowa 485; *Sage v. Nichols*, 51 Iowa 49].

The Court Erred in Refusing to Admit Legal Testimony. — An assignment that "the court erred in refusing to admit legal testimony offered by the plaintiff in his behalf" is too general. The particular ruling should have been embraced in the motion in order to secure a review. *Miller v. Lebanon Lodge No. 48, etc.*, 88 Ind. 286 [*citing* *Musselman v. Musselman*, 44 Ind. 106; *McGee v. Robbins*, 58 Ind. 463]. See also *Parks v. Hill*, 45 Ind. 172.

Reference to Bill of Exceptions Not on File. — An assignment that the court erred in admitting or excluding certain evidence designated merely by reference to a bill of exceptions which was not made or filed until some time later is too indefinite for consideration on appeal. *Worthington v. Brown*, 48 Ind. 152; *Cobble v. Tomlinson*, 50 Ind. 550; *Sutherland v. Hankins*, 56 Ind. 343; *Burns v. Thompson*, 91 Ind. 146; *Arbuckle v. Biederman*, 94 Ind. 168; *Harvey v. Huston*, 94 Ind. 527; *Cain v. Goda*, 94 Ind. 555; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212.

1. "It is not the practice, and it is not incumbent on a party, in a motion for new trial, to set out in detail a verbatim copy of the evidence admitted over objection, or offered and refused, or a verbatim statement of the objec-

(c) **Error in Instructions.** — The particular instruction or portion of an instruction complained of must be pointed out in some manner, either by reference to its number or by its contents.¹

tions made to its introduction. It is sufficient if the evidence be referred to with such certainty as to call the attention of the court to it, and to the ruling in relation thereto, so that the judge could not mistake the matter and the ruling alluded to and complained of by the party filing the motion." *Ohio*, etc., *R. Co. v. Stein* 133 Ind. 243 [citing *Clark v. Bond*, 29 Ind. 555; *Meyer v. Bohlring*, 44 Ind. 238], quoted in *Springer v. Byram*, 137 Ind. 13.

Georgia. — The evidence and the objection made to it must be set out in the motion for a new trial. *Robinson v. State*, 84 Ga. 674; *Hicks v. Sharp*, 89 Ga. 311; *Hoffer v. Gladden*, 75 Ga. 532; *Findley v. Johnson*, 84 Ga. 69; *Trice v. Rose*, 80 Ga. 408; *Clark v. Empire Lumber Co.*, 87 Ga. 742; *Johnson v. State*, 85 Ga. 561.

An assignment of error in admitting the testimony of a named witness "as set out in the brief of evidence" is fatally defective, for the reason that it fails to set forth the testimony to which it refers. *Sheffield v. State*, 97 Ga. 426.

The evidence set out in the motion for a new trial must be brief and not merely a transcript of the reporter's notes. The substance of the evidence is sufficient. The court will not search through a voluminous record for errors. *Gate City Gas-Light Co. v. Farley*, 95 Ga. 796; *Wiggins v. Norton*, 83 Ga. 150; *Mehaffey v. Hambrick*, 83 Ga. 598; *Brown v. Moore*, 83 Ga. 605.

1. **Georgia.** — *Erskine v. Duffy*, 76 Ga. 602; *Small v. Williams*, 87 Ga. 681; *Payne v. Miller* 89 Ga. 73; *Wappoo Mills v. Commercial Guano Co.*, 91 Ga. 396.

Indiana. — *Robinson v. Hadley*, 14 Ind. 417; *Elliott v. Woodward*, 18 Ind. 183; *Horne v. Williams*, 23 Ind. 37; *Peck v. Hensley*, 21 Ind. 344; *Alley v. Gavin*, 40 Ind. 446; *Estep v. Larsh*, 21 Ind. 183; *Jeffersonville*, etc., *R. Co. v. Bowen*, 40 Ind. 545; *Reeves v. Plough*, 41 Ind. 204; *Schlicht v. State*, 56 Ind. 173; *Douglass v. Blankenship*, 50 Ind. 160; *Grant v. Westfall*, 57 Ind. 121; *Earle v. Peterson*, 67 Ind. 503; *Jones v. Layman*, 123 Ind. 569; *Wallace v. Exchange Bank*, 126 Ind. 265; *Memphis*, etc., *Packet Co. v. Pikey*, 142 Ind. 304. See *contra*, *Irwin v. Smith*,

72 Ind. 482; *Dawson v. Coffman*, 28 Ind. 220.

Iowa. — *Beal v. Stone*, 22 Iowa 447; *Lewis v. Lewis*, 75 Iowa 669; *Lyons v. Van Gorder*, 77 Iowa 600.

Nebraska. — *Omaha*, etc., *R. Co. v. Walker*, 17 Neb. 432; *Nyce v. Shaffer*, 20 Neb. 507; *Weir v. Burlington*, etc., *R. Co.*, 19 Neb. 212. But see *contra*, *Weber v. Kirkendall*, 44 Neb. 766.

Texas. — *Darnell v. State*, 15 Tex. App. 70.

Wisconsin. — *Nisbet v. Gill*, 38 Wis. 657; *Meno v. Hoeffel*, 46 Wis. 282.

An assignment that "the court erred in the instructions to the jury" is insufficient as failing to specify an error. *Elliott v. Woodward*, 18 Ind. 183. See also *Candrian v. Miller*, (Wis. 1898) 73 N. W. Rep. 1004.

An assignment that "the court erred in all the instructions it gave, and in refusing to give those asked for by the defendants," does not point out any error with reasonable certainty. *Peck v. Hensley*, 21 Ind. 344.

Assignments that "the court erred in refusing to give instructions asked by the defendants," and that "the court erred in giving instructions to the jury on its own motion," do not sufficiently designate the error complained of. *Douglass v. Blankenship*, 50 Ind. 160.

A new trial will be refused on the ground of error in an instruction not excepted to when given, and as to which no ground of objection is stated in the motion for new trial, although it is therein alleged to be erroneous. *Lyons v. Van Gorder*, 77 Iowa 600.

An assignment that the court erred in giving that part of its charge "wherein it defined the burden of proof and the amount of proof necessary" is sufficient to secure a review of that portion of the charge. *Wells v. Perkins*, 43 Wis. 160.

Contra — Kentucky. — The general assignment that the court erred in giving or refusing instructions requested by one of the parties or given by the court on its own motion is held to be sufficiently specific. *Louisville*, etc., *R. Co. v. McCoy*, 81 Ky. 403; *Meaux v. Meaux*, 81 Ky. 475; *Helfrich Saw*, etc., *Mill Co. v. Everly*, (Ky. 1895) 32 S. W. Rep. 750.

Assignment of Error as to Group of Instructions. — If it is desired to point out an error in any one of certain instructions, the assignment of error should be that the court erred in giving each of such instructions. An assignment merely that the court erred in giving certain instructions is construed to be directed to the entire group designated, and will not be sustained if any one of the group is correct.¹

Nebraska. — Assignments that "the court erred in giving certain instructions to which the defendants excepted," and that "the court erred in refusing to give certain instructions asked by the defendants, to which defendants duly excepted," are sufficient under section 317 of the code to present to the trial court any error in giving or refusing such instructions. *Weber v. Kirkendall*, 44 Neb. 766.

By section 317 of the code the grounds may be assigned in the language of the statute as "error of law occurring at the trial," without specifying the instructions. But see *contra*, *Phoenix Ins. Co. v. King*, 52 Neb. 562.

Reference to Bill of Exceptions Not on File. — An assignment of error that the court erred in giving or refusing certain instructions designated merely by reference to a bill of exceptions which was not made or filed until some time later is too indefinite for consideration on appeal. *Nofsinger v. Reynolds*, 52 Ind. 218; *Moore v. Hyde*, 51 Ind. 475.

Georgia. — **Charge Must Be Set Out in Motion.** — A designation of certain charges as being "embodied and set out in the charge of the court and marked in quotations," will not be considered on appeal. The portion of the charge claimed to be erroneous must be pointed out. *Payne v. Miller*, 89 Ga. 73, citing *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321. See also *Grace v. Martin*, 83 Ga. 245.

Both the charge itself and the specification of the error therein must be set forth in the motion for new trial. *Ers-kine v. Duffy*, 76 Ga. 602.

If the charge is lengthy and sound in part the portion of the charge claimed to be erroneous must be pointed out. *Small v. Williams*, 87 Ga. 681.

1. Indiana. — *Marshall v. Lewark*, 117 Ind. 377; *Ohio, etc., R. Co. v. McCarty*, 121 Ind. 385; *Lawrence v. Van Buskirk*, 140 Ind. 481; *Conner v. Citizens' St. R. Co.*, 146 Ind. 430; *Indiana, etc., R. Co. v. Snyder*, 140 Ind. 647; *Cincinnati, etc., R. Co. v. Mad-*

den, 134 Ind. 462; *Mock v. Muncie*, 9 Ind. App. 536; *Tegarden v. Phillips*, 14 Ind. App. 27; *Supreme Council v. Boyle*, 10 Ind. App. 301; *Kackley v. Evansville, etc., R. Co.*, 7 Ind. App. 169; *Masterson v. State*, 144 Ind. 240; *Baltimore, etc., R. Co. v. Countryman*, 16 Ind. App. 139; *Edmonds v. Mounsey*, 15 Ind. App. 399; *Stewart v. Long*, 16 Ind. App. 164.

Iowa. — *Hallenbeck v. Garst*, 96 Iowa 509; *Koenigs v. Chicago, etc., R. Co.*, 98 Iowa 569.

Nebraska. — *Murphy v. Gould*, 40 Neb. 728; *Spears v. Chicago, etc., R. Co.*, 43 Neb. 720; *Diers v. Mallon*, 46 Neb. 126; *Kaufmann v. Cooper*, 46 Neb. 645; *McCormal v. Redden*, 46 Neb. 776; *Oltmanns v. Findlay*, 47 Neb. 289; *Pythian L. Assoc. v. Preston*, 47 Neb. 392; *Johnston v. Milwaukee, etc., Invest. Co.*, 49 Neb. 68; *Graham v. Frazier*, 49 Neb. 90; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429; *Dempster Mill Mfg. Co. v. Holdrege First Nat. Bank*, 49 Neb. 321; *Stough v. Ogden*, 49 Neb. 291; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768; *South Omaha v. Powell*, 50 Neb. 798; *Union Pac. R. Co. v. Thorne*, 51 Neb. 472; *Hodgin v. Whitcomb*, 51 Neb. 617; *Home F. Ins. Co. v. Phelps*, 51 Neb. 623.

An assignment of error in a motion for a new trial that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them, asked for by and on behalf of the plaintiff, and duly excepted to by the defendant," is sufficiently specific to call for review by the Supreme Court of each of the instructions specified. It is not an assignment to the giving of instructions *en masse*, but to each one separately. *Aultman v. Martin*, 49 Neb. 103, *overruling* *Russel v. Rosenbaum*, 24 Neb. 769.

An assignment that the court erred in giving certain paragraphs of the instructions specified by number, "and in giving each of them," is sufficiently specific, as it refers to each paragraph separately, and not to a group. *Kirchman v. Kratky*, 51 Neb. 191; *Aultman*

10. Amendments — To Include New Grounds. — A motion for a new trial may be amended by making the assignments of error more specific,¹ but not by adding new and additional assignments of error.² After the time for filing the motion has expired the applicant cannot amend his motion to include errors occurring at the trial and known to him at the time of filing his motion.³ But if the error occurring at the trial is discovered after the motion is filed it is held by some authorities that the motion may be amended even though the time for filing the motion has expired.⁴ The applicant must show, however, that he has been unavoidably prevented from making his motion in time and in proper form,⁵ and the failure to insert proper assignments must be accounted for by a showing of diligence.⁶

v. Martin, 49 Neb. 103; *Behrends v. Beyschlag*, 50 Neb. 304; *Lafayette v. Larson*, 73 Ind. 367; *McKendry v. Sinker*, 1 Ind. App. 263; *Tegarden v. Phillips*, 14 Ind. App. 27; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630. But see *Nofsinger v. Reynolds*, 52 Ind. 218.

An assignment that the court erred in giving or in refusing "each of the instructions numbered 1, 2, 3," is sufficiently specific. *Meyer v. Shamp*, 51 Neb. 424.

When several instructions are grouped together in one assignment of the motion for a new trial they will be examined no further than to determine that a single one thereof was rightly given or rightly refused. *Stough v. Ogden*, 49 Neb. 291; *Sloan v. Wherry*, 51 Neb. 703.

An assignment that a group of instructions is erroneous will not be sustained if any one instruction was proper. *South Omaha v. Powell*, 50 Neb. 798.

If a Series of Propositions Be Embodied in the Instructions, and the instructions be excepted to as a whole, if any of the propositions be correct the exceptions must be overruled. *Johnston v. Jones*, 1 Black (U. S.) 209; *Beaver v. Taylor*, 93 U. S. 46; *Rogers v. Marshal*, 1 Wall. (U. S.) 654; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *Hunt v. Maybee*, 7 N. Y. 273; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474; *Decker v. Mathews*, 12 N. Y. 313; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

1. *Sowden v. Craig*, 20 Iowa 478; *Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondson*, 18 Cal. 203.

2. *Riggins v. Brown*, 12 Ga. 271;

Reed v. Miller, 1 Bibb (Ky.) 142; *Bell v. Howard*, 4 Litt. (Ky.) 117.

Where the assignments of error related to giving and refusing certain instructions the motion cannot be amended to show error in failing to instruct the jury as to the burden of proof. *Dutton v. Seevers*, 89 Iowa 302.

Where the Court Is Not Confined to the Grounds Stated in the Motion it is held that the trial court should consider additional grounds filed after the time had expired. *Houston v. Kidwell*, 83 Ky. 301.

3. *State v. Brooks*, 92 Mo. 591; *State v. Dusenberry*, 112 Mo. 295; *State v. Musick*, 101 Mo. 275; *Harnett v. Harnett*, 59 Iowa 401; *Aultman v. Leahey*, 24 Neb. 286. See *contra*, *Gill v. Hecht*, 13 Utah 5; *Martin v. Lake*, 3 Hill (N. Y.) 475.

If no objection is made to the order permitting an amendment, the error is waived by submission of the amended motion to the court on the evidence. *Spears v. Mt. Ayr*, 66 Iowa 721.

4. Amendment After Time Has Expired.

— After the time for filing a motion for a new trial has expired, a motion filed in time may be amended to state additional assignments of error of which the applicant was ignorant at the time when the original motion was filed. The provisions of the code relating to amendments of pleadings, etc., before judgment apply to motions for new trials. *Mt. Vernon Bank v. Porter*, 65 Mo. App. 448; *Seagrave v. Hall*, 3 Ohio Dec. 221.

5. *Aultman v. Leahey*, 24 Neb. 286; *Houston v. Kidwell*, 83 Ky. 301; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; *Moore v. Ulm*, 34 Ga. 565.

6. *Mt. Vernon Bank v. Porter*, 65 Mo. App. 448.

11. **Second Motion Including New Grounds.** — If all the errors occurring at the trial have not been assigned in the motion for a new trial, the applicant may file a second motion including all assignments upon which he relies, and it seems that such motion may be filed without leave of court, if the time has not expired.¹

VIII. MOTION FOR RULE TO SHOW CAUSE. — The common-law method of applying for a new trial was by a motion for a rule to show cause why a new trial should not be granted.² This practice is seldom followed,³ as the statutes and codes contemplate a motion for a new trial and an order granting or denying such motion.

IX. NOTICE OF MOTION — When Required. — In nearly every state the motion for a new trial is regarded as an ordinary motion, and notice of the time and place of the hearing is required, either by statute or rule of court,⁴ and must be given unless waived by the

Amendment on Rehearing. — "The application to amend the motion made after it has been decided and filed, and thus insert an entirely new ground in it, is in effect a second and independent motion for a new trial, and if we should allow it, we would, by doing so, extend the time allowed by the statute for making motions for new trials from ten to at least forty days. We have no such power." *Mundee v. Freeman*, 23 Fla. 529, citing *Stewart v. Mathews*, 19 Fla. 752.

1. *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; *Lincoln v. Beckman*, 23 Neb. 677.

Second Motion as Abandonment of First. — After a motion for a new trial was filed the applicant filed a second motion which was styled a "supplemental motion," but which assigned additional errors which existed at the time the former motion was filed. It was held that the second motion, having been filed in time and without leave of court, would be considered as an abandonment of the former motion, and the second motion only would be considered on appeal. *Lincoln v. Beckman*, 23 Neb. 677.

2. Hilliard on New Trials (2d ed.), § 16.

In *Vernon v. Hankey*, 2 T. R. 113, it was said: "A rule to show cause why there should not be a new trial is granted for little more than asking, if any plausible doubt can be stated; but if this were to be followed up by making the rule absolute on the same grounds, it would be great injustice to the parties, and would tend to multiply litigation to an enormous degree."

3. *Georgia.* — This practice is followed in Georgia. See *Gauldin v. Crawford*, 30 Ga. 674; *Powell v. Howell*, 21 Ga. 214; *Spence v. Holman*, 30 Ga. 646; *Georgia R., etc., Co. v. Usry*, 82 Ga. 54.

A rule *nisi* may be moved for without previous notice. *Powell v. Howell*, 21 Ga. 214.

New Jersey. — This practice is still followed in New Jersey. See *Corbin's Rules*, pp. 49, 50; *Rules of Supreme Court* 35, 36. The application must be made to the trial court within four days after verdict unless for errors subsequently discovered, and may be made *ex parte*. Supreme Court Rule 36. The application for a rule to show cause must be made to the justice of the Supreme Court holding the circuit. *La Valle v. Electric Cutlery Co.*, 56 N. J. L. 59.

Indefinite Time in Order to Show Cause. — A rule *nisi* calling upon the adverse party to show cause why a new trial should not be granted is not void because indefinite, where the time is stated "as soon as they [counsel] can be heard." Such rule is returnable and to be heard when it may suit the convenience of the court, and not necessarily during the same term. *King v. Carey*, 5 Ga. 270.

4. *Callanan v. Lewis*, 79 Iowa 452; *Krakower v. Davis*, 20 Misc. Rep. (N. Y. Supreme Ct.) 350; *Russell v. Agricultural Ins. Co.*, (Supreme Ct.) 46 N. Y. Supp. 186; *Barons v. Anderson*, 37 Kan. 399; *Galloway v. Negle*, 1 Yeates (Pa.) 103; *McWilliams v. Bannister*, 42 Wis. 301; *Wheeler v. Russell*, 93 Wis. 135; *Hooker v. Levy*, (Miss. 1895) 18

appearance or pleadings of the adverse party.¹ But where a new trial must be granted as a matter of right, the application may be *ex parte* and without notice.²

Contents of Notice. — The notice must be in the form of a notice of an ordinary motion, specifying the time and place of the hearing, and in some states it must specify the ground of the motion³ or the evidence or affidavits to be introduced.⁴ or must be accom-

So. Rep. 385. See also article MOTIONS, *ante*, p. 70.

A Notice of Intention to Move for a new trial is required in some states by statute. See *supra*, VII. 8. *Notice of Intention to Move for a New Trial*.

A Rule to Show Cause obtained at a previous term may be argued thereafter without additional notice setting forth the grounds for the application. *Ryerson v. Grover*, 1 N. J. L. 449.

Justices' Courts. — Notice is required on motions for new trials in justices' courts. See article JUSTICES OF THE PEACE, vol. 12, p. 749.

Motion on Minutes of the Court. — No notice of a motion on the minutes to set aside the verdict and grant a new trial, made at the same term, is necessary. Such motion and the decision thereon are a part of the trial and do not require any notice apart from the trial. *Hansen v. Fish*, 27 Wls. 535. See, for an illustration of the usual provision for motion on the minutes, N. Y. Code Civ. Pro., § 999.

Notice to Applicant of Time for Hearing. — Where the code provides that a motion for a new trial shall be heard at the earliest period practicable after its filing, the applicant is not entitled to a notice of the time set for hearing, as he is supposed to take notice of subsequent proceedings. *Shafer v. Hewitt*, 6 Colo. App. 374.

New York — Time of Serving Notice. — Under N. Y. Code Civ. Pro., § 1002, a motion for a new trial founded on an allegation of error in a finding of fact or ruling of law made by the judge upon the trial must be noticed before the expiration of the time for appeal and must be heard at a special term held by the judge who presided at the trial. But a motion for a new trial on the ground of the misconduct of a juror is not subject to such provision. *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97.

1. Waiver of Notice of Motion. — A party waives notice of a motion for a new trial by failing to object at the

hearing of the motion or by making a counter showing and contesting the motion. *Krakower v. Davis*, 20 Misc. Rep. (N. Y. Supreme Ct.) 350; *Russell v. Agricultural Ins. Co.*, 19 N. Y. App. Div. 625, 46 N. Y. Supp. 186; *Chesley v. Mississippi, etc., Boom Co.*, 39 Minn. 83; *Means v. Yeager*, 96 Iowa 694; *Jester v. Lekite*, 5 Harr. (Del.) 19; *Shepherd v. Case*, Col. & C. Cas. (N. Y.) 94; *Williams v. Gregory*, 9 Cal. 76; *Godchaux v. Mulford*, 26 Cal. 316.

Hearing Without Notice — Harmless Error. — The plaintiff cannot complain that the defendant's motion for a new trial was heard and denied in the absence of the plaintiff and without notice, where the disposition of the motion was in favor of the plaintiff. *Wulf v. Manuel*, 9 Mont. 276.

2. New Trial as a Matter of Right. — No notice is required in cases where by statute a party is entitled to a new trial as a matter of right, as it is a matter of course and the proceedings are *ex parte*. *Haseltine v. Simpson*, 61 Wis. 427; *Stanley v. Holliday*, 113 Ind. 525; *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Brown v. Cody*, 115 Ind. 484; *Whitman v. Weller*, 39 Ind. 515; *Whitlock v. Vancleave*, 39 Ind. 511; *Murray v. Kelly*, 27 Ind. 42; *Dennison v. Genesee Circuit Judge*, 37 Mich. 285; *Callanan v. Lewis*, 79 Iowa 452. See also article EJECTMENT, vol. 7, p. 359.

But if required by such statutes, a notice is a condition precedent. *West v. St. Paul, etc., R. Co.*, 40 Minn. 189; *Doster v. Sterling*, 33 Kan. 381; *McManamy v. Ewing*, *McCahon* (Kan.) 172.

3. The Notice of Intention to Move for a New Trial must specify the grounds of the motion. See *supra*, VII. 8. *Notice of Intention to Move for a New Trial*. See also article MOTIONS, *ante*, p. 70.

4. Section 534 of the Kansas Code, requiring the notice of a motion to state that affidavits are to be used, does not apply to motions for new trials. *Werner v. Edmiston*, 24 Kan. 147.

panied with a copy of the evidence ¹ or a copy of the motion. ²

X. CONTINUANCE OR POSTPONEMENT. — A motion for a new trial may be continued to succeeding terms, like other motions or proceedings, ³ unless the statute requires such motion to be heard during the trial term ⁴ or at the next succeeding term. ⁵

By Agreement of Parties. — The continuance may be by agreement of the parties, ⁶ either in writing or entered upon the record. ⁷

By Operation of Law. — The general rule that all causes undisposed of at the end of a term are continued until the next succeeding

1. *McWilliams v. Bannister*, 42 Wis. 301.

2. **Serving Copy of Motion.** — A motion for a new trial should be overruled where the applicant has failed to serve a copy of the motion on the same day when the motion was filed, as required by rule of court, although no objection was made until the hearing of the motion, and after the time for filing a new motion had expired. *Cram v. Moore*, 158 Mass. 276.

3. *Walker v. Hale*, 16 Ala. 26; *Lee v. De Bardeleben Coal, etc., Co.*, 102 Ala. 628; *Higginbotham v. Campbell*, 85 Ga. 638; *Milner v. Burrus*, 85 Ga. 642; *Howland v. Reeves*, 25 Mo. App. 458; *Spalding v. Meier*, 40 Mo. 176; *Turpin v. Turpin*, 3 J. J. Marsh. (Ky.) 327; *Hinton v. Coleman*, 76 Wis. 221.

The statute does not require that a motion be heard or decided where it merely requires the motion to be made within a certain number of days. If the motion for a new trial is made in time it may be continued like any other motion or proceeding. *Brenner v. Bigelow*, 8 Kan. 496; *Coleman v. Edwards*, 5 Ohio St. 55; *Kline v. Wynne*, 10 Ohio St. 223; *Morgan v. Boyd*, 13 Ohio St. 271.

4. *Vallentine v. Holland*, 40 Ark. 338; *Walker v. Jefferson*, 5 Ark. 23; *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335; *England v. Duckworth*, 75 N. Car. 309; *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313; *McKean v. Ziller*, 9 Tex. 58; *Bullock v. Ballew*, 9 Tex. 500; *Lightfoot v. Wilson*, 11 Tex. Civ. App. 151; *Eddleman v. McGlathery*, 74 Tex. 280; *Merrill v. Roberts*, 78 Tex. 28; *Weaver v. Vandervanter*, 84 Tex. 691; *Carter v. Vanzandt County*, 75 Tex. 286.

Continuing Term to Hear Motion. — Where a motion for a new trial must be heard during the trial term the court has power to continue the term for hearing such motion and for time for preparing a bill of exceptions. *U. S. v. Hood*, 19 D. C. 372.

Continuance Although Statute Requires Hearing During Term. — A motion made upon the minutes of the judge is required by Rev. Stat. Wisconsin, § 2878, to be heard during the trial term, and if not heard during the term the motion will expire. But the time may be extended by agreement of the parties and by a waiver by the adverse party of the objection that all the evidence is not of record. *Hinton v. Coleman*, 76 Wis. 221.

Failure to Decide Motion During Term. — Although a motion for a new trial must, under the rule of court, be decided during term, a court will not lose jurisdiction to decide such motion by a failure to decide during term a motion that had been argued and submitted. *Pearce v. Strickler*, (N. Mex. 1897) 49 Pac. Rep. 727.

5. *Scarborough v. Smith*, 52 Miss. 517; *McClure v. Houston*, 10 Smed. & M. (Miss.) 302; *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313.

The motion will expire with the term unless there is an entry showing that it is submitted or taken under advisement. If such entry is made it may be decided at the next term. *Ross v. Garey*, 7 How. (Miss.) 58; *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313.

6. *Dozier v. Owen*, 63 Ga. 539; *Pace v. Mealing*, 21 Ga. 464; *Johnston v. Simmons*, 77 Ga. 298.

7. **Agreement Not of Record.** — It is doubtful whether such agreement would be binding unless in writing, or entered on the minutes of the court. *American White Bronze Co. v. Clark*, 123 Ind. 230.

A motion for a new trial was heard and overruled in the absence of the plaintiff's counsel, although it had been continued by an oral agreement of counsel, communicated to the court and approved, but no record of the continuance having been entered. It was held that the plaintiff was entitled to a *nunc pro tunc* order of continuance and

term by operation of law and without an order of court¹, applies to motions for new trials.²

By Order of Court. — The order may be granted by the court on cause shown.³

The **Hearing** of the motion should be continued to the next term, and not to a day in vacation,⁴ unless the statute permits a hearing in vacation.⁵

to a hearing on the motion, although the plaintiff's attorney was in fault in neglecting to have the order of continuance entered in time. *Spalding v. Meier*, 40 Mo. 176.

1. See article CONTINUANCES, vol. 4, p. 830.

2. *Truett v. Legg*, 32 Md. 147; *Van de Haar v. Van Domseler*, 56 Iowa 671.

Motion Expires Unless Continued. — At common law a motion for a new trial expired with the term and was not continued by operation of law. It could not be considered at a subsequent term unless it had been regularly continued. *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313, cited in *Vicksburg v. Hennessey*, 52 Miss. 178.

Under Code Miss. 1871, § 668, a motion for a new trial is a "proceeding remaining undecided" at the end of the term, which "shall stand continued of course until the next term." No order of continuance is necessary at the close of the term. *Vicksburg v. Hennessey*, 52 Miss. 178.

3. *Walker v. Banks*, 65 Ga. 20; *Milner v. Burrus*, 85 Ga. 642; *Williams v. Central R. Co.*, 77 Ga. 612; *Spalding v. Meier*, 40 Mo. 176; *Bruner v. Marcum*, 50 Mo. 405; *Walker v. Hale*, 16 Ala. 26.

Sufficient Cause. — It is not error to refuse to postpone a motion for a new trial for the purpose of procuring a witness concerning whose testimony the adverse counsel so differed that the testimony could not be inserted in the bill of exceptions. It was the duty of the judge to state the substance of the testimony as he himself understood it. *Miller v. Koger*, 9 Humph. (Tenn.) 231.

The loss of the written instructions to the jury is not a ground for postponement of the hearing of a motion for a new trial or for granting a new trial. The judge may settle the statement from memory or resort to any evidence to rewrite the instructions. *Visher v. Webster*, 13 Cal. 58.

Continuance to Prepare Counter Affidavits. — A party cannot object to the filing of affidavits at or near the time of

the hearing, since he may apply for a continuance to prepare counter affidavits. It is a common practice to grant continuances where the parties are unable to prepare their evidence before the hearing. *Howland v. Reeves*, 25 Mo. App. 459.

4. See *infra*, XIII. *Hearing of Motion.*

5. **Hearing in Vacation.** — A motion for a new trial made in term cannot be heard in vacation over the objection of either party, unless an order is taken for that purpose, or it is so directed in the rule nisi. *Rust v. McLaren*, 54 Ga. 111; *Ferril v. Marks*, 76 Ga. 21. See also article CHAMBERS AND VACATION, vol. 4, p. 336.

Continuance to Vacation — Failure to Hear or Continue. — Where a consent order is taken during the term at which the trial was had, providing that a brief of the evidence be filed and a motion be continued to a day in vacation and heard at chambers, the court will lose jurisdiction to grant a new trial unless the motion is heard or continued on the day named. *Middlebrooks v. Middlebrooks*, 57 Ga. 193; *Western, etc., R. Co. v. Johnson*, 59 Ga. 626.

If continuances are taken during vacation the motion does not lose its vitality until disposed of. *Stone v. Taylor*, 63 Ga. 309.

Hearing at Chambers Continued During Vacation. — Where the motion for a new trial is set for hearing at chambers the court does not lose jurisdiction to grant a new trial by merely continuing the hearing to the next term of court. The motion could then be heard at any time during the next term without a further order of continuance. *Higginbotham v. Campbell*, 85 Ga. 638.

Continuance in Vacation and During Term. — "The rule as to continuances from day to day in vacation has no application to what transpires in term time. Once in court, the motion remains there until heard or otherwise disposed of. Fixing a time for the hearing, or entering continuances from day to day, is no disposition of it."

XI. SUSPENSION OF JUDGMENT. — If a judgment has been entered, the order continuing the motion for a new trial should also provide that the judgment be suspended.¹

XII. WAIVER OR ABANDONMENT OF MOTION — 1. By Agreement. — The right to move for a new trial may be waived by agreement before the time for filing the motion expires.²

2. By Neglect to File Motion in Time. — The right to a new trial is waived by the failure or neglect to file the motion in time³ or to follow all necessary steps in preparing a statement of the case, giving notice, etc.⁴ The right is also waived by a failure to obtain a ruling on the motion before the time for decision has expired.⁵

3. By Moving for Arrest of Judgment. — A motion in arrest of judgment is a waiver of the right to move for a new trial⁶ unless the grounds for a new trial are discovered after making the motion in arrest.⁷ As a general rule the motion in arrest of judgment should be filed first, but if both are filed on the same day it will be presumed that they were filed and disposed of in their proper order.⁸

Carroll v. East Tennessee, etc., R. Co., 82 Ga. 470.

1. Doggett v. Jordan, 4 Fla. 121. It is the practice in many states to enter a judgment as soon as the verdict is returned, regardless of the motion for a new trial. See *supra*, VII. 5. *f. Motion After Judgment Is Entered.*

2. Hackley v. Muskegon Circuit Judge, 58 Mich. 454; McClellan v. Hurd, 11 Colo. 126; Ladd v. Hildebrandt, 27 Wis. 135.

Stipulation by Attorney — Waiver. — Under Gen. Stat. Minn. 1878, c. 88, § 9, empowering an attorney "to bind his client in any of the proceedings in an action or special proceeding, by his agreement, duly made or entered," an attorney may waive the right to a new trial although such new trial was a matter of right in ejectment. Bray v. Doheny, 39 Minn. 355.

A petition for a new trial will not lie after a judgment reciting that on condition of acceptance by the plaintiff of a sum in full for all damages, and on the further condition that the defendant agrees not to appeal, judgment is entered against the defendant and motion for a new trial is withdrawn, the plaintiff also promising not to appeal. Lundon v. Waddick, 98 Iowa 478.

3. Kent v. Lawson, 12 Ind. 675; Shaffer v. Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204; State v. Hall, 26 W. Va. 236.

4. Caney v. Silverthorne, 9 Cal. 67;

Wright v. Snowball, 45 Cal. 654; Cooney v. Furlong, 66 Cal. 520; Hibernia Sav., etc., Soc. v. Moore, 68 Cal. 156.

5. Ruff v. Hand, (Arizona 1890) 24 Pac. Rep. 257; Doddridge v. Gaines, 1 MacArthur (D. C.) 335.

6. See article ARREST OF JUDGMENT, vol. 2, p. 818. See also Cincinnati, etc., R. Co. v. Case, 122 Ind. 316, and cases cited; Eckert v. Binkley, 134 Ind. 614; McReynolds v. Anderson, 56 Mo. App. 398; School City v. Heinzman, 13 Ind. App. 195.

This Was the Rule at Common Law. — See Turbervil v. Stamp, 2 Salk. 647, and cases cited. But the practice was not uniform in all the courts. Candler v. Hammond, 23 Ga. 493; Lane v. Crockett, 7 Price 566; 1 Seldon's Pr. 497; Tidd's Pr. 913.

The Rule Can Work No Hardship, as a party may, after a motion for a new trial, move in arrest of judgment, and thus secure the benefit of both motions. Cincinnati, etc., R. Co. v. Case, 122 Ind. 316.

7. McKinney v. Springer, 6 Ind. 453; Mason v. Palmerton, 2 Ind. 117.

In Philips v. Fowler, 2 Comyns Rep. 525, 1 Barnes 441, a motion for a new trial for misconduct of the jury was granted although the defendant had previously moved in arrest of judgment.

8. Water, etc., Co. v. Gildersleeve, 4 N. Mex. 171; Habersham v. Wetter, 59

4. By Proceeding Inconsistent with Motion. — The right is also waived by pursuing other proceedings inconsistent with the motion,¹ as by taking an appeal before the motion is decided,² by demurring to the evidence,³ or by obtaining a stay of execution.⁴

Motion for Venire de Novo or for Judgment. — But a motion for a venire *de novo*⁵ or insisting on exceptions to conclusions of law,⁶ or a motion for judgment on special findings or for judgment *non obstante veredicto*,⁷ will not constitute a waiver of the right, since such proceedings are not inconsistent with the motion for a new trial.

Ga. 11; Jewell v. Blandford, 7 Dana (Ky.) 473; Pope v. Latham, 1 Ark. 66.

Motion in Arrest Simultaneously. — Ordinarily the motion for a new trial should precede the motion in arrest of judgment. Wallace v. Curtiss, 36 Ill. 156. But where both motions were filed simultaneously they may properly be acted upon by the court, since in such case the motion in arrest of judgment cannot be considered an admission that the verdict was unobjectionable. Sweeney v. Baker, 13 W. Va. 222; Farmers' Bank v. Bayliss, 41 Mo. 274.

Motion Before Ruling on New Trial. — Although a motion in arrest of judgment in effect admits that the verdict is correct, such motion may be filed before a ruling is obtained on a prior motion for a new trial. State v. Griffie, 118 Mo. 188.

1. Where Both Parties Ask for the Direction of a Verdict after the close of the evidence, each waives the right to a new trial for failure to submit questions of fact to the jury. Banker v. Knibloe, 69 Hun (N. Y.) 539.

Failure to Move Court to Direct Verdict. — The failure to move the court to direct a verdict is not a waiver of the right to move for a new trial upon the ground that the verdict rendered was against the weight of evidence. Such failure would be a waiver where the motion attacks the verdict as not supported by the evidence. Slater v. Drescher, 72 Hun (N. Y.) 425.

Waiver of New Trial as of Right. — A new trial as of right is waived by filing a motion for a new trial for cause. Johnson v. Ballard, 148 Ind. 181.

A new trial as of right in real actions is waived by joining in a motion for such new trial a ground for a new trial for cause. Seisler v. Smith, (Ind. 1897) 46 N. E. Rep. 993.

2. Corbett v. Swift, 6 Nev. 194; McArdle v. McArdle, 12 Minn. 122; Walker v. Hale, 16 Ala. 26. But see *supra*, VII. 5. *g. Pending Appeal.*

3. By a demurrer to the evidence a party admits all facts which the evidence tends to prove, and such party waives the right to raise the same questions by a motion for a new trial. Ruddell v. Tyner, 87 Ind. 529; Stockwell v. State, 101 Ind. 1. But it seems that if a demurrer to the evidence is erroneously sustained the adverse party is entitled to a new trial. Missouri Pac. R. Co. v. Goodrich, 38 Kan. 224. It is probable that a demurrer to the evidence is only a waiver of the right to a new trial on the ground of insufficiency of the evidence, and not to other errors occurring at the trial.

4. Waiver by Taking Stay of Execution. — Under section 318 of the Nebraska Code Civ. Pro. a party taking a stay of a decree of foreclosure waives the right to appeal from the decree, and therefore waives his right to a new trial. Banks v. Hitchcock, 20 Neb. 315.

5. Jenkins v. Parkhill, 25 Ind. 473.
6. Dodge v. Pope, 93 Ind. 480; Bertelson v. Bower, 81 Ind. 512; Lockwood v. Dills, 74 Ind. 56.

7. Fisk v. Henarie, 14 Oregon 29; Indianapolis, etc., R. Co. v. McCaffrey, 62 Ind. 552; Ronan v. Meyer, 84 Ind. 390; Brannon v. May, 42 Ind. 92; Chicago, etc., R. Co. v. Dimick, 96 Ill. 42; Atchison, etc., R. Co. v. Holland, 58 Kan. 317.

But in Nixon v. Downey, 49 Iowa 166, it was held that where, after judgment upon a special verdict, motions are made for a new trial and for a judgment on the general verdict, the latter motion implies a waiver of the former. This was distinguished in Stone v. Hawkeye Ins. Co., 68 Iowa 737, in which case it was held that

XIII. HEARING OF MOTION — 1. Time of Hearing and Decision — After Trial Term. — At common law a motion for a new trial could be made during the first days of the term next after that at which the trial was had,¹ and it is clear that the hearing and decision under the statutes and codes may be had at the succeeding term² unless there is an express provision to the contrary.³

Motion on the Minutes. — A hearing of the motion on the minutes of the court is usually required at the trial term, since there is no record to preserve the evidence, and much must be referred

after the motion for judgment notwithstanding the general verdict has been overruled, a motion for a new trial may properly be filed if the time for filing has not elapsed.

1. See *supra*, VII. 5. *Time When Motion Must Be Made.*

2. Under Code Iowa, § 172, "upon any final adjournment of the court, all business not otherwise disposed of will stand continued generally." A motion for a new trial need not be determined during the term, as upon final adjournment it is business undisposed of and may be taken up at the next term. *Van de Haar v. Van Domseler*, 56 Iowa 671.

Time of Presenting to the Court — Making. — An application for a new trial is "made," within the meaning of section 308 of the Kansas Code, when a written motion is filed, without presenting the same to the court for decision. *Freelove v. Gould*, 3 Kan. App. 750, citing *Wallace v. Lewis*, 9 Mont. 399, and *People v. Ah Sam*, 41 Cal. 650, as to the distinction between filing and presenting the motion.

Where the statute requires that the motion be made a certain number of days after verdict, the court may hear and determine the motion at a later time, as such statute does not fix the time for hearing. *Speer v. Meschine*, 46 S. Car. 505.

Hearing During Term — Entry of Decision Afterwards. — A statute requiring that a motion for a new trial on the judge's minutes be heard during term does not require that the decision be rendered at that time. But if the statute requires a decision during term, an order may be entered at a subsequent term *nunc pro tunc*. *Calhoun v. Port Royal*, etc., R. Co., 42 S. Car. 132.

3. *McKean v. Ziller*, 9 Tex. 58; *Laird v. State*, 15 Tex. 317; *Fricke v. State*, 11 Tex. App. 6.

Motions for new trials must be heard at the trial term and cannot be contin-

ued or heard at subsequent terms. *McKean v. Ziller*, 9 Tex. 58; *Bass v. Hays*, 38 Tex. 128; *Ruff v. Hand*, (Arizona 1890) 24 Pac. Rep. 257.

The jurisdiction of the court to set aside its judgments for new trials continues during the term although an appeal has been perfected during the term. *Blum v. Wettermark*, 58 Tex. 125.

Alabama. — Except upon the ground of newly discovered evidence, or fraud, or mistake, a motion for a new trial must be heard and determined within thirty days after judgment, and no new trial can be granted after the trial of court. *Ex p. Highland Ave.*, etc., R. Co., 105 Ala. 221; *Walker v. Hale*, 16 Ala. 27; *Pratt v. Keils*, 28 Ala. 396; *Florence Cotton*, etc., Co. v. Field, 104 Ala. 471.

But a motion made during the term at which the judgment is rendered may be heard at a subsequent term if continued by a special order of court. A general order of continuance of "all causes and motions not otherwise disposed of" is not sufficient. *Ex p. Highland Ave.*, etc., R. Co., 105 Ala. 221 [citing *Hundley v. Yonge*, 69 Ala. 90; *Gunnells v. State Bank*, 18 Ala. 676].

Indiana. — Rev. Stat. Ind., § 561, requiring that "the application * * * may be made at any time during the term," etc., is construed to require the presentation of the motion during term. It is said that "the statute declares it shall be by motion upon written cause filed at the time of making the motion, clearly contemplating that the motion shall be made or presented to the court, and also that the cause or reason for the motion shall be reduced to writing and filed at the same time of making the motion, the motion to be entered by the court and the written reasons filed by the clerk." *Emission v. Shepard*, 121 Ind. 184.

Kentucky. — Merely filing a motion with the clerk is not sufficient. The

to the memory of the trial judge before he has forgotten the testimony.¹

Hearing After Term at Which Verdict Was Rendered. — Statutes requiring that the motion must be heard and determined at the term at which the findings are made or their verdict is rendered are construed as directory merely, and do not deprive the court of jurisdiction to determine the motion at subsequent terms.²

If for Any Reason the Court Is Unable to Hear the Motion during the term, a party free from negligence will not lose his right to a new trial through the negligence or inability of the court. The motion may be decided in vacation if so ordered,³ or at the next term,⁴ or if the statute does not permit a new trial to be granted at the next term, the applicant may obtain a new trial in a court of equity.⁵

2. Abandonment — Failure to Obtain Ruling in Time. — If the motion is not disposed of during the statutory time it will be regarded as denied or overruled.⁶

3. Hearing in Vacation or at Chambers. — The hearing must be had and the decision rendered during a term of court, as the judge has no power to hear and determine the motion in vacation,⁷ or at chambers,⁸ unless the statutes expressly confer such power.⁹

motion must be decided or continued during the term. *Buckner v. Conly*, 1 T. B. Mon. (Ky.) 3.

1. *Prentiss v. Danaher*, 20 Wis. 311; *Dunbar v. Hollinshead*, 10 Wis. 505.

Under Rev. Stat. Wisconsin, § 2878, a motion for a new trial on the minutes falls with the expiration of the term, but may be kept alive by stipulation of the parties. *Hinton v. Coleman*, 76 Wis. 221; *Steinhofel v. Chicago*, etc., R. Co., 92 Wis. 123.

Although Gen. Stat. Minnesota, § 254, requires a motion for a new trial on the minutes to be heard during the trial term, the court has jurisdiction to hear the motion at succeeding terms. The objection to hearing the motion at a subsequent term must be made before argument of the motion to the trial court on the merits. *Larson v. Ross*, 56 Minn. 74; *Gribble v. Livermore*, 64 Minn. 396.

2. *Gomer v. Chaffe*, 5 Colo. 383.

Extension by Agreement. — Although the code requires the motion to be determined at the trial term, a motion made in time may be heard at a subsequent term by agreement of counsel. *Myers v. Stafford*, 114 N. Car. 231.

3. *Johnston v. Simmons*, 77 Ga. 298, and cases cited.

4. *Johnston v. Simmons*, 77 Ga. 298;

King v. Carey, 5 Ga. 270; *Pace v. Mealing*, 21 Ga. 464.

5. Where the motion was not heard because of the inability of the court to hear it a court of equity will grant a new trial. *Leigh v. Armor*, 35 Ark. 123; *Vallentine v. Holland*, 40 Ark. 338; *Knifong v. Hendricks*, 2 Gratt. (Va.) 212.

6. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335; *Ruff v. Hand*, (Arizona 1890) 24 Pac. Rep. 257.

7. *Molair v. Port Royal*, etc., R. Co., 31 S. Car. 510. See article CHAMBERS AND VACATION, vol. 4, p. 348.

8. *State v. Chavis*, 34 S. Car. 132; *Charles v. Jacobs*, 5 S. Car. 348; *Donly v. Fort*, 42 S. Car. 200.

When authorized by statute the motion may be heard at chambers. See statutes in *Com. v. McLaughlin*, 122 Mass. 449; *Korman's Application*, 162 Pa. St. 151.

9. See article CHAMBERS AND VACATION, vol. 4, p. 348.

Although the court is authorized by statute to hear in vacation a motion made during term and continued, yet an original motion not continued or ordered to be heard cannot be heard at chambers. *Brinkley v. Buchanan*, 55 Ga. 342; *Ferrill v. Marks*, 76 Ga. 21; *Walker v. Banks*, 65 Ga. 20.

4. Presence of Parties at Hearing. — It is not necessary that the accused be in court on the hearing of a motion for a new trial.¹ But it is error to exclude a party² or to deny the request of the accused to be present at the hearing.³

XIV. EVIDENCE IN SUPPORT OF MOTION — 1. What Evidence Required. — On the hearing of the motion the nature of the evidence varies according to the grounds urged for a new trial. Some grounds, as excessive or inadequate damages, error in the instructions, or irregularity in the proceedings, can be presented to the court by the record or files in the case. Error in evidence, or a claim that the verdict is contrary to the evidence, may be presented to the court by reference to the minutes of the court in cases where the court can easily recall the evidence; otherwise a bill of exceptions or statement of the case will become necessary to present the errors assigned.⁴

2. Oral Testimony. — Although the evidence on the hearing is generally confined to affidavits, depositions, or a statement of the case or bill of exceptions, the court may in its discretion admit oral testimony as on the hearing of other motions;⁵ but it is not

When the hearing is continued to a day in vacation it may be continued from day to day until heard. *Stone v. Taylor*, 63 Ga. 309; *Herz v. Frank*, (Ga. 1898) 30 S. E. Rep. 797. But after the day set, the court loses power to grant a new trial unless a further continuance was granted. *Arnold v. Hall*, 70 Ga. 445.

Michigan. — By Rule 21 of the Revised Rules of the Circuit Courts, a motion for a new trial may be heard and a decision entered in vacation as of the last day of the preceding term. (Substituted for Rules 31 and 32.)

1. As to the right of the accused to be present see Am. and Eng. Encyc. of Law, tit. *Constitutional Law*, vol. 6, p. 997.

2. See article TRIAL.

3. *State v. Hoffman*, 78 Mo. 256; *State v. Lewis*, 80 Mo. 110; *Sweat v. State*, 4 Tex. App. 617; *Gibson v. State*, 3 Tex. App. 437; *Berkley v. State*, 4 Tex. App. 122.

But the error in refusing a request to be present at the hearing is cured by permitting the accused to file and argue his motion anew or by a rehearing in his presence. *Berkley v. State*, 4 Tex. App. 122; *Garcia v. State*, 5 Tex. App. 337; *Krautz v. State*, 4 Tex. App. 534; *State v. Decklotts*, 19 Iowa 447.

A refusal by the court to hear argument on a motion for a new trial on the ground that the verdict is contrary

to the law and evidence is not a denial of the constitutional right of the defendant to be heard by his counsel. *State v. Boasso*, 38 La. Ann. 202.

4. See subdivisions of this chapter. *infra*.

5. *Schoolfield v. Brunton*, 20 Colo. 139; *Gano v. Wells*, 36 Kan. 688.

Examination of Witnesses. — It is common practice to examine the sheriff in open court where the ground for a new trial is alleged misconduct of the jury or officers in charge of the jury. *Howland v. Reeves*, 25 Mo. App. 458.

Texas Code Crim. Pro., art. 781, authorizing a hearing "by affidavit or otherwise," permits the court to hear the evidence of absent and new witnesses. *Childs v. State*, 10 Tex. App. 183, and cases cited.

It is not an abuse of discretion to require the movant in a criminal case to establish the fact of intoxication of the jurors by affidavits instead of by the testimony of witnesses. *People v. Tucker*, 117 Cal. 229.

It is error for the court to examine a bailiff as to misconduct alleged as a ground for a new trial, where both parties are absent and have no notice of the proceeding. *City Bank v. Kent*, 57 Ga. 283.

Where it is claimed that an affidavit was made by a person of unsound mind, the court may require that the witness be examined in court and may refuse to examine other witnesses

error for the court to exclude such testimony.¹ The court may require the affiant to appear in court and submit to cross-examination as to facts stated in his affidavit, in order to test his knowledge and credibility.²

3. Affidavits — *a. GENERALLY — When Necessary.* — When the ground for a new trial consists of extrinsic facts and matters not of record, such as irregularity of the court, jury, or prevailing party, or accident and surprise, or misconduct, or newly discovered evidence, the proper method is to set forth the facts by affidavits in support of the motion, as stated heretofore in considering these grounds for a new trial.³

Contents — Competency and Admissibility of Evidence. — The evidence set forth must be admissible, and not hearsay⁴ or otherwise

whose affidavits are not impeached. *U. S. v. Lloyd*, 4 Cranch (C. C.) 472.

Under Rule 21 of the Superior Court of Massachusetts "the court will not hear any motion grounded on facts, unless the facts are verified by affidavit, or are apparent from the record and from the papers on file in the case, or are agreed and stated in writing, signed by the parties or their attorneys." But such rule does not prevent a single justice of such court from admitting oral evidence on a motion for a new trial on the ground of newly discovered evidence, as the object of the rule is to exclude evidence not supported by oath unless the facts are agreed upon. *Spaulding v. Knight*, 118 Mass. 528.

1. *Gano v. Wells*, 36 Kan. 688.

2. *Glidewell v. State*, 15 Lea (Tenn.) 133; *Moore v. State*, 96 Tenn. 209.

Right to Cross-examine Parties Making Counter Affidavit. — On a motion for a new trial on account of misconduct of the jury the court refused to require parties making counter affidavits to appear and submit to cross-examination by the defendant. This ruling was held not error, the defendant not being entitled to such proceeding as a matter of right, although the court might in its discretion have permitted it. *People v. Lee Chuck*, 78 Cal. 339.

Oral Testimony of Trial Judge. — It is not error for the court hearing a motion for a new trial to refuse to receive oral testimony of the trial judge as to his admonition to the jury not to read newspapers relating to the trial. Such evidence, if material, could be included in a bill of exceptions by a mere statement of the trial judge. *People v. Azoff*, 105 Cal. 632.

An Examination of the Newly Discovered Witness may be directed by the court on motion of the adverse party, and if on the hearing the testimony of the proposed witness is insufficient or contradictory a new trial will be refused. *Housh v. State*, 43 Neb. 163.

3. See *supra*, III. *Grounds for New Trial*, the several subsections.

4. **Hearsay.** — *State v. Williams*, 14 W. Va. 851; *Sheppard v. Sheppard*, 10 N. J. L. 250; *Jackson v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 998; *Holland v. Huston*, 20 Mont. 84.

An averment by the applicant for a new trial, that he has been told by A that A has been told by B that B has heard C make certain admissions which are set forth as newly discovered evidence, is insufficient. The admission should be proved by the affidavit of B. *White v. Wallen*, 17 Ga. 106.

An averment that since the trial the affiant has been informed by a certain person that certain physicians had said that their post-mortem examination of the body of the deceased justified another theory of the death is insufficient without the affidavits of such physicians. *Chmelir v. Sawyer*, 42 Neb. 362.

In asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain persons know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the newly discovered witnesses as to what they know and as to what they will testify. The affidavit of the party himself is but hearsay testimony, and cannot be received unless, for good cause shown, the affidavits of the newly discovered wit-

incompetent.¹

Averment on Information and Belief. — The facts must be averred as true, since little weight will be accorded to statements on information and belief.²

Statement of Conclusions of Law and Ultimate Facts. — The affidavits must state the evidence in substantially the same manner as that in which it would be introduced at the trial.³ It is not sufficient to aver mere conclusions of law or ultimate facts, as the court must determine from the affidavits whether the evidence is material,⁴ newly discovered, credible, and probably sufficient to change the result.⁵

6. AFFIDAVITS OF JURORS. — The general rule is that a juror's testimony will not be received to impeach his verdict, but such testimony is competent to sustain the verdict when assailed.⁶

nesses cannot be obtained in time, or in such further time as may have been granted for that purpose. *Bennett v. Southard*, 35 Cal. 688.

1. **The Affidavit of a Party Charged with the Same Crime** and under indictment jointly with others, will be excluded as incompetent, since such party would be incompetent to testify on a new trial, if granted. *Carrico v. State*, 36 Tex. Crim. Rep. 618.

2. *Eaken v. Thompson*, 4 Ind. App. 393; *Stanley v. Sutherland*, 54 Ind. 339.

3. *Burnley v. Rice*, 21 Tex. 182; *Perry v. Cochran*, 1 Cal. 180; *McCombs v. Chandler*, 5 Harr. (Del.) 423; *Pickett v. Richet*, 2 Bibb (Ky.) 178; *Dennett v. Dow*, 17 Me. 20; *State v. Williams*, 14 W. Va. 851; *Varner v. Core*, 20 W. Va. 473.

4. *Lorig v. Davenport*, 99 Iowa 479.
5. In *State v. Schaefer*, 56 Mo. App. 496, an application for a new trial was made on newly discovered evidence that the defendant was insane when the crime was committed, and affidavits were offered stating that in the opinion of each affiant the defendant was at the time insane, without stating the conduct of the defendant upon which such opinions were based. The court held the showing insufficient, saying: "To authorize the granting of a new trial on account of newly discovered evidence, one of the important requisites is that it must be made to appear that the evidence relied on would likely produce a different result on another trial. Hence it is necessary for the affidavits to set forth the evidence with great particularity, in order that the court may judge of its materiality and weight."

6. **Jurors Cannot Impeach Their Verdict** — *Alabama*. — *Clay v. Montgomery*, 102 Ala. 297.

Arizona. — *Torque v. Carrillo*, 1 Arizona 336.

Arkansas. — *Ward v. Blackwood*, 48 Ark. 396; *Pleasants v. Heard*, 15 Ark. 403; *Stanton v. State*, 13 Ark. 318; *Smith v. State*, 59 Ark. 132.

California. — *Clark v. His Creditors*, 57 Cal. 639; *Amsby v. Dickhouse*, 4 Cal. 102; *Castro v. Gill*, 5 Cal. 40; *People v. Sprague*, 53 Cal. 422; *People v. Gray*, 61 Cal. 164; *People v. Pratt*, 78 Cal. 345; *People v. Deegan*, 88 Cal. 602; *Boyce v. California Stage Co.*, 25 Cal. 465; *Polhemus v. Heiman*, 50 Cal. 438; *People v. Hunt*, 59 Cal. 432; *People v. Azoff*, 105 Cal. 632; *People v. Kloss*, 115 Cal. 567; *Fredericks v. Judah*, 73 Cal. 604.

Colorado. — *Heller v. People*, 22 Colo. 11; *Knight v. Fisher*, 15 Colo. 176; *Wray v. Carpenter*, 16 Colo. 271.

Connecticut. — *Haight v. Turner*, 21 Conn. 593; *Meade v. Smith*, 16 Conn. 346; *State v. Freeman*, 5 Conn. 348.

Dakota. — *Murphy v. Murphy*, 1 S. Dak. 316; *Gaines v. White*, 1 S. Dak. 434; *Ulrich v. Dakota L. & T. Co.*, 2 S. Dak. 285; *Territory v. King*, 6 Dakota 131; *Edward Thompson Co. v. Gunderson*, 10 S. Dak. 42; *Territory v. Taylor*, 1 Dakota 459.

Delaware. — *McCombs v. Chandler*, 5 Harr. (Del.) 423; *Croasdale v. Tantum*, 6 Houst. (Del.) 218.

District of Columbia. — *Ladd v. Wilson*, 1 Cranch (C. C.) 305.

Florida. — *Coker v. Hayes*, 16 Fla. 368; *Kelly v. State*, (Fla. 1897) 22 So. Rep. 303; *Godwin v. Bryan*, 16 Fla. 396; *McMurray v. Basnett*, 18 Fla. 609.

Reason for Rule. — Such evidence is forbidden by public policy, since it would disclose the secrets of the jury room and afford opportunity for fraud and perjury. It would open such a door

- Georgia.* — *Bishop v. State*, 9 Ga. 121; *Clark v. Carter*, 12 Ga. 500; *Mercer v. State*, 17 Ga. 146; *Coleman v. State*, 28 Ga. 78; *Brown v. State*, 28 Ga. 199; *Rutland v. Hathorn*, 36 Ga. 380; *O'Barr v. Alexander*, 37 Ga. 195; *State v. Doon*, R. M. Charl. (Ga.) 1; *Coleman v. Slade*, 75 Ga. 61; *McElven v. State*, 30 Ga. 869; *Hoye v. State*, 39 Ga. 718; *King v. King*, 49 Ga. 622; *Anderson v. Green*, 46 Ga. 361; *Moughon v. State*, 59 Ga. 309; *Oatis v. Brown*, 59 Ga. 711; *Hill v. State*, 64 Ga. 453; *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Fulton County v. Phillips*, 91 Ga. 65; *Hill v. State*, 91 Ga. 153; *Cornwall v. State*, 91 Ga. 277; *Carr v. State*, 96 Ga. 284; *Hale v. State*, 91 Ga. 19; *Augusta v. Hudson*, 94 Ga. 135; *McTyler v. State* 91 Ga. 254.
- Idaho.* — *Jacobs v. Dooley*, 1 Idaho 41; *Flood v. McClure*, (Idaho 1893) 32 Pac. Rep. 254.
- Illinois.* — *Forester v. Guard*, 1 Ill. 74; *Reins v. People*, 30 Ill. 256; *Smith v. Eames*, 4 Ill. 76; *Allison v. People*, 45 Ill. 37; *Peck v. Brewer*, 48 Ill. 54; *Bertholf v. Quinlan*, 68 Ill. 297; *Reed v. Thompson*, 88 Ill. 245; *Niccolls v. Foster*, 89 Ill. 386; *Lechleiter v. Broehl*, 17 Ill. App. 490; *Barker v. Livingston County Nat. Bank*, 30 Ill. App. 591; *Martin v. Ehrenfels*, 24 Ill. 187; *Roy v. Goings*, 112 Ill. 656; *Chicago v. Dermody*, 61 Ill. 431; *Guykowski v. People*, 2 Ill. 476; *Smith v. Smith*, 69 Ill. App. 314; *Virginia v. Plummer*, 65 Ill. App. 419; *Palmer v. People*, 138 Ill. 356; *Frank v. Taubman*, 31 Ill. App. 592; *Artz v. Robertson*, 50 Ill. App. 27; *Chicago Sanitary Dist. v. Cullerton*, 147 Ill. 385. *Contra*, *Sawyer v. Stephenson*, 1 Ill. 24, now overruled.
- Indiana.* — *Taylor v. Garnett*, 110 Ind. 290; *Jones v. State*, 89 Ind. 82; *Long v. State*, 95 Ind. 486; *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *McKinley v. Crawfordsville First Nat. Bank*, 118 Ind. 375; *Houk v. Allen*, 126 Ind. 569; *Tegarden v. Phillips*, 14 Ind. App. 27; *McCray v. Stewart*, 16 Ind. 377; *Reed v. State*, 141 Ind. 116; *Bennett v. State*, 3 Ind. 167; *Elliot v. Mills*, 10 Ind. 368; *Stanley v. Sutherland*, 54 Ind. 339; *Barlow v. State*, 2 Blackf. (Ind.) 114; *Conner v. Winton*, 8 Ind. 316; *Sinclair v. Roush*, 14 Ind. 450; *Hughes v. Listner*, 23 Ind. 396; *Haun v. Wilson*, 28 Ind. 296; *Bradford v. State*, 15 Ind. 347.
- Iowa.* — *Cook v. Sypher*, 3 Iowa 484; *Bryson v. Chicago, etc., R. Co.*, 89 Iowa 677; *State v. Douglass*, 7 Iowa 413; *Kassing v. Walter*, (Iowa 1896) 65 N. W. Rep. 832; *Brown v. Cole*, 45 Iowa 601; *Hallenbeck v. Garst*, 96 Iowa 509; *Garretty v. Brazell*, 34 Iowa 100; *State v. Lauderbeck*, 96 Iowa 258; *Fox v. Wunderlich*, 64 Iowa 187; *Ward v. Thompson*, 48 Iowa 588; *Davenport v. Cummings*, 15 Iowa 219; *Jack v. Naber*, 15 Iowa 450; *Moffit v. Rogers*, 15 Iowa 453; *Darrance v. Preston*, 18 Iowa 396; *Cowles v. Chicago, etc., R. Co.*, 32 Iowa 515; *Bingham v. Foster*, 37 Iowa 339; *State v. Beste*, 91 Iowa 565; *Dunlavey v. Watson*, 38 Iowa 398; *State v. Hutchinson*, 95 Iowa 566; *State v. McConkey*, 49 Iowa 499; *Griffin v. Harriman*, 74 Iowa 438; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *State v. Whalen*, 98 Iowa 662; *Wilkins v. Bent*, 66 Iowa 531; *Purcell v. Tibbles*, 101 Iowa 24; *Turney v. Barr*, 75 Iowa 758; *State v. La Grange*, 99 Iowa 10; *Wright v. Illinois, etc., Tel. Co.*, 20 Iowa 210; *Abel v. Kennedy*, 3 Greene (Iowa) 47.
- Kansas.* — *Winfield Nat. Bank v. Croco*, 46 Kan. 620; *Cain Bros. Co. v. Wallace*, 46 Kan. 138; *State v. Plum*, 49 Kan. 679; *State v. Clark*, 34 Kan. 289; *State v. Burwell*, 34 Kan. 312; *Le Roy, etc., R. Co. v. Anderson*, 41 Kan. 528. See *contra*, *Perry v. Bailey*, 12 Kan. 539; *Johnson v. Husband*, 22 Kan. 277; *State v. Horne*, 9 Kan. 119.
- Kentucky.* — *Steele v. Logan*, 3 A. K. Marsh. (Ky.) 394; *Heath v. Conway*, 1 Bibb (Ky.) 398; *Johnson v. Davenport*, 3 J. J. Marsh. (Ky.) 390; *Cain v. Cain*, 1 B. Mon. (Ky.) 213; *Taylor v. Giger*, Hard. (Ky.) 595; *Pittsburg Coal Co. v. Withers*, (Ky. 1896) 37 S. W. Rep. 584; *Alexander v. Humber*, 86 Ky. 565.
- Louisiana.* — *State v. Caldwell*, 3 La. Ann. 435; *State v. Millican*, 15 La. Ann. 557; *Duhron v. Landry*, 15 La. Ann. 591; *State v. Bird*, 38 La. Ann. 497; *Cire v. Rightor*, 11 La. 141; *State v. Brette*, 6 La. Ann. 653; *State v. Whitesides*, 49 La. Ann. 352; *State v. Morris*, 41 La. Ann. 785; *State v. Richmond*, 42 La. Ann. 299.
- Maine.* — *State v. Pike*, 65 Me. 111; *Shepherd v. Camden*, 82 Me. 535.

for tampering with weak and indiscreet men that it would render all verdicts insecure; and, therefore, the law has wisely guarded against all such testimony and has considered it as unworthy

Massachusetts. — Hix v. Drury, 5 Pick. (Mass.) 296; Ferrill v. Simpson, 8 Pick. (Mass.) 359; Lathrop v. Sharon, 12 Pick. (Mass.) 172; Bridgewater v. Plymouth, 97 Mass. 382; Dorr v. Fenno, 12 Pick. (Mass.) 521; Hannum v. Belchertown, 19 Pick. (Mass.) 311; Murdock v. Sumner, 22 Pick. (Mass.) 156; Cook v. Castner, 9 Cush. (Mass.) 266; Folsom v. Manchester, 11 Cush. (Mass.) 334; Boston, etc., R. Corp. v. Dana, 1 Gray (Mass.) 105; Chadbourne v. Franklin, 5 Gray (Mass.) 312; Woodward v. Leavitt, 107 Mass. 453; Capen v. Stoughton, 167 Gray (Mass.) 364; Whitney v. Whitman, 5 Mass. 405; Warren v. Spencer Water Co., 143 Mass. 155; Com. v. White, 147 Mass. 76; Chemical Electric Light, etc., Co. v. Howard, 150 Mass. 495; Com. v. Drew, 4 Mass. 391; Rowe v. Canney, 139 Mass. 41; Bridge v. Eggleston, 14 Mass. 248; Com. v. Gagle, 147 Mass. 576; Com. v. Meserve, 156 Mass. 61; Harrington v. Worcester, etc., St. R. Co., 157 Mass. 579. *Contra*, Grinnell v. Phillips, 1 Mass. 540.

Michigan. — *In re* Merriman, 108 Mich. 454.

Minnesota. — State v. Lentz, 45 Minn. 177; Knowlton v. McMahon, 13 Minn. 386; State v. Stokely, 16 Minn. 282; Gardner v. Minea, 47 Minn. 295; Bradt v. Rommel, 26 Minn. 505; Wester v. Hedberg, 68 Minn. 434; Svenson v. Chicago Great Western R. Co., 68 Minn. 14.

Missouri. — Pratte v. Coffman, 33 Mo. 71; Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240; State v. Coupenhaver, 39 Mo. 430; State v. Rush, 95 Mo. 199; State v. McNamara, 100 Mo. 100; Cattell v. Dispatch Pub. Co., 88 Mo. 356; State v. Cooper, 85 Mo. 256; State v. Branstetter, 65 Mo. 149; State v. Dunn, 80 Mo. 681; State v. Alexander, 66 Mo. 148; State v. Fox, 79 Mo. 109; Philips v. Stewart, 69 Mo. 149; State v. Underwood, 57 Mo. 40; Miller v. St. Louis R. Co., 5 Mo. App. 471; State v. Burks, 132 Mo. 363; State v. Dieckman, 11 Mo. App. 538; State v. Wood, 124 Mo. 412; State v. Dusenberry, 112 Mo. 277; Easley v. Missouri Pac. R. Co., 113 Mo. 236; State v. Gage, 52 Mo. App. 464; Winn v. Reed, 61 Mo. App. 621; McCormick v. Monroe, 64 Mo. App. 197; State v. Schaefer, 116 Mo. 96;

Burns v. Lindell R. Co., 24 Mo. App. 10; Hanlon v. O'Keefe, 38 Mo. App. 273; McMurdock v. Kimberlin, 23 Mo. App. 523; State v. Swinney, 25 Mo. App. 347.

Montana. — Fitzgerald v. Clark, 17 Mont. 100; State v. Gay, 18 Mont. 51.

Nebraska. — Gran v. Houston, 45 Neb. 813; Johnson v. Parrotte, 34 Neb. 26; Harris v. State, 24 Neb. 803; Flannagan v. Heath, 31 Neb. 776.

Nevada. — State v. Crutchley, 91 Nev. 368.

New Hampshire. — Folsom v. Brawn, 25 N. H. 114; Leighton v. Sargent, 31 N. H. 119; Walker v. Kennison, 34 N. H. 257; Clark v. Manchester, 64 N. H. 471; Smith v. Smith, 50 N. H. 216; Dodge v. Carroll, 59 N. H. 238; Griffin v. Auburn, 59 N. H. 287; Knight v. Epsom, 62 N. H. 356; Palmer v. State, 65 N. H. 221.

New Jersey. — Schenck v. Stevenson, 2 N. J. L. 365; Clark v. Read, 5 N. J. L. 560; Den v. M'Allister, 7 N. J. L. 46; Randall v. Grover, 1 N. J. L. 175; Brewster v. Thompson, 1 N. J. L. 36; Jessup v. Cook, 6 N. J. L. 434; Hutchinson v. Consumers' Coal Co., 36 N. J. L. 24; Kennedy v. Kennedy, 18 N. J. L. 450.

New Mexico. — U. S. v. Biena, 8 N. Mex. 99.

New York. — Clum v. Smith, 5 Hill (N. Y.) 560; Williams v. Montgomery, 60 N. Y. 648; Dalrymple v. Williams, 63 N. Y. 361; Wiggins v. Downer, 67 How. Pr. (N. Y. Supreme Ct.) 65; Dana v. Tucker, 4 Johns. (N. Y.) 487; Mitchell v. Carter, 14 Hun (N. Y.) 448; Green v. Bliss, 12 How. Pr. (N. Y. Supreme Ct.) 428; Ostrander v. People, 28 Hun (N. Y.) 48; Thomas v. Chapman, 45 Barb. (N. Y.) 98; Taylor v. Everett, 2 How. Pr. (N. Y. Supreme Ct.) 23; Perkins v. Brainard Quarry Co., 11 Misc. Rep. (N. Y. C. Pl.) 328; Paige v. Chedsey, 1 Misc. Rep. (N. Y. City Ct.) 396; Messenger v. New York Fourth Nat. Bank, 48 How. Pr. (N. Y. C. Pl.) 542, 6 Daly (N. Y.) 190; Kelly v. Sheehy, 8 Daly (N. Y.) 29; Castle v. Greenwich F. Ins. Co., (City Ct.) 45 N. Y. Supp. 901; Dayton v. Church, 7 Abb. N. Cas. (Brooklyn City Ct.) 367; People v. Columbia C. Pl., 1 Wend. (N. Y.) 297; New York, etc., Ice Lines v. Howell, 19 N. Y. App. Div. 341; Fran-

of notice. "It would be a most pernicious practice, and in its consequences dangerous to this much-valued mode of trial, to permit a verdict, openly and solemnly declared in court, to be

cis's Case, 1 City Hall Rec. (N. Y.) 121; People v. Barker, 2 Wheel. Cr. Cas. (N. Y. Ct. Gen. Sess.) 19; Brownell v. McEwen, 5 Den. (N. Y.) 367; *Ex p.* Caykendoll, 6 Cow. (N. Y.) 53; People v. Hartung, 4 Park. Cr. Rep. (Albany Oyer & T. Ct.) 256, 17 How. Pr. (N. Y.) 85; People v. Carnal, 1 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 256; Wilson v. People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 619, 8 Abb. Pr. (N. Y.) 137; Patterson v. Cary, 4 N. Y. Month. L. Bul. 23; Mallach v. Ridley, 22 N. Y. Wkly Dig. 159; McCormick v. Wilson, N. Y. Daily Reg. July 27, 1885; Moses v. Central Park, etc., R. Co., 3 Misc. Rep. (N. Y. C. Pl.) 322; Moore v. New York El. R. Co., 18 Civ. Pro. Rep. (N. Y. C. Pl.) 146, 24 Abb. N. Cas. (N. Y.) 77, 15 Daly (N. Y.) 506, 130 N. Y. 523.

North Carolina. — Lafoon v. Shearin, 95 N. Car. 391; Suttrel v. Dry, 1 Murph. (N. Car.) 94; Johnson v. Allen, 100 N. Car. 131; State v. Best, 111 N. Car. 638; Jones v. Parker, 97 N. Car. 33; State v. Harper, 101 N. Car. 761; State v. Royal, 90 N. Car. 755; Purcell v. Southern R. Co., 119 N. Car. 728.

Ohio. — Hulet v. Barnett, 10 Ohio 459; Wertz v. Cincinnati, etc., R. Co., (C. Pl.) 30 Ohio L. J. 280; Farrer v. State, 2 Ohio St. 54; Holman v. Riddle, 8 Ohio St. 384.

Oregon. — Cline v. Broy, 1 Oregon 89.

Pennsylvania. — Willing v. Swasey, 1 Browne (Pa.) 123; Cluggage v. Swan, 4 Binn. (Pa.) 150; White v. White, 5 Rawle (Pa.) 61; Tewksbury v. Boyle, 5 Kulp (Pa.) 496; Kunkel v. Hughes, 6 Pa. Dist. Rep. 356; Smalley v. Morris, 157 Pa. St. 349.

Rhode Island. — Tucker v. South Kingston, 5 R. I. 558; Luft v. Lingane, 17 R. I. 420; Darling v. New York, etc., R. Co., 17 R. I. 708.

South Carolina. — State v. Tindall, 10 Rich. L. (S. Car.) 212; Price v. McIlvain, 3 Brev. (S. Car.) 419; Smith v. Culbertson, 9 Rich. L. (S. Car.) 106; Reaves v. Moody, 15 Rich. L. (S. Car.) 312; State v. Aughttry, 49 S. Car. 285; State v. Bennett, 40 S. Car. 308; State v. Senn, 32 S. Car. 392.

Texas. — Mason v. Russel, 1 Tex. 721; Burns v. Paine, 8 Tex. 159; Boetge v. Landa, 22 Tex. 105; Thomas v. Zushlag, 25 Tex. Supp. 225; Texas

Pac. R. Co. v. Wisenor, 66 Tex. 674; Ivey v. Williams, 78 Tex. 685; Wood v. Gulf, etc., R. Co., 15 Tex. Civ. App. 322; International, etc., R. Co. v. Gordon, 72 Tex. 44; Letcher v. Morrison, 79 Tex. 240; Wills Point Bank v. Bates, 72 Tex. 137.

Utah. — People v. Ritchie, 12 Utah 180; People v. Flynn, 7 Utah 378; Homer v. Inter-Mountain Abstract Co., 9 Utah 193.

Vermont. — Robbins v. Windover, 2 Tyler (Vt.) 11; Sheldon v. Perkins, 37 Vt. 550; Downer v. Baxter, 30 Vt. 467; Carpenter v. Willey, 65 Vt. 168.

Virginia. — Price v. Warren, 1 Hen. & M. (Va.) 386; Cochran v. Street, 1 Wash. (Va.) 81; Bull v. Com., 14 Grait. (Va.) 613; Elam v. Commercial Bank, 86 Va. 92; Taylor v. Com., 90 Va. 109.

West Virginia. — Chesapeake, etc. R. Co. v. Patton, 9 W. Va. 648; State v. Cobbs, 40 W. Va. 718; Lewis v. McMullin, 5 W. Va. 581; State v. Harrison, 36 W. Va. 729; Bartlett v. Patton, 33 W. Va. 71.

Wisconsin. — Edmister v. Garrison, 18 Wis. 594; Schultz v. Catlin, 78 Wis. 611.

Wyoming. — Bunce v. McMahon, (Wyoming 1895) 42 Pac. Rep. 23.

United States. — Mattox v. U. S., 146 U. S. 140; U. S. v. Reid, 12 How. (U. S.) 366; Rumford Chemical Works v. Finnie, 2 Flipp. (U. S.) 459; Ladd v. Wilson, 1 Cranch (C. C.) 305; Glaspell v. Northern Pac. R. Co., 43 Fed. Rep. 900; Fuller v. Fletcher, 44 Fed. Rep. 34; Ewers v. National Imp. Co., 63 Fed. Rep. 562; Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co., 57 Fed. Rep. 898; Pelzer Mfg. Co. v. Hamburg Bremen F. Ins. Co., 71 Fed. Rep. 826. See *contra*, Hyman v. Eames, 41 Fed. Rep. 676.

England. — Vaise v. Delaval, 1 T. R. 11; Owen v. Warburton, 1 B. & P. N. R. 326; Coster v. Merest, 3 Brod. & B. 272, 7 E. C. L. 433.

Contra — Tennessee. — Crawford v. State, 2 Yerg. (Tenn.) 60; Broby v. State, 4 Yerg. (Tenn.) 114; Wade v. Ordway, 1 Baxt. (Tenn.) 229.

Irregularities in Verdict. — As to affidavits of jurors showing irregularities in the verdict, or explaining or contradicting the verdict, see article VERDICT.

subverted by going behind it and inquiring into the secrets of the jury room."¹

Misconduct or Irregularity of the Jury Must Be Established by Other Evidence, such as the testimony of the officer in charge of the jury,² or the testimony of a party³ or a chance witness,⁴ or such evidence as the jury may leave in the jury room.

1. Washington, J., in *Harrison v. Rowan*, 4 Wash. (U. S.) 32.

"But aside from all adjudications, the doctrine rests upon the clearest principles of public policy. It is infinitely better that the irregularities which, undoubtedly, sometimes occur in the jury room should be tolerated, rather than to throw open the doors and allow every disappointed party to penetrate into its secrets. The most enlightened jurists have united in deprecating the mischiefs which would flow from such a license." *People v. Hartung*, 4 Park. Cr. Rep. (Albany Oyer & T. Ct.) 315.

"Public policy forbids the introduction of jurors' affidavits to prove anything which may have transpired in the jury room whilst consulting of their verdict. To allow verdicts to be overturned by the evidence of jurors would open a door for tampering with the jury, and might lead to consequences, in their operation on judicial proceedings, of a very mischievous and pernicious character. To guard against such consequences it is better the door should be at once closed against the introduction of the jurors as evidence to overturn their verdict." 3 *Graham and Waterman on New Trials*, c. 16, x. (b), approved in *Rumford Chemical Works v. Finnie*, 2 Flipp. (U. S.) 461.

Contra — Tennessee. — In Tennessee the practice has been to receive the affidavits of jurors as to misconduct of jurors. *Crawford v. State*, 2 Yerg. (Tenn.) 60; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *Booby v. State*, 4 Yerg. (Tenn.) 114; *Elledge v. Todd*, 1 Humph. (Tenn.) 43; *Bennett v. Baker*, 1 Humph. (Tenn.) 399; *Hudson v. State*, 9 Yerg. (Tenn.) 408; *Cochran v. State*, 7 Humph. (Tenn.) 547; *Nelson v. State*, 10 Humph. (Tenn.) 533. But affidavits of jurors are not admissible to show that the jury misunderstood the charge or disregarded it. *Norris v. State*, 3 Humph. (Tenn.) 333; *Scruggs v. State*, 90 Tenn. 81; *Roller v. Bachman*, 5 Lea (Tenn.) 160; *Saunders v. Fuller*, 4 Humph. (Tenn.) 518; *Galvin v. State*, 6 Coldw. (Tenn.) 287.

Texas. — By Tex. Code Crim. Pro. 1895, art. 817, "it shall be competent to prove such misconduct [of the jury] by the voluntary affidavit of a juror, and a verdict may in like manner, in such cases, be sustained by such affidavit." *Anschicks v. State*, 6 Tex. App. 524; *Hunter v. State*, 8 Tex. App. 75; *Jack v. State*, 26 Tex. 4; *Parker v. State*, (Tex. Crim. App. 1895) 30 S. W. Rep. 553; *Mason v. State*, (Tex. App. 1891) 16 S. W. Rep. 766; *Mitchell v. State*, 36 Tex. Crim. Rep. 278; *Ray v. State*, 35 Tex. Crim. Rep. 354; *Williams v. State*, 33 Tex. Crim. Rep. 128; *Weatherford v. State*, 31 Tex. Crim. Rep. 530. Such practice is discouraged by the courts. *McCulloch v. State*, 35 Tex. Crim. Rep. 268.

2. **The Testimony of the Officer in Charge** is competent to prove the irregularities or misconduct of the jury. It is a sufficient check upon the corruption of the officer in charge of the jury, that the jurors may by affidavit or testimony contradict the officer's testimony. *Wright v. Abbott*, 160 Mass. 395; *Willson v. Berryman*, 5 Cal. 44; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Morrow v. M'Lennen*, 3 N. J. L. 477; *Kennedy v. Kennedy*, 18 N. J. L. 450; *Harrison v. Rowan*, 4 Wash. (U. S.) 32.

3. **Affidavit of Party — Misconduct of Jury.** — An affidavit of a party to an action, stating what took place in a jury room while the jurors were considering their verdict, without any statement therein, or proof that such party was present in the jury room, will not be received to impeach the verdict of a jury, for it cannot be presumed that such party was present in the jury room. *Hoare v. Hindley*, 49 Cal. 275.

An affidavit showing that a juror has made statements to the effect that the jury did not take into consideration the instructions of the court, and that members of the jury refused to make affidavits as to that fact, cannot be considered. *State v. Grady*, 4 Iowa 461.

4. In the case of *Vaise v. Delaval*, 1 T. R. 11, where the verdict was obtained by tossing up a coin, Lord Mansfield said that the court could not re-

Exceptions — Misconduct of Parties or Court Officers. — The rule does not exclude the testimony of jurors as to the irregularities of other persons, and such testimony is competent to prove the misconduct of parties¹ or of officers having charge of the jury.²

Misconduct of Jury Outside Jury Room. — Nor does the rule extend to misconduct of the jurors which occurs outside of the jury room or during the trial; it includes only their misconduct during their retirement.³

To Show Resort to Chance. — In some states this rule is relaxed only to admit the affidavits of jurors to prove that their verdict was the result of a resort to the determination of chance.⁴

ceive an affidavit to this effect from any of the jurors themselves, in whom such conduct was a very high misdemeanor, but that the court must derive its knowledge from some other source, as from some person who saw the transaction through a window or by some other means.

1. Misconduct of Parties. — The rule prohibiting the use of affidavits of jurors to impeach their verdict does not apply where the affidavits tend to show the misconduct of parties to the suit, otherwise attempts to corrupt juries could not be proved. *Den v. Driver*, 1 N. J. L. 193; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 7; *Ritchie v. Holbrooke*, 7 S. & R. (Pa.) 458; *Hix v. Drury*, 5 Pick. (Mass.) 236; *Perry v. Bailey*, 12 Kan. 539.

2. Misconduct of Officers. — The rule prohibiting the use of affidavits of jurors to impeach their verdict does not apply where such affidavits tend to show misconduct of the bailiff or officer having charge of them. *Heller v. People*, 22 Colo. 11; *Reins v. People*, 30 Ill. 256; *Wilson v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 619; *Nelms v. State*, 13 Smed. & M. (Miss.) 503; *Wiggins v. Downer*, 67 How. Pr. (N. Y. Supreme Ct.) 65; *Cole v. Swan*, 4 Greene (Iowa) 32; *Mattox v. U. S.*, 146 U. S. 140. But see, *contra*, *Doran v. Shaw*, 3 T. B. Mon. (Ky.) 415.

3. Haffron v. Gallupe, 55 Me. 563; *Mattox v. U. S.*, 146 U. S. 140; *Peppercorn v. Black River Falls*, 89 Wis. 38.

Affidavits of jurors are admissible to prove their misconduct in visiting the place where the accident occurred, in order to understand the evidence, but such affidavits are not admissible to prove circumstances and assertions showing that such view of the place had no influence upon the verdict. *Rush v. St. Paul City R. Co.*, (Minn. 1897) 72 N. W. Rep. 733.

Affidavit of Juror to Prove Effect of Misconduct. — The fact that the jurors remembered and were influenced by the improper remarks of counsel cannot be established by the affidavits of jurors. *Weatherford v. State*, 31 Tex. Crim. Rep. 530.

Affidavits of jurors are competent to prove that the bailiff had communicated with and misinformed the jury, but not to prove the effect which such communications had on their verdict. *State v. La Grange*, 99 Iowa 10.

4. Affidavits of Jurors Showing a Resort to Chance. — In some states the courts will receive the affidavits of jurors to show that they arrived at their verdict by resorting to chance or that they used the "average process." *Wright v. Illinois*, etc., Tel. Co., 20 Iowa 195; *Darland v. Wade*, 48 Iowa 547; *Perry v. Bailey*, 12 Kan. 539. *Contra*, *Vaise v. Delaval*, 1 T. R. 11.

As to Chance Verdicts, see for a full discussion, article VERDICT.

Code Provisions. — In the following states the codes provide substantially that "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." This is held to exclude affidavits of jurors as to any other kind of misconduct.

California. — *Boyce v. California Stage Co.*, 25 Cal. 477; *Polhemus v. Heiman*, 50 Cal. 438; *People v. Hughes*, 29 Cal. 257; *Turner v. Tuolumne County Water Co.*, 25 Cal. 397; *People v. Hunt*, 59 Cal. 430; *People v. Gray*, 61 Cal. 183; *Dixon v. Plums*, 98 Cal. 384, 101 Cal. 511.

Colorado. — *Wray v. Carpenter*, 16 Colo. 271; *Richards v. Richards*, 20 Colo. 303.

Hearsay Evidence of Declarations of Juror. — For the same reason hearsay evidence of the statements of the jurors showing misconduct will also be excluded.¹

4. Time of Filing Affidavits. — Affidavits in support of a motion for a new trial need not be filed with the motion,² but may be filed at any time before the hearing,³ unless required to be filed

Idaho. — *Griffiths v. Montandon*, (Idaho 1895) 39 Pac. Rep. 548.

Montana. — *Gordon v. Trevarthan*, 13 Mont. 387; *State v. Anderson*, 14 Mont. 544.

South Dakota. — *Ulrich v. Dakota L. & T. Co.*, 2 S. Dak. 285; *Murphy v. Murphy*, 1 S. Dak. 316; *Gaines v. White*, 1 S. Dak. 434.

Utah. — *People v. Ritchie*, 12 Utah 180.

Washington. — *Goodman v. Cody*, 1 Wash. Ter. 329.

Arkansas. — Under section 2298, Mansfield's Dig. 1884, a juror can be examined as to whether the verdict was determined by lot, but not as to any other misconduct of the jury. *Ward v. Blackwood*, 48 Ark. 396; *Smith v. State*, 59 Ark. 132; *Fain v. Goodwin*, 35 Ark. 109; *Wilder v. State*, 29 Ark. 293; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519.

1. *Arkansas.* — *Pleasants v. Heard*, 15 Ark. 403.

Colorado. — *Richards v. Richards*, 20 Colo. 303.

Florida. — *Coker v. Hayes*, 16 Fla. 368.

Illinois. — *Allison v. People*, 45 Ill. 37; *Niccolls v. Foster*, 89 Ill. 386; *Hughes v. People*, 116 Ill. 330; *Spies v. People*, 122 Ill. 1.

Indiana. — *Drummond v. Leslie*, 5 Blackf. (Ind.) 453; *Dunn v. Hall*, 8 Blackf. (Ind.) 32.

Iowa. — *State v. Quinton*, 59 Iowa 362.

Louisiana. — *Trahan v. McMannus*, 2 La. 209; *Irish v. Wright*, 8 Rob. (La.) 428; *State v. Beatty*, 30 La. Ann. 1266.

Minnesota. — *St. Martin v. Desnoyer*, 1 Minn. 156.

Missouri. — *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236.

Nebraska. — *Peterson v. Skjelver*, 43 Neb. 663; *Lamb v. State*, 41 Neb. 356.

New Hampshire. — *Smith v. Smith*, 50 N. H. 212.

New York. — *People v. Hartung*, 8 Abb. Pr. (N. Y. Supreme Ct.) 132; *People v. Wilson*, 8 Abb. Pr. (N. Y. Supreme Ct.) 137; *Gale v. New York*

Cent., etc., R. Co., 53 How. Pr. (N. Y. Supreme Ct.) 385.

Tennessee. — *Stone v. State*, 4 Humph. (Tenn.) 27.

Admissions of jurors to some third person that they drew lots to determine the verdict are hearsay and not admissible to prove the misconduct of the jury. *Aylett v. Jewel*, 2 W. Bl. 1299; *State v. Quinton*, 59 Iowa 362.

"It would be a most mischievous and dangerous thing to suffer verdicts to be overturned or set aside upon the loose, random declarations of jurymen after they are discharged, not on oath, to third persons, concerning the circumstances upon which they made up their verdict while they were on oath, previous to their delivering their verdict into court. It would open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure; and therefore the law has wisely guarded against all such after declarations and has considered them as unworthy of notice. Indeed, so cautious is the law upon this subject that the court will not receive even the affidavits of the jurors themselves, to impeach their own verdicts, after they are delivered in and recorded in court." *Price v. McIlvain*, 3 Brev. (S. Car.) 419.

2. *Werner v. Edmiston*, 24 Kan. 147.

3. Filing Without Leave Before Hearing. — Where the time of filing affidavits of witnesses to establish newly discovered evidence is not fixed by statute or rule of court, the affidavits may be filed at any time before hearing and without leave. They need not accompany the motion. The adverse party may obtain an order requiring them to be filed by a certain time, but in the absence of an order it is within the discretion of the court to consider affidavits filed at any time before the hearing. *Howland v. Reeves*, 25 Mo. App. 458.

Failure to File Affidavits Before Hearing. — If objection is made, affidavits in support of a motion for a new trial should not be received if not filed before presenting to the court. But if used at the hearing, the error is waived

at a certain time by statute or rule of court.¹ The court has a wide discretion as to the time of filing, and will protect the adverse party from injury or surprise due to unexpected testimony by granting a continuance of the hearing² or an extension of time.³

5. Counter Affidavits. — On the hearing of a motion⁴ for a new trial the adverse party may introduce counter affidavits⁵ to disprove the grounds for a new trial. Counter affidavits may be filed at any time before the hearing⁶ or at such time as may be fixed by the court.⁷ The affidavits of the applicant in resistance or denial of the counter affidavits should be filed before the hearing. If the time is not sufficient, the applicant should apply for a continuance of the hearing before entering upon a discussion of the merits of the motion.⁸ Counter affidavits are admissible to impeach the new witness,⁹ to contradict the showing of diligence,

by failure to object. *Longfellow v. State*, 10 Neb. 105.

1. *Carter v. Prior*, 8 Mo. App. 577; *Roemmich v. Wamsganz*, 8 Mo. App. 576; *Howe v. Briggs*, 17 Cal. 386.

2. Where the adverse party had no notice of the filing of affidavit in support of the motion for a new trial, the court cannot refuse to receive such evidence for want of notice, but the adverse party is entitled to a continuance to procure counter testimony if he desires. *Werner v. Edmiston*, 24 Kan. 147.

3. *Shipman v. State*, 38 Ind. 549.

4. *Hire v. State*, 144 Ind. 359.

5. *Bratton v. Bryan*, 1 A. K. Marsh. (Ky.) 212; *New Castle, etc., R. Co. v. Chambers*, 6 Ind. 346; *Bingham v. Walk*, 128 Ind. 164; *Hamm v. Romine*, 98 Ind. 77; *Smith v. State*, 143 Ind. 685; *Moody v. Priest*, 69 Iowa 23; *Lundon v. Waddick*, 98 Iowa 478; *Burlingame v. Cowee*, 16 R. I. 40; *Burr v. Palmer*, 23 Vt. 244; *Hannum v. State*, 90 Tenn. 647; *Moore v. State*, 96 Tenn. 209; *McGavock v. Brown*, 4 Humph. (Tenn.) 251.

This was the practice at common law on hearing a motion for a new trial on the ground of newly discovered evidence. *Thurtell v. Beaumont*, 8 Moo. 612, 1 Bing. 339, 8 E. C. L. 538.

Upon a motion for a new trial supported by affidavit that opposing counsel had violated an oral agreement not to try the case in the absence of the affiant, counter affidavits are admissible. *Davis v. Ransom*, 57 Tex. 333.

Iowa. — Section 3268 of the Iowa Code does not contemplate notice to adverse parties or an answer to the petition for a new trial, and it would

seem that counter affidavits are not admissible. *Buena Vista County v. Iowa Falls, etc., R. Co.*, 55 Iowa 157.

Amendment at Hearing. — A defective affidavit may be amended at the time of hearing and before submission so as to state a defense to the action. *Goings v. Chapman*, 18 Ind. 194.

Counter Affidavit of New Witness. — The new witness will be permitted to contradict his affidavit in support of a new trial and to make a counter affidavit denying the facts stated in the former affidavit. In such case a new trial will be refused. *Hire v. State*, 144 Ind. 359.

6. The trial court may in its discretion permit the filing of counter affidavits at any time before the ruling on the motion. *Hire v. State*, 144 Ind. 359.

7. Time of Filing Counter Affidavits. — The court may in its discretion admit counter affidavits after submission of the motion or at any time before decision. *Hire v. State*, 144 Ind. 359. But a refusal to do so is not such an abuse of discretion as to justify a reversal. *Smith v. State*, 143 Ind. 685.

Extension of Time. — Where the adverse party has prepared and served counter affidavits in time, but inadvertently omitted to file them within the time prescribed by the code, he may obtain leave by motion to file them later. *Spottiswood v. Weir*, 80 Cal. 448.

8. *Lawrence v. State*, 35 Tex. Crim. Rep. 114.

9. **California.** — *Merk v. Gelzhaeuser*, 50 Cal. 632; *Thompson v. Thompson*, 88 Cal. 110.

Indiana. — *Richmond First Nat. Volume XIV.*

and even to controvert the newly discovered evidence by showing that it would be insufficient to change the result. But it would seem that if the evidence thus presented is conflicting, the merits of the case and the credibility of the witness should be determined by a new trial. At all events, the counter affidavits are received to enlighten the court, and are not so conclusive as to control its discretion.¹

6. Affidavits in Rebuttal. — As in cases of ordinary motions, affidavits in rebuttal will be permitted, but the practice is not uniform.²

Bank v. Gibbons, 7 Ind. App. 629; *Thornburg v. Buck*, 13 Ind. App. 446; *Hammond, etc., Electric R. Co. v. Spyzchalski*, 17 Ind. App. 7; *De Hart v. Ager*, 107 Ind. 460; *Hire v. State*, 144 Ind. 359.

Iowa. — *Hopkins v. Knapp, etc., Co.*, 92 Iowa 212; *Lorig v. Davenport*, 99 Iowa 479.

Minnesota. — *Finch v. Green*, 16 Minn. 355.

Missouri. — *State v. Burd*, 115 Mo. 405.

New York. — *Brooks v. Rochester R. Co.*, 10 Misc. Rep. (N. Y. Supreme Ct.) 88; *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285.

Ohio. — *Ousley v. Witheron*, 13 Ohio Cir. Ct. Rep. 298, 7 Ohio Cir. Dec. 448.

Rhode Island. — *Burlingame v. Cowee*, 16 R. I. 40.

Tennessee. — *McGavock v. Brown*, 4 Humph. (Tenn.) 251.

Texas. — *Hyde v. State*, 16 Tex. 445; *Dignowitty v. State*, 17 Tex. 521.

Virginia. — *Nicholas v. Com.*, 91 Va. 741.

Right to Jury Trial on Newly Discovered Evidence. — It has been contended that on a motion for a new trial the merits of the case as affected by the newly discovered evidence could not be tried upon affidavits and counter affidavits; that a hearing on affidavits deprives the applicant of the right to present his case anew to a jury, and that if the court assumes to consider counter affidavits as to such matters, it determines in advance the very things which belong to the exclusive province of the jury. But it is uniformly held that on the hearing of the motion the court may examine counter affidavits to determine whether a new trial would promote justice or result in a different judgment. *Hammond, etc., Electric R. Co. v. Spyzchalski*, 17 Ind. App. 7, and cases cited.

In Criminal Cases — Right to Confront Witness. — The admission of counter affidavits on a hearing of a motion for a new trial is not a violation of the constitutional right of a prisoner to be confronted by adverse witnesses, 'as such right exists only as to trial by jury. See the contention in briefs in *State v. Betsall*, 11 W. Va. 703.

Impeaching Witness — Motion at Special Term. — Counter affidavits to impeach the new witness will not be considered on motion upon case and exceptions at special term. "Whether such new witnesses are entitled to credit or not ought not to be determined upon this motion; that question belongs to the trial court, as was very properly said in *Upington v. Keenan*, (Supreme Ct.) 21 N. Y. Supp. 699." *Phelps v. Delmore*, 4 Misc. Rep. (N. Y. Supreme Ct.) 508.

1. *Burlingame v. Cowee*, 16 R. I. 40.

A Conflict of Evidence cannot properly be determined on affidavit, and therefore it is proper to grant a new trial. *Goldsworthy v. Linden*, 75 Wis. 24.

Discretion of Court. — Where the affidavit showing grounds for a new trial are controverted by counter affidavits the discretion of the court in granting or refusing a new trial will not be reviewed. *People v. Tice*, 97 Cal. 459; *Goldsworthy v. Linden*, 75 Wis. 24.

But see *contra*, if the showing of the applicant is insufficient, *Holland v. Huston*, 20 Mont. 84.

2. Where counter affidavits are received to contradict and explain newly discovered evidence in support of a motion for a new trial the moving party will not be permitted to introduce affidavits in rebuttal. "They must present their whole case at once to the court, and not lead it on through a series of confirming and rebutting proofs, thus protracting the cause to an unreasonable extent." *Ames v. Howard*, 1 Sumn. (U. S.) 482.

7. Minutes of the Court.—In ordinary cases, where the error complained of is manifest and the facts are within the recollection of the judge, it will not be necessary to prepare a statement of the case or bill of exceptions to be used at the hearing. The best and easiest method in such cases is to present the motion for a new trial on the minutes of the court. This saves the delay and danger of preparing and settling a bill of exceptions before the hearing. If the applicant secures a new trial such evidence will become useless. But if a new trial is refused or either party appeals, a case¹ or bill of exceptions² must be settled upon which the appeal may be heard.

Other Available Evidence Considered.—On the hearing of the motion on the minutes the judge is not confined to his notes of the testimony, or even to the record, but reference may be had to the pleadings and orders of court on file, and also to depositions, documentary evidence, and stenographic reports of the testi-

1. Code Civ. Pro. Cal., § 661; *Oakland Gaslight Co. v. Dameron*, 57 Cal. 292; *Gribble v. Livermore*, 64 Minn. 396; *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335; *Perego v. Dodge*, 9 Utah 3.

Contents of Statement After Hearing.—Only the errors relied upon and argued at the hearing should be included in the statement. It is not good practice to rely upon the specification of errors made in the notice and incorporated into the statement. *Leonard v. Shaw*, 114 Cal. 69.

New York.—By Code Civ. Pro., § 990, "the judge presiding at a trial by a jury may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict, or a direction dismissing the complaint, and grant a new trial, upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law. If an appeal is taken from the order made upon the motion, it must be heard upon a case, prepared and settled in the usual manner." *Mackay v. Lewis*, 54 How. Pr. (N. Y. Ct. App. 503; *Hinman v. Stillwell*, 34 Hun (N. Y.) 178; *Cheney v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 415; *Sharkey v. Torrilhon*, 7 Hun (N. Y.) 343; *Clark v. Mechanics' Nat. Bank*, 8 Daly (N. Y.) 481; *Kenner v. Morrison*, 12 Hun (N. Y.) 204; *Beach v. Skillman*, 12 Hun (N. Y.) 297.

Before the above section was amended, such motion could not be made on the ground that the verdict

was contrary to law. *Algeo v. Duncan*, 39 N. Y. 313; *McDonald v. Walter*, 40 N. Y. 551; *Tinson v. Welch*, 51 N. Y. 244. But see later *Wasilewski v. Wendell*, (City Ct.) 9 N. Y. St. Rep. 508.

A motion for a new trial on the ground of surprise cannot be made on the minutes, as this ground is not included in the above section. Such motion must be made at the trial term. *Argall v. Jacobs*, 56 How. Pr. (N. Y. Supreme Ct.) 167, 21 Hun (N. Y.) 414, 87 N. Y. 110.

The motion can be made only upon the grounds specified in section 990 of the code. *Delaney v. Brett*, 51 N. Y. 81; *Swartout v. Willingham*, 31 Abb. N. Cas. (N. Y. Supreme Ct.) 66, *disapproving dicta* in *Campanello v. New York Cent., etc., R. Co.*, (Buffalo Super. Ct.) 15 N. Y. Supp. 670.

2. Wisconsin.—By Sanb. & B. Annot. Stat. Wis. 1898, § 2878, "the judge before whom the issue is tried may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or because the verdict is contrary to law or contrary to evidence, or for excessive or inadequate damages; but such motion, if heard upon the minutes, can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge and an appeal is taken from the decision, a bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had."

mony.¹ The judge is free to consider any evidence or proceeding within his recollection, whether of record or not.²

Hearing on Minutes Limited to Jury Trials.—There are some instances, however, where the motion cannot be made upon the minutes. The statutes of some states permit such motion only where the trial was by jury³ and where a verdict has

1. Code Civ. Pro. Cal., § 660. Although this section enumerates depositions, documentary evidence, and phonographic reports, the provisions do not preclude the court from considering any evidence adduced at the trial, although not reduced to writing. *Malcolmson v. Harris*, 90 Cal. 262.

Exceptions and Minutes Noted by Judge.

—A motion for a new trial may be made to the justice in special term, upon exceptions which are simply noted on his minutes and not reduced to form, and upon his minutes of the evidence. This is done to facilitate the determination of the motion and prevent putting the party to the expense of formally preparing the exceptions and the case and going to the general term. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

2. A motion for a new trial founded upon "the records, proceedings, and minutes of the judge" is in effect upon the minutes of the court. Such a motion, it was said, "is no more nor less than a motion on the minutes of the judge, under section 2878 Rev. Stat., for on such a motion all the proceedings in the case, whether of record or not, are before the court for its consideration." *Hinton v. Coleman*, 76 Wis. 221.

Recollection of Judge—Absence of Notes or Any Form of Evidence.—In *Malcolmson v. Harris*, 90 Cal. 262, the court, in construing sections 658, 659, and 661 of the Code of Civil Procedure, held that a motion may be made on the minutes of the court although no notes were reduced to writing by reporter, clerk, or judge, as the applicant may rely upon the recollection of the judge. "By these various provisions," said the court, "a very simple, plain, and expeditious practice is prescribed, by which the trouble, expense, and delay of settling statements or bills of exceptions may be entirely avoided in all that large class of cases in which the order of the trial judge granting or denying a new trial is accepted as final, as it always must be—so far as the ground we are considering is con-

cerned—when there is a substantial conflict of evidence. And even where the losing party wishes to appeal, it will generally be easier and more convenient to make a statement after than before the order; for the argument of the motion will generally eliminate many of the points, as its decision will always do away with the necessity of setting out evidence upon points as to which there is an admitted conflict. The wonder is that a practice so convenient, so saving of time, trouble, and expense, is so little resorted to. Possibly the explanation is to be found in the fact that the terms of the statute leave it doubtful whether in a case like the present, where there are no written notes of the testimony capable of being placed on file, the moving party can have any advantage of the testimony actually adduced at the trial, and necessarily resting alone in the recollection of the judge. If so, it is fortunate that an occasion has arisen for removing any misconception on that point, for we have no doubt that a party moving on the minutes of the court may rely on all matters that could be legitimately included in a statement prepared in advance of the motion. It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony as matters to which reference may be had on the hearing of the motion (§ 660), and there is some force in the argument that such an enumeration should be regarded as exclusive; but there is much more force in the consideration that since the judge has the undoubted right to include testimony actually given, though not reported, in a statement prepared in advance of the hearing, there is no reason why his recollection of the evidence should not be equally resorted to in making a statement after the hearing."

3. Code Civ. Pro. N. Y., § 999, *supra*, applies only to jury trials. *Knight v. Sackett*, etc., *Lithographing Co.*, 31 Abb. N. Cas. (N. Y. Super. Ct.) 373, 61 N. Y. Super. Ct. 219.

been rendered.¹

Time of Hearing on Minutes. — A motion upon the minutes must necessarily be made promptly and before the judge has forgotten the facts of the case. It must be made at the trial term,² as it cannot be considered at the special term without a case made.³

8. Bill of Exceptions. — In the absence of any statute requiring it, a motion for a new trial may be presented and heard without a bill of exceptions preserving the evidence and proceedings at the trial.⁴ The office of a bill of exceptions is not so much to refresh the memory of the trial judge as to preserve the proceedings for review in the appellate court. The trial court cannot require a bill for its own information.⁵

A motion cannot be made on the minutes of the judge where the case is tried without a jury and the judge files his decision containing his findings of fact, conclusions of law, and the direction for judgment, as section 999 of the code applies to jury trials. *New York v. Constantine*, 60 N. Y. Super. Ct. 469.

1. Where the case is disposed of without reaching a verdict a motion cannot be made on the judge's minutes. *Drucker v. Manhattan R. Co.*, 51 N. Y. Super. Ct. 429, 106 N. Y. 157; *Emmerich v. Hefferan*, 33 Hun (N. Y.) 54, 97 N. Y. 619; *Higgins v. General Transatlantic Co.*, 18 N. Y. Wkly. Dig. 259; *Union Mills First Nat. Bank v. Clark*, 42 Hun (N. Y.) 90; *Twenty-third St. Baptist Church v. Cornwall*, (Super. Ct.) 18 N. Y. St. Rep. 878, 56 N. Y. Super. Ct. 260, 117 N. Y. 601.

Nonsuit. — Such motion is improper where the plaintiff was nonsuited. *Van Doren v. Horton*, 19 Hun (N. Y.) 7; *Dusenbury v. Dusenbury*, 61 How. Pr. (N. Y. Super. Ct.) 432. See *contra*, *Duden v. Waitzfelder*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 295.

Where the Complaint Is Dismissed at the trial the judge has no power to grant a new trial on his minutes. *Healy v. Twenty-third St. R. Co.*, 11 Daly (N. Y.) 281.

2. *Ibbotson v. King*, 42 N. Y. Super. Ct. 207.

A motion for new trial upon the minutes cannot be made after the expiration of a year and where execution is issued and a receiver appointed. *Rebhun v. Swartwout*, (City Ct.) 3 N. Y. Supp. 419.

3. The motion for a new trial cannot be made on the minutes at special term, as this term can review only on a case made. *Thayer Mfg. Jewelry*

Co. v. Steinau, 58 How. Pr. (N. Y. Supreme Ct.) 315.

4. "It is not provided in the code that the motion for a new trial must be heard upon a bill or bills of exceptions; and although it may not be deemed improper practice to present bills of exceptions, on the hearing of the motion, covering all the grounds of the motion except that of newly discovered evidence, yet it is unnecessary to do so, and the motion may be heard without any bill of exceptions. After the denial of the motion, the defendant may present the draft of a bill, and it may contain any of the grounds upon which the defendant relied for a new trial; and it should contain also so much of the evidence, proceedings, and decisions as may be necessary to explain such ground, and no more." *People v. Keyser*, 53 Cal. 183.

5. In *Emery v. Emery*, 54 Iowa 106, the court held that the lower court could not by rule of court require a bill of exceptions to be prepared and settled before hearing a motion for a new trial. "A motion for a new trial," it was said, "should be determined on the merits, unless there is some statute or rule of court not inconsistent therewith which prevents it. There is no such statute, and we think the rule is inconsistent with the spirit and intent of the statute, for the reason that a bill of exceptions is and must be regarded as unnecessary to enable the court to properly determine the motion, and for the further reason that the only office of a bill of exceptions is to inform the appellate court what occurred on the trial which does not otherwise appear of record. The trial court has no right or authority to require a bill of exceptions to be prepared for its own information. Such court is presumed,

Failure to Settle Bill in Time. — When a bill is required as a condition precedent to the granting of a new trial, the motion will be refused if the bill was not prepared, served, settled, and signed as prescribed by the statute.¹

9. Certified Cases. — Under the provisions of the *New York* Code of Civil Procedure a motion for a new trial on exceptions taken at a jury trial may be heard in general term on a certified case prepared by the exceptant. This method can be pursued only as to errors of law, as the verdict is conclusive as to all issues in such cases.²

10. Brief of Evidence. — By rule of court in *Georgia* the applicant for a new trial is required to prepare a brief of the evidence under the revision and approval of the court, and such brief may be incorporated into the bill of exceptions or may be attached thereto as an exhibit, when identified as true by the signature of the judge thereon.³ The times and methods of preparing and filing the brief of the evidence are regulated by the order of the court in each case, and the discretion of the trial court in this matter is seldom disapproved by the appellate court.⁴

and as a matter of law is bound, to know what occurred during the trial. Possessing such knowledge, the court is enabled to sign correct and true bills of exceptions for the information of the appellate court."

1. Rhode Island. — Unless a statement of the evidence has been prepared and presented to the trial judge within the prescribed time, and allowed by him, the motion for a new trial will be refused. *Fiske v. Paine*, 18 R. I. 632; *Clarke v. South Kingstown*, 18 R. I. 283; *Chafee v. Sprague*, 15 R. I. 135; *Peck v. Parkis*, 8 R. I. 364; *Olney v. Chadsey*, 7 R. I. 224; *Potter v. Padel-ford*, 3 R. I. 162.

Where no bill of exceptions was prepared or presented to the trial judge within five days the court will not grant a new trial on a stenographic report of the testimony, supported by the affidavits of persons present at the trial, as the Judiciary Act, c. 31, § 7, requires a statement of the evidence to be presented in time, and if not allowed by the judge it may be filed and supported by affidavits to the satisfaction of the court. *Reynolds v. Chapman*, 18 R. I. 746.

2. See article CERTIFIED CASES, vol. 3, p. 950.

Maine — Report of Evidence. — Rev. Stat. Me., c. 82, § 33, provides that when a motion is made in the Supreme Judicial Court to have a verdict set aside as being against law or evidence,

a report of the whole evidence shall be signed by the presiding judge, and that when founded upon any alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion shall be heard and reported by the justice. *Bartlett v. Lewis*, 58 Me. 350; *State v. Hill*, 48 Me. 241; *Freeman v. Morey*, 41 Me. 588; *Lakeman v. Pollard*, 43 Me. 463; *Taylor v. Pierce*, 43 Me. 530; *Nutt v. Merrill*, 40 Me. 237; *Rogers v. Kennebec, etc., R. Co.*, 38 Me. 227; *Bradbury v. Saco Water Power Co.*, 41 Me. 155.

On motion for a new trial on the ground of newly discovered evidence the report must contain not only the new evidence but also the full report of the evidence introduced at the trial, in order that the court may determine what evidence is new and whether it will be sufficient to change the result. *Brann v. Vassalboro*, 50 Me. 64.

Unless the evidence is sufficiently reported to disclose the error the case will be affirmed. *Howes v. Tolman*, 63 Me. 258.

3. Rules of Supreme Court, Nos. 10, 49.

By Code Ga. 1882, § 4253, the brief of evidence on a motion for a new trial, when filed and approved according to law, is declared to be a part of the record, and need not, except by reference thereto, be embodied in the bill of exceptions.

4. *Turner v. Rawson*, 5 Ga. 399; *Dunn v. Crozier*, 17 Ga. 70; *Candler v.*

11. Statement of Case — a. NATURE AND OBJECT OF STATEMENT. — In those jurisdictions in which it is the practice to apply for a new trial by first serving a notice of intention to move therefor,¹ the movant is required to procure a case to be settled similar to that used on appeal. This statement is a specification of the grounds for a new trial, together with such abstract of the evidence as may be necessary to explain and prove such grounds.²

Object to Assign Errors and Abbreviate Evidence. — The object of the statement is to point out specifically the grounds for a new trial which have been stated in general terms in the notice of intention to move therefor; to bring into the record for review only such portions of the testimony³ as will substantiate and prove the

Hammond, 23 Ga. 493; Hamilton v. Conyers, 25 Ga. 158; Goodwyn v. Hightower, 30 Ga. 249; Vanover v. Turner, 41 Ga. 577; Middlebrooks v. Middlebrooks, 57 Ga. 193; Ford v. Holmes, 61 Ga. 419; Stope v. Taylor, 63 Ga. 309; Maynard v. Head, 78 Ga. 190; Williams v. Central R. Co., 77 Ga. 612; Brown v. Groover, 65 Ga. 238; Georgia R. Co. v. Mitchell, 75 Ga. 144; Pease v. Pease, 66 Ga. 277; Western, etc., R. Co. v. Johnson, 59 Ga. 626; Usry v. Phillips, 68 Ga. 815; McCord v. Harden, 69 Ga. 747; Arnold v. Hall, 70 Ga. 445; Wharton v. Sims, 88 Ga. 617; Rich v. State, 74 Ga. 811; Price v. Bell, 88 Ga. 740; Tate v. Griffith, 83 Ga. 153; Richmond, etc., R. Co. v. Buice, 88 Ga. 180; Moxley v. Kinloch, 80 Ga. 46; Central R. Co. v. Curtis, 87 Ga. 416; Central R., etc., Co. v. Robertson, 92 Ga. 741; Smith v. Ray, 93 Ga. 253; Georgia Pac. R. Co. v. Luther, 90 Ga. 249; Cooper v. Whaley, 90 Ga. 285; West v. Smith, 90 Ga. 284; Boatwright v. State, 91 Ga. 13; Brunswick Light, etc., Co. v. Gale, 91 Ga. 813; Lee v. Atlanta St. R. Co., 91 Ga. 215; King v. Sears, 91 Ga. 577; Bailey v. Thornton, 94 Ga. 719; Cook v. Childers, 94 Ga. 718; Ellington v. Hall, 94 Ga. 724; Anderson v. McLean, 94 Ga. 798; Lewis v. Equitable Mortg. Co., 94 Ga. 572; Adamson v. Melson, 94 Ga. 725; Watson v. Long, 94 Ga. 255; Central R., etc., Co. v. Pool, 95 Ga. 410; Hinson v. Guckenheimer, 95 Ga. 567; Williams v. State, 95 Ga. 567; Hood v. Culver, 95 Ga. 120; Heller v. De Leon, 96 Ga. 805; Dillard v. Rickerson, 96 Ga. 818; Owensby v. State, 96 Ga. 433; Wall v. Carter, 96 Ga. 768; Durden v. Trubee, 94 Ga. 725; Williams v. Johnston, 94 Ga. 722; Central R., etc., Co. v. Keller, 94 Ga. 721; Laslie v. Laslie, 94 Ga. 720; Flournoy v. Stevens, 94 Ga. 718;

Paulding County v. Scoggins, 97 Ga. 253; Newman v. Malsby, 99 Ga. 627; Mann v. Tallapoosa St. R. Co., 99 Ga. 117; Baker v. Johnson, 99 Ga. 374.

1. See *supra*, VII. 8. *Notice of Intention to Move for a New Trial.*

California has furnished the model for the legislation upon this particular method of proceeding.

2. Statement Where Motion Made on Minutes of the Court. — Where a motion for a new trial is made upon the minutes of the court the errors are required to be specified in the notice of intention to move for a new trial, and the statement is drawn up after the hearing of the motion. Such statement must contain a specification of errors in case the notice of intention is not incorporated therein. A common practice is to incorporate such notice into the statement. "A better practice is to make a formal statement of the causes relied upon and argued at the hearing, as it is only the formal objections stated in the notice and argued at the hearing of the motion that are entitled to be included in the statement." Leonard v. Shaw, 114 Cal. 69.

3. "The Principal Object of Requiring These Specifications" in statements on motions for new trial and in bills of exceptions is to abbreviate the statement of evidence by restricting it to such as is relevant and material to prove or disprove the specified fact. By the specifications required, the opposing party and the judge are notified of the exact points of contest, and thereby enabled to determine what evidence should be brought into the statement and what should be excluded therefrom. Without such specifications, the judge could not perform the duty enjoined upon him 'to strike out of it [the statement or bill of excep-

errors complained of; and to enable the adverse party to suggest such amendments as may be necessary.¹

Failure to Make Specifications. — The codes require the moving party to specify in the statement the particulars in which the evidence is claimed to be insufficient and to specify the errors of law upon which such party will rely, and provide that if no such specifications be made the statement will be disregarded on the hearing of the motion.²

A. CONTENTS OF STATEMENT — (1) *In General.* — The statement consists of: (1) the specifications of the insufficiency of the evidence; (2) the specifications of errors of law; and (3) the abstract of the evidence relating to each specification. These will be considered separately.

(2) *Specification of Insufficiency of Evidence.* — It is not sufficient merely to state that the evidence in the statement is insuffi-

tions] all redundant and useless matter, and to make the statement truly represent the case." *Dawson v. Schloss*, 93 Cal. 194.

1. **Object of Specifications.** — "These specifications are necessary in the preparation of the statement, to enable the adverse party to suggest intelligently such amendments as he may deem important to the just determination of the case, and to enable the parties, as well as the court, to pass intelligently upon the questions to be considered, and to notify the opposite party what he may be called upon to meet." *Sterling v. Parsons*, 9 Utah 81.

"The purpose of the statute is apparent. It was to direct the attention of court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court." *Eddelbittel v. Durrell*, 55 Cal. 277, approved in *Haight v. Tryon*, 112 Cal. 5.

2. **California.** — A statement on a motion for a new trial which does not specify the particular reasons on which the party will rely for a new trial must be disregarded. *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Hutton v. Reed*, 25 Cal. 478; *Barrett v. Tewksbury*, 15 Cal. 354; *Burgett v. Pacheco*, 27 Cal. 408; *Partridge v. San Francisco*, 27 Cal. 415; *Zenith Gold, etc., Min. Co. v. Irvine*, 32 Cal. 302; *Barstow v. Newman*, 34 Cal. 90; *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381; *Hill v. Weisler*, 49 Cal. 146; *Crane v. Gladding*, 59 Cal. 303; *San Gabriel Wine*

Co. v. Behlow, 94 Cal. 108; *Moore v. Murdock*, 26 Cal. 524; *Crossett v. Whelan*, 44 Cal. 203; *Zeigler v. Wells*, 28 Cal. 264; *People v. Central Pac. R. Co.*, 43 Cal. 423; *Carleton v. Townsend*, 28 Cal. 221; *McCrary v. Everding*, 44 Cal. 285; *Beans v. Emanuelli*, 36 Cal. 121; *Stockton v. Creanor*, 45 Cal. 247; *Richardson v. Kier*, 37 Cal. 265; *Wyatt v. Buell*, 47 Cal. 625; *Harding v. Vandewater*, 40 Cal. 82; *Spencer v. Long*, 39 Cal. 702.

A statement on a motion for a new trial which contains no specifications of error should be disregarded on the hearing of the motion. *Nye v. Marysville, etc., St. R. Co.*, 97 Cal. 461; *Walls v. Preston*, 25 Cal. 61; *Levy v. Getleson*, 27 Cal. 685; *Hawkins v. Abbott*, 40 Cal. 630; *Budd v. Drais*, 50 Cal. 120; *Silva v. Holland*, 74 Cal. 530; *Hershey v. Kneass*, 75 Cal. 115.

Montana. — *Mason v. Germaine*, 1 Mont. 263; *Thorp v. Freed*, 1 Mont. 651; *Stafford v. Hornbuckle*, 3 Mont. 485; *Bass v. Buker*, 6 Mont. 442; *Raymond v. Thexton*, 7 Mont. 299; *Carron v. Wood*, 10 Mont. 500; *Gallatin Canal Co. v. Lay*, 10 Mont. 528; *McLeod v. Dickenson*, 11 Mont. 438.

Nevada. — *Corbett v. Job*, 5 Nev. 205; *Caldwell v. Greely*, 5 Nev. 260; *Sherman v. Shaw*, 9 Nev. 148; *McWilliams v. Herachman*, 5 Nev. 263.

Utah. — *Sterling v. Parsons*, 9 Utah 81; *Gilbertson v. Miller Min., etc., Co.*, 4 Utah 46; *Slater v. Union Pac. R. Co.*, 8 Utah 178; *Bankhead v. Union Pac. R. Co.*, 2 Utah 507; *Gill v. Hecht*, 13 Utah 5.

United States. — *Benites v. Hampton*, 123 U. S. 519.

cient to justify or support the findings or verdict,¹ as the codes require that the statement shall specify the particulars in which such evidence is alleged to be insufficient,² and further provide that if no such specifications be made the statement shall be disregarded on the hearing of the motion.³

Absence of Material Evidence.—The specification should point out the absence in the evidence of material fact or facts necessary to support the findings or verdict.⁴

Where the Judgment Is Based on Findings of the Court it is sufficient

1. Where a specification merely states in effect that the evidence is not sufficient to sustain the verdict or findings, and does not specify in what particulars it is insufficient, the statement will not be reviewed. *Beans v. Emanuelli*, 36 Cal. 120; *Eddelbittel v. Durrell*, 55 Cal. 278; *Dawson v. Schloss*, 93 Cal. 194; *Hidden v. Jordan*, 28 Cal. 312; *Holcomb v. Keliher*, 3 S. Dak. 497; *Griswold v. Boley*, 1 Mont. 545.

2. When Sufficiently Specific.—“The object of the specifications required by the statute is clearly to direct the attention of the court and adverse party to the particular point on which the evidence is claimed to be insufficient, and when this object is accomplished they will be held sufficient.” *Matter of Yoakam*, 103 Cal. 503 [*citing* *McCullough v. Clark*, 41 Cal. 298; *Eddelbittel v. Durrell*, 55 Cal. 279; *Newell v. Desmond*, 63 Cal. 242]. See specifications held sufficient in *Matter of Yoakam*, 103 Cal. 503; *Harnett v. Central Pac. R. Co.*, 78 Cal. 32.

3. *California*.—*Carleton v. Townsend*, 28 Cal. 219; *Harper v. Minor*, 27 Cal. 107; *Green v. Killey*, 38 Cal. 201; *Reamer v. Nesmith*, 34 Cal. 624; *Spanagel v. Dellinger*, 38 Cal. 278; *Foot v. Richmond*, 42 Cal. 439; *Thorne v. Hammond*, 46 Cal. 530; *Coleman v. Gilmore*, 49 Cal. 340; *Watson v. San Francisco, etc., R. Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Preston v. Hearst*, 54 Cal. 595; *Douglas v. Fulda*, 54 Cal. 589; *Phillips v. Lowrey*, 54 Cal. 584; *Donohoe v. Mariposa Land, etc., Co.*, 66 Cal. 317; *Coglan v. Beard*, 67 Cal. 303; *Hartman v. Rogers*, 69 Cal. 643; *Shepherd v. Jones*, 71 Cal. 223; *Alpers v. Schammel*, 75 Cal. 590; *Heilbron v. Centreville, etc., Irrigation Ditch Co.*, 76 Cal. 8; *Heilbron v. Kings River, etc., Canal Co.*, 76 Cal. 11; *Menk v. Home Ins. Co.*, 76 Cal. 50; *Parker v. Reay*, 76 Cal. 103; *Malone v. Del Norte County*, 77 Cal. 217; *San Francisco v.*

Pacific Bank, 89 Cal. 23; *Eltzroth v. Ryan*, 89 Cal. 135; *Baird v. Peall*, 92 Cal. 235; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55; *Dawson v. Schloss*, 93 Cal. 194; *San Gabriel Wine Co. v. Behlow*, 94 Cal. 108; *Perham v. Kuper*, 61 Cal. 331.

Montana.—*Helena First Nat. Bank v. Roberts*, 9 Mont. 323; *Zickler v. Deegan*, 16 Mont. 198; *Bardwell v. Anderson*, 18 Mont. 528; *Froman v. Patterson*, 10 Mont. 107.

North Dakota.—*Gould v. Duluth, etc., Elevator Co.*, 2 N. Dak. 216; *Illstad v. Anderson*, 2 N. Dak. 167; *Hostetter v. Brooks Elevator Co.*, 4 N. Dak. 357; *Henry v. Maher*, 6 N. Dak. 413.

South Dakota.—*Holcomb v. Keliher*, 3 S. Dak. 497; *Billingsley v. Hiles*, 6 S. Dak. 445; *National Cash Register Co. v. Pfister*, 5 S. Dak. 143; *Pierce v. Manning*, 2 S. Dak. 517; *Sioux Banking Co. v. Kendall*, 6 S. Dak. 543.

Utah.—*Paragoonah Field, etc., Co. v. Edwards*, 9 Utah 477.

4. *Matter of Yoakam*, 103 Cal. 503, and cases cited.

A specification that there was no evidence tending to show that the defendant wrongfully entered upon the demanded premises or ejected the plaintiff therefrom only points to the character of the defendant's entry, and is not sufficient to enable the court to review the evidence as to the fact of ouster and entry. *Doherty v. Enterprise Min. Co.*, 50 Cal. 187.

Where the Objection Is to the Assessment of Damages, a specification that there is no evidence to sustain the verdict as to damages is sufficient. *Du Brutz v. Jessup*, 54 Cal. 118.

Adverse Possession.—A specification that “there is no evidence to show that the title has ever been in the defendant” is sufficient to bring up the question of the defendant's adverse possession. *Morris v. De Celis*, 51 Cal. 55.

specification to state that a finding is not sustained by the evidence,¹ unless the finding contains several facts.²

Stating What Evidence Does Show. — It is not a sufficient specification to state in brief what the evidence shows,³ or to relate evidence contrary to the finding or verdict,⁴ or to narrate the evidence with comments on its insufficiency.⁵

(3) **Specification of Errors of Law.** — While a general statement of the errors of law occurring at the trial is permitted in the notice and motion, the codes require that the statement shall specify the particular errors upon which the party will rely. If no errors are specified in the statement it will not be considered although exceptions are preserved therein and the motion for a new trial is in regular form.⁶

Specification in Terms of Statute Insufficient. — It will not be sufficient to assign the errors in the general terms of the statute relating to the grounds for a new trial,⁷ or merely to state that the ver-

1. *Knott v. Peden*, 84 Cal. 300; *Stockton v. Creanor*, 45 Cal. 247; *Strang v. Ryan*, 46 Cal. 34.

2. In some form the specification must distinguish each particular proposition of fact excepted to from all others found by the court or involved in a general verdict of a jury. *Dawson v. Schloss*, 93 Cal. 194.

In *Strang v. Ryan*, 46 Cal. 34, a specification that a finding was not justified by the evidence was held sufficient although there were several facts included in the finding.

Particulars of Insufficiency. — A specification that "there was no evidence to sustain or justify the second, third, fifth, * * * and seventeenth findings of fact, or either of them," is clearly insufficient, as it does not disclose the particular in which the evidence is insufficient. *Spotts v. Hanley*, 85 Cal. 155. See also *Parker v. Reay*, 76 Cal. 103; *Eddelbuttel v. Durrell*, 55 Cal. 277; *Haight v. Tryon*, 112 Cal. 4.

3. *Haight v. Tryon*, 112 Cal. 4; *Dawson v. Schloss*, 93 Cal. 200; *Kumle v. Grand Lodge, etc.*, 110 Cal. 204.

4. *Helena First Nat. Bank v. Roberts*, 9 Mont. 323.

5. Specifications merely stating that the evidence shows certain facts and stating the views of the attorney as to the result of the testimony are not sufficient. *Kumle v. Grand Lodge, etc.*, 110 Cal. 204; *Baird v. Peall*, 92 Cal. 235.

More Narrations of the Evidence are not sufficient. There must be a specification wherein the particular evidence

is insufficient. *Spotts v. Hanley*, 85 Cal. 155.

6. *California.* — *Squires v. Foorman*, 10 Cal. 298; *Dobbins v. Dollarhide*, 15 Cal. 374; *Hutton v. Reed*, 25 Cal. 487; *Walls v. Preston*, 25 Cal. 61; *Moore v. Murdock*, 26 Cal. 524; *Partridge v. San Francisco*, 27 Cal. 417; *Burnett v. Pacheco*, 27 Cal. 410; *Crowther v. Rowlandson*, 27 Cal. 376; *Zeigler v. Wells*, 28 Cal. 264; *Carleton v. Townsend*, 28 Cal. 221; *Vilhac v. Riven*, 28 Cal. 413; *Zenith Gold, etc., Min. Co. v. Irvine*, 32 Cal. 303; *Barstow v. Newman*, 34 Cal. 90; *Sanchez v. McMahon*, 35 Cal. 224; *Butterfield v. Central Pac. R. Co.*, 37 Cal. 384; *Crosett v. Whelan*, 44 Cal. 200; *Matter of Page*, 57 Cal. 238.

Dakota. — *Bush v. Northern Pac. R. Co.*, 3 Dakota 444; *Caulfield v. Bogle*, 2 Dakota 464; *Holcomb v. Keliher*, 3 S. Dak. 497; *Billingsley v. Hiles*, 6 S. Dak. 445.

Idaho. — *Purdy v. Steel*, 1 Idaho 216.

Montana. — *Griswold v. Boley*, 1 Mont. 545; *Pinney v. Hershfield*, 1 Mont. 367; *Taylor v. Holter*, 2 Mont. 477; *Fant v. Tandy*, 7 Mont. 447; *Raymond v. Thexton*, 7 Mont. 299; *McLeod v. Dickenson*, 11 Mont. 439.

Utah. — *Bankhead v. Union Pac. R. Co.*, 2 Utah 507; *Gilberson v. Miller Min., etc., Co.*, 4 Utah 46; *Paragoonah Field, etc., Co. v. Edwards*, 9 Utah 477.

7. General specifications in the statement of the errors relied upon, such as the "insufficiency of the evidence to justify the verdict," "the verdict and judgment are against law," "excessive

dict,¹ finding, or judgment² is contrary to law, without specifying a particular proposition of law that is erroneous therein. The specification of error should point out a particular ruling or order³ upon which the party will rely as a ground for a new trial.

The Insufficiency of the Evidence to sustain a finding or verdict should not be assigned as an error of law.⁴

The Specification of Errors Must Form a Part of the Statement,⁵ and is not properly a part of the notice of intention to move for a new trial.⁶

damages as given by the jury," or "error in law occurring at the trial and excepted to by the defendants," are insufficient although substantially in the same terms as the statutory grounds for a new trial. The legislature intended something more than the mere specification in the general language of the statute in enumerating the grounds for a new trial. *Hutton v. Reed*, 25 Cal. 478.

1. **Verdict Contrary to Law.** — A mere assignment that the verdict is against law, without a specification why or in what way or for what reason it is against law, is too general to point out any error, and is therefore insufficient. *Gilbertson v. Miller Min., etc., Co.*, 4 Utah 46; *Hidden v. Jordan*, 28 Cal. 312; *Holcomb v. Keliher*, 3 S. Dak. 497.

A specification in a motion for a new trial that "the verdict is contrary to the law and the facts, in that the negligence of the defendant was the proximate cause of the injury to the plaintiff, and that there is no evidence in the case that shows that the plaintiff was guilty of any negligence whatever," sufficiently designates the error complained of. *Alt v. Chicago, etc., R. Co.*, 5 S. Dak. 20.

2. *Wilson v. Wilson*, 45 Cal. 399; *Shepherd v. Jones*, 71 Cal. 223.

A specification, "To which order and decision the said plaintiffs then and there duly excepted, and assign as error that said order and decision are against law," does not specify a particular proposition of law, and is insufficient. *Haggia v. Clark*, 28 Cal. 162.

Specifications that "the decision of the court is against law," and that "upon the facts and evidence the court should have rendered its decision in favor of plaintiff," are insufficient both as to errors of law and as to specifications of the insufficiency of the evidence. *Harding v. Vandewater*, 40 Cal. 77. See also *Stockton v. Creanor*,

45 Cal. 247; *Moore v. Murdock*, 26 Cal. 514.

3. **Errors Relating to the Evidence.** — There must be a particular specification of each error in admitting or excluding evidence. It is not sufficient to refer by one specification to numerous exceptions to rulings on the evidence scattered through the statement. *People v. Central Pac. R. Co.*, 43 Cal. 423; *Beans v. Emaquelli*, 36 Cal. 117; *Carleton v. Townsend*, 28 Cal. 221.

Error in Instructions. — A specification of errors of law occurring at the trial, that the court erred in "the giving of each of the instructions requested by the defendants," is sufficient, as it designates each particular error of law. *McCreery v. Everding*, 44 Cal. 246.

A general specification in a statement, that "the court erred in giving to the jury the instructions asked by plaintiff," is insufficient where there are four such instructions. *Joyce v. White*, 95 Cal. 236.

4. **Insufficiency of Evidence as Error of Law.** — Where the moving party specifies the insufficiency of the evidence as an error of law or as particulars in which the court erred, the error will not be considered, as it is not an error of law that the evidence is insufficient to justify a particular finding of fact. *Bardwell v. Anderson*, 18 Mont. 528; *Smith v. Christian*, 47 Cal. 18; *Heilbron v. Centreville, etc., Irrigation Ditch Co.*, 76 Cal. 10; *Nichols v. Jones*, 14 Colo. 61; *Cunnington v. Scott*, 4 Utah 446.

5. A paper containing the grounds of a motion for a new trial, if unsigned, constitutes no part of the statement. The grounds of a motion for a new trial are indispensable to the statement. They constitute its basis, and if they are wanting the statement should be disregarded. *Spencer v. Long*, 39 Cal. 700. See also *Preston v. Hearst*, 54 Cal. 595.

6. *Ferreer v. Home Mut. Ins. Co.*, 47 Cal. 416.

or of the notice of appeal.¹

(4) *Abstract of the Evidence.* — The evidence in a statement prepared for the hearing of a motion for a new trial should be stated in substance, briefly, and only that portion of the evidence should be stated which explains the specification of error.² The evidence should be stated in a narrative form.³ The reporters' notes showing each question and answer should not be inserted, but the substance of the testimony should be stated in all cases,⁴ unless it is necessary to show an objection, ruling, and exception.⁵

Instruments and Records Abbreviated. — Deeds, records, and conveyances should not be copied at length unless objection is made to the construction or form of such instruments.⁶

Matters of Record Excluded. — No matter which properly belongs in the record or judgment roll should be incorporated in the statement, as the statement is annexed to the record for review on appeal.⁷

1. *Burnett v. Pacheco*, 27 Cal. 408, the court saying: "The place for the specification of errors, in an appeal from a judgment, is in the statement, if there be one, * * * and not in the notice of appeal."

2. *Lewis v. Kelton*, 58 Cal. 303; *Brooke's Estate*, 54 Cal. 474; *Doyle v. Franklin*, 48 Cal. 539; *Canfield v. Thompson*, 49 Cal. 212; *Clark v. Sawyer*, 48 Cal. 141; *Dwinelle v. Henriquez*, 1 Cal. 389; *Cohn v. Mulford*, 15 Cal. 52; *Woodbury v. Bowman*, 13 Cal. 635; *Kilburn v. Ritchie*, 2 Cal. 148; *Moore v. Massini*, 43 Cal. 391; *Leet v. Wilson*, 24 Cal. 401; *Doll v. Anderson*, 27 Cal. 251; *People v. Winters*, 29 Cal. 660; *McCarty's Estate*, 58 Cal. 336.

Sufficiency of Evidence — Voluminous Books of Account. — Where the specification of error was a finding that an account was balanced by sales at a certain time, and this contention was based upon books of account kept by the defendant, the appellate court will not consider such a voluminous record, although the parties stipulate in the statement that the books of account may be offered in evidence by either party on the hearing for a new trial and on appeal without further identification and with the same force and effect as if incorporated in the statement. "This is a very convenient way," said the court, "of making a statement; but it places a burden upon this court which, notwithstanding the fact that it is agreed to by all the parties, we decline to assume. It is the duty of the party moving for a

new trial to present a statement containing the grounds upon which he intends to rely, and so much of the evidence as may be necessary to explain the same, and no more." *Adams v. Lombard*, 80 Cal. 426.

3. *Narrative Form.* — In some cases the evidence cannot be reduced to the narrative form without gaining or losing some force thereby. In such case the statement may contain questions and answers. *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121.

4. *Ross v. Roadhouse*, 36 Cal. 580. See also *Knowles v. Inches*, 12 Cal. 213; *Battersby v. Abbott*, 9 Cal. 565; *People v. York*, 9 Cal. 421; *McMinn v. Whelan*, 27 Cal. 320; *Caldwell v. Parks*, 50 Cal. 502.

5. *People v. Williams*, 45 Cal. 28; *Hansen v. Martin*, 54 Cal. 394; *Treat v. Reilly*, 35 Cal. 132; *Shay v. Tuolumne County Water Co.*, 6 Cal. 73.

6. *Knowles v. Inches*, 12 Cal. 213.

7. *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381.

The instructions and a bill of particulars must be included in the statement if errors are assigned concerning them, as they are not a part of the judgment roll or record. *Paris v. Raynor*, 76 Cal. 647.

Notice of the Motion for a New Trial and notice of the intention to move for a new trial are not a part of the record or judgment roll, and will not be considered if incorporated therein. Such notices should be made a part of the statement or bill of exceptions.

California. — *Girdner v. Beswick*, 69 Cal. 112; *Dominguez v. Mascotti*, 74

All Material Evidence Included. — All the evidence material to the points specified should be incorporated, since it will be presumed that the statement contains all such evidence,¹ unless the contrary affirmatively appears. If the error specified is that the verdict or finding is not sustained by the evidence, all the material evidence should be included.²

c. PROCEDURE TO OBTAIN SETTLEMENT OF STATEMENT. — After the moving party has served notice of his intention to move for a new trial³ he must, within the prescribed time, prepare a draft of the statement of the case.⁴

d. SERVICE ON ADVERSE PARTY. — Such statement, or a copy thereof, must be served upon all the adverse parties within the prescribed time.⁵

e. WHEN SETTLED WITHOUT NOTICE. — If this proposed statement is adopted or no amendments are proposed by the adverse parties, or if the amendments proposed are allowed by the moving party, the proposed statement and amendments, if any, may be presented to the judge or referee without notice to the adverse party.⁶

Cal. 269; *Heine v. Treadwell*, 72 Cal. 217; *Richardson v. Eureka*, 92 Cal. 64; *Alpers v. Schammel*, 75 Cal. 590; *Hook v. Hall*, 68 Cal. 22; *Nye v. Marysville*, etc., St. R. Co., 97 Cal. 461; *Scott v. Wood*, 81 Cal. 398; *People v. Crowley*, 100 Cal. 478; *Herrlich v. McDonald*, 80 Cal. 472. And see *Pico v. Cohn*, 78 Cal. 384; *Gage v. Downey*, 79 Cal. 140; *Calderwood v. Brooks*, 28 Cal. 151.

Idaho. — *Graham v. Linehan*, 1 Idaho 780.

Utah. — *Perego v. Dodge*, 9 Utah 3; *People v. Smith*, 3 Utah 425; *Lowell v. Parkinson*, 4 Utah 64; *Bowring v. Bowring*, 4 Utah 185; *Reever v. White*, 8 Utah 188.

1. *Judson v. Lyford*, 84 Cal. 509; *Abbey Homestead Assoc. v. Willard*, 48 Cal. 615; *Smith v. Athern*, 34 Cal. 511; *Clark v. Gridley*, 35 Cal. 403; *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 405.

Affirmative Showing. — But the statement need not show affirmatively that it contains all the evidence material to the points specified therein. *Hidden v. Jordan*, 28 Cal. 301, repudiating an earlier doctrine to the contrary.

2. When the motion for a new trial is based upon the insufficiency of the evidence to justify the verdict, the statement will not be considered unless it appears affirmatively that it contains all the material evidence produced at the trial. *Sherman v. Shaw*, 9 Nev. 148; *State v. Bonds*, 2 Nev. 265; *Sher-*

wood v. Sissa, 5 Nev. 349; *Bowker v. Goodwin*, 7 Nev. 135; *State v. Parsons*, 7 Nev. 58; *Caples v. Central Pac. R. Co.*, 6 Nev. 265.

3. See *supra*, VII. 8. *Notice of Intention to Move for a New Trial.*

4. **California Procedure the Model.** — The procedure outlined is a summary of the provisions of the California Code of Civil Procedure, § 659, par. 3. This section has been adopted with some amendments in other states. See *Comp. Laws S. Dak.*, § 5090; *Rev. Codes N. Dak.*, § 5474; 3 *Annot. Codes Mont.*, § 1172.

In *Cosgrove v. Johnson*, 30 Cal. 509, the procedure for preparing and settling a statement of the case under the Practice Act and before the amendment of the California Code is outlined.

The procedure in *Nevada* is outlined and commented upon in *Levy v. Fargo*, 1 Nev. 415.

5. **When Time Commences to Run.** — The time within which a statement must be prepared and served on the adverse party commences to run on service of the notice of the intention to move for a new trial. *Chase v. Evoy*, 58 Cal. 348. See also *Le Roy v. Rassette*, 32 Cal. 171; *Cottle v. Leitch*, 43 Cal. 320.

6. **Notice of Settlement.** — The adverse party is not entitled to notice of the presentment of the statement of the judge for settlement, when such party has proposed no amendments within the

f. AMENDMENTS BY ADVERSE PARTY. — Where the adverse party is not satisfied with the statement he must prepare amendments thereto and serve them or a copy thereof upon the moving party within a certain time.¹

g. ADOPTION OF AMENDMENTS. — If the amendments are adopted by the moving party he should amend the statement accordingly and present the amended statement to the judge who tried the cause for settlement, or deliver it to the clerk of the court for the judge.²

h. NOTICE OF TIME OF SETTLEMENT. — If the amendments are not adopted the proposed statement and amendments should, within the time fixed, be presented by the moving party to the judge, upon notice for a certain number of days to the adverse party; or at such time they may be delivered to the clerk for the judge.³

time prescribed by the statute. *Wulf v. Manuel*, 9 Mont. 276.

Settlement by Clerk. — Under section 197 of the Nevada Practice Act the certificate of the clerk that no amendments to the statement have been filed is all that is required where no amendments have been proposed or filed. *Borden v. Bender*, 16 Nev. 49.

Failure to Sign Statement — Waiver. — A proposed statement for a new trial should be signed by the attorney for the moving party. Where no objection is made when the adverse party receives the draft, the latter waives the objection. *Pearce v. Boggs*, 99 Cal. 340.

1. Time for Proposing Amendments. — Under the former Practice Act of California, § 195, the time within which amendments must be proposed, and the practice, were regulated by rules of court. *Vilhac v. Biven*, 28 Cal. 409; *Warden v. Mendocino County*, 32 Cal. 655.

For Similar Practice in Making Case on Appeal, see article CASE MADE ON APPEAL, vol. 3, p. 894.

Failure to Serve Amendments. — Before this section was amended it did not require the service of a copy of the proposed amendment. An engrossed statement as settled will not be stricken out because the amendments were not served on the opposite party where both parties had notice of the time and place of the settlement of the statement before the judge. *Vilhac v. Biven*, 28 Cal. 409.

2. Time for Presenting for Settlement. — The code contains no provision limiting the time for presenting a statement for settlement where amendments

have been proposed and adopted by the moving party. But it must be presented or filed with the clerk within a reasonable time. It need not be presented or filed as soon as if the amendments were not adopted. *Pendergrass v. Cross*, 73 Cal. 475.

Necessity of Settlement when Statement Certified by Attorneys. — Although the attorneys for both parties certify that the statement of the case is correct, this does not supersede the certificate of the judge, as the statute requires that it be signed by the judge "with his certificate that the same is allowed." *Raymond v. Thexton*, 7 Mont. 299, in which case the court said: "In this respect the statute in relation to statements on motion for a new trial differs from that in relation to statements of the case on appeals in general. In the latter case, the statement, in place of its being required to be certified to and signed by the judge, may be agreed to by the parties or their attorneys and certified to by them as being correct." See also *Scherrer v. Hale*, 9 Mont. 63; *Becker v. Yellowstone County*, 10 Mont. 88; *Hutchinson v. Bours*, 13 Cal. 50.

The Signature and Certificate of the Judge are indispensable and cannot be waived by the parties. If omitted when the statement is filed, the appellate court cannot remand the record for correction or amendment. *Adams v. Dohrmann*, 63 Cal. 417 [citing *Schreiber v. Whitney*, 60 Cal. 431; *Keller v. Lewis*, 56 Cal. 466]; *Gee v. Terrio*, 55 Cal. 381. But see *contra*, under former Practice Act, *Dickinson v. Von Horn*, 9 Cal. 207.

3. The Judge May Refuse to Settle the

2. **FAILURE TO SETTLE IN TIME** — **Disallowance for Failure to Prepare and Serve in Time.** — If the moving party has not complied with the statute in preparing, serving, and filing the statement, the proper practice is to bring the irregularity to the court's attention by reserving the right to object in the statement and urging the objection at the time of the settlement and on the hearing of the motion for a new trial.¹ In such case the court should refuse to

Statement if no notice of the time of the settlement is given to the adverse party. *Gallardo v. Atlantic, etc., Tel. Co.*, 49 Cal. 511.

No notice of the refusal of the moving party to adopt proposed amendments is required other than the delivery of the statement and amendments to the clerk or judge. *Mellor v. Crouch*, 76 Cal. 594.

1. *Henry v. Merguire*, 106 Cal. 142, the court saying: "When the judge settles the bill of exceptions or statement, the record is made up; and if, on its face, it shows that the statute was not followed in preparing the record, then that fact may be urged in the lower court, and on appeal in the Supreme Court, as a reason why the motion for new trial should be denied."

Filing with Clerk. — Under Code Civ. Pro. Cal., § 659, par. 3, the statement is not required to be filed with the clerk until it is engrossed and signed by the judge with his certificate that it is allowed. Until so filed it does not become a part of the record. *Biagi v. Howes*, 66 Cal. 469.

It must appear in the transcript that the statement was filed after it was settled and before the hearing of the motion, otherwise it will not be considered on appeal. *Mills v. Dearborn*, 82 Cal. 55; *Mix v. San Diego, etc., R. Co.*, 86 Cal. 235; *Jue Fook Sam v. Lord*, 83 Cal. 160.

Under the former Practice Act the proposed statement was not served on the adverse party, but was filed with the clerk and was not required to be filed after settlement. *Brundage v. Adams*, 41 Cal. 619; *Gately v. Irvine*, 51 Cal. 172; *O'Neil v. Dougherty*, 47 Cal. 164; *Williams v. Gregory*, 9 Cal. 76.

Failure to File Statement in Time. — Where the moving party states in his notice of intention to move for a new trial that the motion will be upon a statement of the case, such party loses all right to prosecute his motion if the statement is not served, settled, and

filed in time. *Le Roy v. Rasette*, 32 Cal. 171; *Chase v. Evoy*, 58 Cal. 348; *Poulson v. Hoskins*, 55 Cal. 468; *Quivey v. Gambert*, 32 Cal. 304; *Cooney v. Furlong*, 66 Cal. 520; *Bunnel v. Stockton*, 83 Cal. 319; *Buckley v. Althorff*, 86 Cal. 643; *Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co.*, 15 Nev. 450; *Harrison v. Lockwood*, 14 Nev. 263; *Williams v. Rice*, 13 Nev. 234; *Robinson v. Benson*, 19 Nev. 331.

The certificate need not show that the proceedings before settlement were regular, that notice of settlement was given, or that the proposed statement was served, as a settled statement will be presumed to be regular and in compliance with the statute. *Battersby v. Abbott*, 9 Cal. 566; *Vilhac v. Biven*, 28 Cal. 413; *Valentine v. Stewart*, 15 Cal. 396; *People v. Martin*, 6 Cal. 477; *Young v. Rosenbaum*, 39 Cal. 646.

Waiver by Failure to File in Time. — Under section 195 of the California Practice Act of 1851, a failure to file the statement within the required time amounted to a waiver of the right to obtain a new trial. *Jenkins v. Frink*, 27 Cal. 337; *Campbell v. Jones*, 41 Cal. 515; *Cooney v. Furlong*, 66 Cal. 520; *Thompson v. Lynch*, 43 Cal. 482; *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 357; *De Castro v. Richardson*, 25 Cal. 51; *Cottle v. Leitch*, 43 Cal. 322; *Mott v. Foster*, 45 Cal. 72. See also *Whitmore v. Shiverick*, 3 Nev. 299; *Clark v. Strouse*, 11 Nev. 76.

When the right is thus waived the court has no right to restore it by entering an order of extension after the time for filing the statement has expired. *Hegeler v. Henckell*, 27 Cal. 491; *Bunnel v. Stockton*, 83 Cal. 319; *Elder v. Frevert*, 18 Nev. 279.

Waiver of Objection that Statement Was Not Filed in Time. — Where it appears that the statement was submitted by consent of the parties at the hearing and the motion was denied, the adverse party is precluded from objecting in the appellate court that the statement was

settle the statement,¹ and deny the motion,² rather than strike the statement from the files and dismiss the motion.³

4. EXTENSION OF TIME TO PREPARE AND SERVE.—The time for preparing a statement may be extended by the parties⁴ or by an order of court obtained before the statutory time has expired,⁵ and such order will carry with it an extension of time

not served in time. *Millard v. Hathaway*, 27 Cal. 119.

Proposing amendments to the statement is a waiver of the right to object that the statement was not filed in time, unless such right to object is reserved in the proposed amendment or by other suitable method. *Quivey v. Gambert*, 32 Cal. 304; *Cottle v. Leitch*, 43 Cal. 320; *Cole v. Wilcox*, 99 Cal. 549.

1. Court May Refuse to Settle Statement Out of Time.—Where it appears to the court that the statement has not been served or presented in compliance with the statute, the court should refuse to settle the statement and refuse to grant a new trial thereon. *Wills v. Rhen Kong*, 70 Cal. 548. See also *Clark v. Crane*, 57 Cal. 629.

2. Striking Out Statement and Dismissing Motion.—“A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unembarrassed his right of appeal to this court. If his notice or statement has not been served or filed within time, that is a good reason why his motion should be denied when finally brought to a hearing; but under the method of procedure prescribed by the code it is not intended that the record upon which the motion is made may be first stricken out and the motion then denied.” Dictum in *Quivey v. Gambert*, 32 Cal. 304.

3. The court should not strike out the statement, but should hear any objections which the adverse party may offer to the proposed statement, and incorporate the same therein. A record of the whole matter would then be preserved for review on appeal. *Sweeney v. Great Falls, etc., R. Co.*, 11 Mont. 34.

It is not good practice to strike from the files a proposed statement because the right to a new trial had been waived or lost, or because the statute had not been complied with. *Calderwood v. Peyser*, 42 Cal. 110; *Lucas v. Marysville*, 44 Cal. 212; *Cottle v. Leitch*, 43 Cal. 320.

For a time this question seems to have been in doubt. See remarks in

Descalso v. Duane, (Cal. 1893) 33 Pac. Rep. 328. But it is now settled. See *Henty v. Merguire*, 106 Cal. 142.

In the following cases the practice of striking the motion from the files was followed: *Levy v. Getleson*, 27 Cal. 685; *De Castro v. Richardson*, 25 Cal. 49; *Sutton v. Symons*, 100 Cal. 576; *Loucks v. Edmondson*, 18 Cal. 203.

4. Extension by Agreement of Parties.—“It has been assumed in many cases, if not directly decided, that the time for giving notice of motion for a new trial, as well as for every other step to be taken in relation thereto, may be waived or extended by consent.” *Simpson v. Budd*, 91 Cal. 486 [*criting* *Hobbs v. Duff*, 43 Cal. 485; *Brichman v. Ross*, 67 Cal. 602; *Patrick v. Morse*, 64 Cal. 462; *Gray v. Nunan*, 63 Cal. 220; *Schleffery v. Tapia*, 68 Cal. 184; *Curtis v. Superior Ct.*, 70 Cal. 390].

Extension by Court After Agreement Has Expired.—Before an extension by agreement of the parties had expired, the court granted a further extension, over objection, and the statement was served within the time as extended by the court, but more than forty days after the statutory time had expired. It was held that the service was in time. As the parties could extend the period fixed by the code, it was immaterial whether the time was kept running by the agreement of the parties or by the order of the court extending the time under section 1054 of the code. *Curtis v. Superior Ct.*, 70 Cal. 390.

5. Extension by Court.—*Curtis v. Superior Ct.*, 70 Cal. 390; *Matthews v. Superior Ct.*, 68 Cal. 638.

The California Code Civ. Pro., § 1054, as amended in 1886, permits an extension of time for the preparation of statements upon good cause shown, but provides that “such extension shall not exceed thirty days without the consent of the adverse party.” See interpretation in *Curtis v. Superior Ct.*, 70 Cal. 390; *Bunuel v. Stockton*, 83 Cal. 319; *Muir v. Galloway*, 61 Cal. 498 [*doubted* in *Reay v. Butler*, 99 Cal. 480]; *Cole v. Wilcox*, 99 Cal. 549. For decisions under the Practice Act before

to serve the statement.¹ The order of extension should specify the dates within which the statement must be prepared and served,² and should be entered of record at the time when it is made.³

k. SETTLEMENT AND CORRECTION BY JUDGE. — The same proceedings may be taken for the settlement of the statement as are required for the settlement of bills of exceptions.⁴ It is the duty of the judge to correct any inaccuracy so as to make the statement truly represent the case, and to strike out all useless and redundant matter, notwithstanding the assent of the parties to such inaccuracy and redundancy.⁵

this amendment, see *Harper v. Minor*, 27 Cal. 112; *Carrillo v. Smith*, 37 Cal. 338; *Cottle v. Leitch*, 43 Cal. 322; *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 354; *Jenkins v. Frink*, 27 Cal. 337.

An order extending the time within which the statement can be served if it exceeds the period of extension allowed by law, is valid only as to such period. *Cottle v. Leitch*, 43 Cal. 322.

When the statutory time has expired the right to prepare a statement is lost and cannot be restored by the court, and no order of extension can then be granted. *Hegeler v. Henckell*, 27 Cal. 491; *Cooney v. Furlong*, 66 Cal. 520; *Munch v. Williamson*, 24 Cal. 167.

Proposing amendments and joining in the settlement without preserving an objection that the extension was beyond the statutory limit will operate as a waiver of the objection. *Walsh v. Mueller*, 14 Mont. 76.

1. Extension of Time to Serve Statement. — Although section 1054 of the California Code of Civil Procedure provides for the extension of time for the preparation of a statement, and not for the service of the statement, an order of extension carries with it an extension of the time for the service of the statement. *Bryant v. Sternfeld*, 89 Cal. 611 [*citing* *Curtis v. Superior Ct.*, 70 Cal. 390; *Burton v. Todd*, 68 Cal. 485].

2. For construction of indefinite orders of extension, see *Jenkins v. Frink*, 27 Cal. 337; *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 354; *Easterby v. Larco*, 24 Cal. 179; *Harper v. Minor*, 27 Cal. 107.

Amendment of Order. — An order granting an extension of time for preparing a statement "on appeal" may be amended to a statement for "a new trial," in conformity to the order intended, although the term has expired.

Spanagel v. Dellinger, 34 Cal. 476, *overruling* *De Castro v. Richardson*, 25 Cal. 49.

3. An order extending the time must not only be signed, but must be filed or entered in the minutes within the time prescribed by the statute. *Campbell v. Jones*, 41 Cal. 518; *Clark v. Strouse*, 11 Nev. 76.

4. See generally article BILLS OF EXCEPTIONS, vol. 3, p. 374; CASE MADE ON APPEAL, vol. 3, p. 879.

Mandamus to Compel Settlement. — Where it appears that the moving party has prepared and served a statement in time and has notified the adverse party of the time and place of presenting it to the judge for settlement, if the judge refuses to settle it mandamus will lie to compel him to do so. *People v. Hewill*, 56 Cal. 118; *People v. Crane*, 60 Cal. 279; *People v. Rosborough*, 29 Cal. 416; *People v. Keyser*, 53 Cal. 184. See also, for a discussion of this subject, article MANDAMUS, vol. 3, pp. 561, 576.

5. Striking Out Redundant and Superfluous Matter. — The statement should contain enough of the evidence and other matter to explain the specifications of error, and no more. Where the sufficiency of the entire evidence is not attacked by the specification it is the duty of the court to strike out portions of the evidence not necessary to an understanding of the exception and to require the moving party to state the substance and effect of the evidence. *Knowles v. Inches*, 12 Cal. 213; *Conroy v. Duane*, 45 Cal. 601; *McMinn v. Whelan*, 27 Cal. 320.

A Mere Transcript of the Reporter's Notes is not a proper form for a statement. It is the duty of the court to require the substance of the evidence to be given. *McMinn v. Whelan*, 27 Cal. 320.

Engrossment as Amended. — When the statement has been corrected by the judge, and the amendments allowed or disallowed, it is the duty of the moving party¹ to engross or copy the corrected statement with the amendments inserted in the proper places.²

Signature and Certificate of Allowance. — When settled, the statement should be signed by the judge or referee, with his certificate to the effect that it is allowed, and should then be filed with the clerk.³

1. AMENDMENT AFTER SETTLEMENT. — Although the statement has been settled and certified it may be amended⁴ by the lower court⁵ after the term has expired.⁶

1. It is not the duty of the clerk to engross the statement. *People v. Bartlett*, 40 Cal. 143.

2. See *Marlow v. Marsh*, 9 Cal. 259; *People v. Edwards*, 9 Cal. 291. See also *Skillman v. Riley*, 10 Cal. 300; *Baldwin v. Ferre*, 23 Cal. 461; *Kimball v. Semple*, 31 Cal. 661; *Bush v. Taylor*, 45 Cal. 112; *Fant v. Tandy*, 7 Mont. 443; *Gallatin Canal Co. v. Lay*, 10 Mont. 528; *Smith v. Davis*, 55 Cal. 26.

Engrossment is not required where the amendment can be effected by interlineation by consent. *McCreery v. Everding*, 44 Cal. 248.

A statement on a motion for a new trial will not be disregarded because amendments thereto are not engrossed into the record, but occupy a separate place in the close of the statement, where such amendments consist of additional matter, complete and intelligible in itself. *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121.

3. **Settlement by Referee.** — When all the proceedings are reported to the court by the referee who tried the cause, either the judge or the referee may settle the statement. *Marshall v. Golden Fleece Gold, etc., Min. Co.*, 16 Nev. 156.

Settlement by Judge's Successor. — The codes provide that a statement may be settled by the successor of the trial judge. *Territory v. Bryson*, 9 Mont. 41; *People v. Hobson*, 17 Cal. 424; *People v. Henderson*, 28 Cal. 466; *People v. Hodgdon*, 55 Cal. 72; *Morse v. Evans*, 6 How. Pr. (N. Y. Supreme Ct.) 445.

Mere Signature Insufficient. — A mere signature of the judge on the statement is not sufficient. *McCartney v. Fitz Henry*, 16 Cal. 185. But see *contra*, *Kidd v. Laird*, 15 Cal. 177.

Under Code Civ. Pro. Cal., § 659, "when settled, the statement shall be signed by the judge or referee, with

his certificate to the effect that the same is allowed."

Certificate of Settlement. — The certificate of a statement need not enumerate or specify each kind of matter contained therein as settled and allowed. A certificate reciting that "the foregoing statement on motion for a new trial is a full, correct, and true statement of the evidence in the foregoing case, and is hereby allowed," is sufficient to permit the review of instructions contained therein. *Arnold v. Sinclair*, 12 Mont. 248.

A mere certificate that the amendments have been allowed, indorsed on the statement by the judge, is insufficient, and such statement will not be considered on appeal. *Baldwin v. Ferre*, 23 Cal. 461.

A certificate as follows: "The foregoing statement on motion for a new trial has been settled and allowed by me and is correct," is sufficient although placed before certain attached exhibits referred to and identified in the statement as a part thereof. *Sharon v. Sharon*, 79 Cal. 633, *citing Kirstein v. Madden*, 38 Cal. 160.

An order granting a new trial on a statement without a certificate will be reversed. *Sawyer v. Sargent*, 65 Cal. 259; *Slater v. Union Pac. R. Co.*, 8 Utah 178.

4. *Low v. McCallan*, 64 Cal. 2; *Flynn v. Cottle*, 47 Cal. 527; *Spanagel v. Dellinger*, 34 Cal. 476 [*overruling De Castro v. Richardson*, 25 Cal. 49]; *Marshall v. Golden Fleece Gold, etc., Min. Co.*, 16 Nev. 156.

5. **Amendment by Supreme Court.** — The Supreme Court has no power to correct a statement upon motion for a new trial upon affidavits showing an error therein. *Santa Barbara v. Eldred*, 95 Cal. 378; *Hyde v. Boyle*, 86 Cal. 352; *Matter of Gates*, 90 Cal. 257.

6. See principles in *Spanagel v. Dellinger*, 34 Cal. 476.

XV. DECISION OF MOTION — GENERAL PRINCIPLES GOVERNING —

1. Discretion of Trial Court. — Generally the motion for a new trial is addressed to the discretion of the court¹ except where a party is entitled to a new trial as a matter of right.² The trial court having seen and heard all that takes place on the trial, and having better opportunities for the ascertainment of the merits of the case, is allowed a wide latitude of discretion in determining motions for new trial, and appellate courts are reluctant to interfere unless it clearly appears that such discretion has been abused.³ "This does not mean that the motion is to be granted or denied at the mere pleasure or fancy or feeling of the court, but that, the matter being one which cannot be determined by the application of definite and precise rules, it is to be acted upon in the exercise of a sound practical judgment, in view of all the relevant facts of the particular case."⁴ It is a judicial and not an arbitrary discretion.⁵

Limited by Rules of Law and Procedure. — Trial courts are not free to exercise their discretion in all cases, but are limited to some extent by such principles of law as are applicable to the case, and

1. See *infra*, XXI. 8. *Discretion of Lower Court.*

2. See article EJECTMENT, vol. 7, p. 355.

Liberal Rule in Actions of Ejectment. — A new trial may be granted upon slighter grounds in an action of ejectment than in ordinary actions, especially where no damages have been awarded and costs imposed, for the reason that a new trial may be demanded under the suit as a matter of right merely upon the payment of all costs and damages. *Reid v. Young*, 7 N. Y. App. Div. 400.

3. Discretion of Trial Court as to Damages. — "A district judge who hears the evidence and is in a condition to duly appreciate the force of every item of testimony given before him would be justified in exercising, and he ought to exercise, a wider discretion in granting new trials than an appellate court would be justified in exercising in reversing his orders denying them. I do not perceive any evidence that the District Court did not, in this instance, properly deny a new trial, but I take this occasion to observe that there seems to be an impression to some extent prevailing among district judges that their discretion in granting new trials is limited by the same strict and somewhat rigid rules applicable to appellate courts. If this is so, I think the impression erroneous. The position of *nisi prius* judges enables them

to fully comprehend and appreciate the merits of applications for new trials and intelligently exercise that legal discretion committed to them, and when, in their opinion, the circumstances demand it, they should not hesitate to liberally exercise it to promote the administration of justice." Dissenting opinion of Sawyer, C. J., in *Kinsey v. Wallace*, 36 Cal. 484.

Discretion Not Affected by Statutes. — The power to exercise discretion in granting new trials is the same as at common law, and is not affected by a statute permitting an assignment of errors as to orders granting or refusing a new trial. *Hewitt v. Jones*, 72 Ill. 218.

4. *Pratt v. Pioneer Press Co.*, 32 Minn. 217.

5. Judicial but Not Arbitrary Discretion. — *Haggin v. Christian*, 1 A. K. Marsh. (Ky.) 579; *Vanderburg v. Campbell*, 64 Miss. 89; *Com. v. Manson*, 2 Ashm. (Pa.) 31; *Howser v. Com.*, 51 Pa. St. 332; *Tefft v. Marsh*, 1 W. Va. 38; *O'Meara v. State*, 17 Ohio St. 515; *U. S. v. Lewis*, 2 N. Mex. 459; *Carpenter v. Coe*, 67 Barb. (N. Y.) 411; *Platt v. Munroe*, 34 Barb. (N. Y.) 291; *Longley v. Daly*, 1 S. Dak. 257.

The discretion of the trial court in granting or refusing a new trial must be exercised in a prudent and reasonable manner. *Tefft v. Marsh*, 1 W. Va. 38; *People v. Superior Ct.*, 5 Wend. (N. Y.) 114.

by the usual course of procedure.¹

Failure to Administer Substantial Justice. — As to most of the grounds for a new trial the discretion of the court is not limited by any fixed and well-defined rules of law, except that the court is bound to grant a new trial where substantial justice has not been done.²

1. Discretion Must Conform to Precedent. — "But this is not a power to be exercised arbitrarily, or otherwise than according to the usual modes of procedure in such cases, as established and understood. Any other course would tend to the confusion of parties as to when and how their cases should be made up and presented, and thereby make the administration of justice less certain, and increase the chances of injustice." *Witters v. Sowles*, 31 Fed. Rep. 5.

No Discretion Where Only Conclusions of Law Involved. — It is held that on an application for a new trial on the ground of unavoidable absence of counsel, as shown by an uncontroverted affidavit, the rule that the action of the lower court in granting or refusing a new trial will not be reversed unless it appear to be clearly erroneous has no application where the facts are undisputed and the only conclusion to be drawn is one of law. *McLeod v. Shelly Mfg., etc., Co.*, 108 Ala. 81.

Discretion Governed by Legal Rules. — The discretion of the circuit judge in granting a new trial must be governed by legal rules, rather than by his mere will or pleasure. *Vanderburg v. Campbell*, 64 Miss. 89.

Although the discretionary power of the trial court is wide, it must be exercised in accordance with fixed legal principles. *Freeman v. Rich*, 1 Iowa 504; *Hendricks v. Wallis*, 7 Iowa 224; *Todd v. State*, 25 Ind. 212; *Dorr v. Watson*, 28 Miss. 383.

Limited to Doubtful Cases. — "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." *Bailey v. Taaffe*, 29 Cal. 423.

Cannot Be Exercised Contrary to the Law or Facts. — Although the trial court is vested with a discretionary power to grant new trials and there is a stronger presumption in favor of an order granting than of an order denying a new trial, such discretion is not arbitrary and is confined to cases of insufficiency of the evidence and the like. The Supreme Court is not deprived of the power to reverse an order granting a new trial when the ground for such order does not in fact exist, or is not a legal ground, or the applicant is barred by his own negligence. *Clifford v. Denver, etc., R. Co.*, 12 Colo. 125.

Errors of Law in Granting New Trial. — It is conceded that if the court, in ordering a new trial, misapplies or mistakes a legal proposition as to cumulative or impeaching evidence or as to the admissibility of the affidavits of jurors, such ruling will be reviewed with the same freedom as if made at any other stage of the trial. *Shepherd v. Brenton*, 15 Iowa 84.

Discretion as to Trial by Referee. — In cases tried by referees the discretion of a court in granting a new trial must be exercised entirely with reference to the evidence disclosed by the record. *Hughley v. Wabasha*, 69 Minn. 245; *Minneapolis First Nat. Bank v. St. Cloud*, (Minn. 1898) 75 N. W. Rep. 1054.

2. A motion for a new trial upon the alleged ground that the evidence is insufficient to support the verdict should be granted by the Circuit Court unless it clearly appears that substantial justice has been done. But when the same question is presented to the Supreme Court, on appeal, that court should not grant a new trial unless it clearly appears from the record that substantial justice has not been done. *Christy v. Holmes*, 57 Ind. 314.

Abuse of Discretion. — Where the discretion of the court has been exercised in such a way as to prejudice the applicant for a new trial or to deprive him of a substantial right, an order refusing a new trial will be reversed for abuse of discretion. *Roberts v. Leslie*, 46 N. Y. Super. Ct. 76; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

The court does not exercise a power similar to a review on appeal from the verdict of the jury, but interposes its equitable authority to prevent the jury from inflicting by its verdict a gross, material, and palpable wrong.¹

2. Court May Grant on Its Own Motion. — Courts have the inherent power to correct errors in cases tried before them, and in the exercise of such power may grant new trials on their own motion or for grounds not specified in the motion of one of the parties.² This power has been limited by statutes in some states.³ Such

Instances of Abuse of Discretion — Refusal of New Trial on the Ground of Surprise. — *Porter v. Doe*, 10 Ark. 186; *Trulock v. State*, 1 Iowa 515; *Honore v. Murray*, 3 Dana (Ky.) 31; *Donallen v. Lennox*, 6 Dana (Ky.) 89 (surprise by trying case out of its order on the docket); *Moreland v. McDermott*, 10 Mo. 605; *Livingston's Petition*, 2 Abb. Pr. N. S. (N. Y. Ct. App.) 1; *Chinn v. Taylor*, 64 Tex. 385.

Surprise in Testimony of Witness. — There are instances where refusal of a new trial on this ground has been held an abuse of discretion because resulting in manifest injustice. *Todd v. State*, 25 Ind. 212; *Delmas v. Margo*, 25 Tex. 3; *Rodriguez v. Comstock*, 24 Cal. 85; *Wilson v. Brandon*, 8 Ga. 136; *Van Tassell v. New York, etc., R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 312; *Bristol v. Schultz*, 68 Minn. 106.

1. *Patteson v. Ford*, 2 Gratt. (Va.) 19; *Powell v. Manson*, 22 Gratt. (Va.) 177; *Goode v. Love*, 4 Leigh (Va.) 635; *Cowles v. Coe*, 21 Conn. 220; *Union Bank v. Middlebrook*, 33 Conn. 95; *Covington Mills Co. v. Summers*, 36 Ga. 615; *Fanning v. M'Craney*, 1 Mori. (Iowa) 398; *Cartwright v. Carpenter*, 7 How. (Miss.) 328; *Dulaney v. Rankin*, 47 Miss. 391; *Adams v. Webster*, 25 La. Ann. 113; *Huston v. Vail*, 51 Ind. 299.

Division of Opinion. — Upon a rule to show cause why a new trial should not be granted, if the judges are divided in opinion as to granting a new trial, the rule must be discharged. *Lanning v. London*, 4 Wash. (U. S.) 332; *Goddard v. Coffin*, *Davies* (U. S.) 381; *Lehre v. Murray*, 2 Brev. (S. Car.) 19; *Colony v. Hathaway*, 1 Tyler (Vt.) 281.

3. Inherent Power of Court to Grant on Its Own Motion. — *Ex p. Henry*, 24 Ala. 638; *Gould v. Tatum*, 21 Ark. 330; *Duff v. Fisher*, 15 Cal. 380; *McCabe v. Lewis*, 76 Mo. 301; *Richmond v. Wardlaw*, 36 Mo. 313; *Simpson v. Blunt*, 42

Mo. 544; *Williams v. Circuit Ct.*, 5 Mo. 248; *State v. McCrear*, 40 La. Ann. 20; *Weber v. Kirkendall*, 44 Neb. 766; *Schmidt v. Brown*, 80 Hun (N. Y.) 183; *Mills v. Scott*, 99 U. S. 25; *Rex v. Holt*, 5 T. R. 438; *Rex v. Morris*, 2 Burr. 1189; *Rex v. Atkinson*, 5 T. R. 437, note a. See, however, *Jordan v. Tarver*, 92 Ga. 379; *Lloyd v. Brinck*, 35 Tex. 1; *Long v. Kingfisher County*, 5 Okla. 128.

Granting for Causes Not Assigned in Motion. — A court has the inherent power to order a new trial on its own motion and for any sufficient causes not assigned in the motion for a new trial. *Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 270; *Hewitt v. Steele*, 118 Mo. 463; *Lovell v. Davis*, 52 Mo. App. 342; *Baughman v. National Waterworks Co.*, 58 Mo. App. 576.

A judge may overrule a motion for a new trial and at the same time grant a new trial for causes not assigned in the motion. The pendency of the motion will not suspend the power of the court to set aside the verdict on its own motion. *Ellis v. Ginsburg*, 163 Mass. 143.

3. Statutes Limiting Power of Court. — A statute authorizing a court to entertain a motion to set aside a verdict on the minutes does not prevent a judge from setting aside a verdict on his own motion. *Schmidt v. Brown*, 80 Hun (N. Y.) 183.

The *Missouri* statute now embodied in Rev. Stat. Mo. 1889, § 2241, providing that "only one new trial shall be allowed to either party, except, first, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior," limits the power of the court to set aside a verdict and award a new trial on its own motion except for the causes mentioned therein. *State v. Adams*, 84 Mo. 310, affirming 12 Mo. App. 436.

Under statutes which require a mo-

extraordinary power should be exercised sparingly and upon due notice to the parties or at the time when the verdict is rendered.¹

3. Refusal Where Both Parties Consent. — If substantial justice has been done, the court is not bound to grant a new trial although requested by both parties to do so.²

4. Technical and Harmless Errors — Technical Errors — Inequitable Defenses. — Where it appears that substantial justice has been done, a new trial will not be awarded for mere technical errors³ or to permit a party to make an inequitable defense.⁴

Harmless Error. — It is an invariable rule that a new trial will not be granted for harmless errors occurring during the trial.⁵

tion to be made by the party aggrieved and notice to be given to the adverse party, and do not authorize a court to act on its own motion, a court has no power to award a new trial. *Long v. Kingfisher County*, 5 Okla. 128.

California Code Civ. Pro., § 662, providing that a verdict may be set aside by the court on its own motion for certain causes, limits the power of the court to the causes specified in the section. *Townley v. Adams*, 118 Cal. 382.

1. Time When Power Should Not Be Exercised. — The court should exercise such power promptly and not on a motion for judgment long after the time when proceedings for a new trial might have been commenced. *Gould v. Duluth, etc., Elevator Co.*, 2 N. Dak. 216.

In *Clement v. Barnes*, 6 S. Dak. 483, it was held that an order setting aside a verdict on the court's own motion could not be made on the day after the verdict was returned. The court said: "To hold that a court may, upon its own motion, set aside a verdict to which neither party has objected, one day after its rendition, would tend to confuse and unsettle the practice, and lead the courts and practitioners of this jurisdiction into the realms of uncertainty. Upon the coming in of the jury, the parties and their counsel are presumed to be present in court, for the purpose of taking an exception to any ruling of the court in relation to the verdict; and it is evident that the legislature did not intend to subject the prevailing party to the hardship of having his verdict, to which the other side has made no objection, set aside without notice and without a hearing, and upon the court's own motion, after the jury has been discharged and the witnesses have separated and the litigants have returned to their respective vocations or places of abode."

2. Aiken v. Bruen, 21 Ind. 137; *Phe-lan v. Ruiz*, 15 Cal. 90; *Rock Island v. McEniry*, 39 Ill. App. 218; *Smedley v. Chicago, etc., R. Co.*, 45 Ill. App. 426.

"When a suit has regularly and properly been prosecuted and defended to a final judgment, by which substantial justice has been decreed, the parties are not entitled, as of right, and without sufficient reason, to evoke the interposition of the court for the purpose of having the cause retried and again determined, at the expense of the public and to the delay of other creditors, although both of the litigants join in the application." *Nichols v. Sixth Ave. R. Co.*, 10 Bosw. (N. Y.) 260.

3. Technical Errors. — *De Clerq v. Mungin*, 46 Ill. 112; *Creote v. Willey*, 83 Ill. 444; *Roseville Union Bank v. Gilbert*, 24 Ill. App. 334; *Woodward v. Horst*, 10 Iowa 120; *Buck v. Waddle*, 1 Ohio 357.

If the verdict be in accordance with justice it will stand though the ruling on a point of law may have been doubtful. *Ingraham v. South Carolina Ins. Co.*, 2 Treadw. (S. Car.) 707; *Rogers v. Page, Brayt.* (Vt.) 169; *Breckenridge v. Anderson*, 3 J. J. Marsh. (Ky.) 710; *Pearson v. Burditt*, 26 Tex. 157.

4. A new trial will not be granted to enable the applicant to avail himself of a legal defense, where substantial justice has been done and such defense would be inequitable. *McConnell v. Strong*, 11 Vt. 280.

A new trial will not be granted to permit a mere technical defense. *Bush v. Critchfield*, 5 Ohio 109; *Bates v. Cooper*, 5 Ohio 115.

5. Harmless Errors. — For errors held to be harmless, see article APPEALS, vol. 2, p. 537.

As to errors relating to the procedure for new trial, see the various subtitles herein, and especially *infra*, XXI. *Re-*

5. Probability that New Trial Will Change the Result. — The test applied in all applications for a new trial is whether the new trial will probably change the result. If the result would probably be the same a new trial will be refused, as substantial justice has been done.¹

6. Small Amount Involved. — A new trial will not be granted where the amount in dispute is too small to merit a re-examination² or where the applicant can recover only nominal damages in any event.³ In such cases the maxim *de minimis non curat lex* is applied.⁴

7. New Trial to Recover Nominal Damages — Failure to Assess Nominal Damages. — Error in failing to assess nominal damages is considered as a mere harmless error, not affecting the substantial rights of the parties,⁵ and is not a ground for a new

view of Order Granting or Denying New Trial.

As to errors in instructions and evidence, see *supra*, III. 12. *Errors of Law Occurring at the Trial.*

1. See *supra*, III. 5. *Accident or Surprise*; III. 11. *Newly Discovered Evidence*; III. 12. *Errors of Law Occurring at the Trial.*

2. *Badgley v. Heald*, 9 Ill. 64; *Engel v. Fischer*, 44 Ill. App. 362; *Kimball v. Castagnio*, 8 Colo. 525.

3. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Damages*, vol. 8, p. 560.

4. See Am. and Eng. Encyc. of Law (2d ed.), tit. *De Minimis Non Curat Lex*.

Such maxim is not applicable where the evidence showed that the value of the property replevied did not exceed three hundred and sixty dollars, and the court found the value at three hundred and seventy-five dollars, as the appellate court could not change the judgment to an amount not supported by the findings. The judgment must be reversed and remanded for a new trial. *Merrill v. Hurlburt*, 63 Cal. 494.

Where a verdict for \$37.90 was rendered on a claim of \$75.81 for rent, it was held error to refuse a new trial, although the trial court was of the opinion that the difference was too small to justify another trial, being less than the costs to be incurred by the county by a new trial. *Galloway v. Weber*, 55 Ill. App. 366.

5. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Damages*, vol. 8, p. 560.

Failure to Assess Nominal Damages. — A new trial will not be granted for a failure to assess nominal damages where no question of permanent right is involved. *Knowles v. Steele*, 59

Minn. 452; *Harris v. Kerr*, 37 Minn. 537; *Crawford v. Bergen*, 91 Iowa 675; *Watson v. Van Meter*, 43 Iowa 76; *Portman v. Klemish*, 54 Iowa 198; *Rowley v. Jewett*, 56 Iowa 492; *Phenix Ins. Co. v. Findley*, 59 Iowa 591; *Wire v. Foster*, 62 Iowa 114; *Schwartz v. Davis*, 90 Iowa 324.

To Recover Vindictive Damages. — Where the plaintiff is entitled to merely nominal damages a verdict for the defendant will not be set aside to enable a party to recover vindictive damages. *McKee v. Ingalls*, 5 Ill. 30; *Johnson v. Weedman*, 5 Ill. 495; *Comstock v. Brosseau*, 65 Ill. 39.

A Verdict Against the Weight of Evidence will not be set aside for a new trial where the plaintiff can recover only nominal damages.

Arkansas. — *Trippe v. Du Val*, 33 Ark. 811.

Connecticut. — *Briggs v. Morse*, 42 Conn. 258; *Cooke v. Barr*, 39 Conn. 206.

Illinois. — *Clark v. Hatfield*, 88 Ill. 440; *Sheen v. Peoria Journal R. Co.*, 53 Ill. App. 267.

Indiana. — *State v. Miller*, 5 Blackf. (Ind.) 381; *Black v. Coan*, 48 Ind. 385; *State v. Cloud*, 94 Ind. 174; *Jennings v. Loring*, 5 Ind. 250.

Minnesota. — *Warner v. Lockerby*, 31 Minn. 421; *Harris v. Kerr*, 37 Minn. 537.

New York. — *Brantingham v. Fay*, 1 Johns. Cas. (N. Y.) 255; *Ex p. Bailly*, 2 Cow. (N. Y.) 479; *Rundell v. Butler*, 10 Wend. (N. Y.) 119; *Jarvis v. Hatheway*, 3 Johns. (N. Y.) 180.

South Carolina. — *Futch v. Walker*, 1 Bailey L. (S. Car.) 98; *Elwell v. Bradham*, 2 Spears L. (S. Car.) 168.

Wisconsin. — *Jones v. King*, 33 Wis.

trial¹ unless a question of permanent right is involved or the right to recover costs is material.

XVI. ORDER GRANTING OR REFUSING NEW TRIAL — 1. **Statement of Grounds in the Order.** — The order granting or refusing² a new trial should specify the reasons or grounds on which the court based its order, so that the rights of the parties may be determined thereafter.³ Such a statement is necessary in order to inform the appellate court as to the reasons which controlled the lower court, and also to preserve the rights of the parties in the subsequent taxation of costs⁴ or the subsequent application for a second new trial.⁵

Failure to State Grounds. — In some states statutes requiring the court to state its reasons in the order⁶ are construed to be merely directory, and the failure to make such statement does not render the order void.⁷

2. Effect of Order and Its Conditions — **Vacates Verdict and Judgment.** — An order granting a new trial in effect vacates a former judgment, without any special order to set it aside,⁸ and also sweeps

422; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

England. — *Macrow v. Hull*, 1 Burr. 11; *Farewell v. Chaffey*, 1 Burr. 54; *Harris v. Jones*, 1 M. & Rob. 173.

1. *Ross v. Thompson*, 78 Ind. 90; *Watson v. Van Meter*, 43 Iowa 76; *Trippe v. Du Val*, 33 Ark. 811.

2. **Where the Motion Is Not Filed in Time**, an order overruling such motion should show that the court dismissed the motion for that reason, and not because the grounds stated therein were insufficient. *William H. T. v. State*, 18 Fla. 883; *Dupuis v. Thompson*, 16 Fla. 70.

3. *Boswell v. Jones*, 1 Wash. (Va.) 322; *Marietta v. Emerson*, 5 Ohio St. 288; *State v. Edwards*, 35 Mo. App. 680; *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 505.

4. See *infra*, XVII. *Costs on Granting New Trial*.

5. See *infra*, XXIII. *Subsequent New Trials*.

6. *State v. Edwards*, 35 Mo. App. 680; *O'Meara v. Swanson*, 62 Mo. App. 71; *Hewitt v. Steele*, 118 Mo. 463; *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533; *McRae v. Garth Lumber Co.*, 102 Mich. 488.

See grounds stated and reasons assigned in the order refusing a new trial in *Patterson v. Collier*, 77 Ga. 292.

In the **Absence of Statute** there is no law which requires the trial court to specify the grounds on which the order

is made, although it is better practice to do so. If there is no reason stated in the order, the presumption is that a new trial was granted because the court thought the verdict to be against the weight of the evidence. *Schraer v. Stefan*, 80 Wis. 653; *Shrewsbury v. Miler*, 10 W. Va. 115; *Rixey v. Ward*, 3 Rand. (Va.) 52; *Matter of Martin*, 113 Cal. 479.

A Written Opinion Not Incorporated in the Record, but merely filed with the papers in the case, is not made a part of the record, and does not "specify of record the ground or grounds on which said new trial is granted." *Hewitt v. Steele*, 118 Mo. 463; *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533.

Where the Court Fails to State the Ground on which the new trial was granted, the appellate court will sustain the order, if it can be sustained upon any one or more of the grounds assigned in the motion. *Hewitt v. Steele*, 118 Mo. 463; *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533; *Brunswick First Nat. Bank v. Wood*, 124 Mo. 72.

7. *Coleman v. Davis*, 13 Colo. 98; *Gomer v. Chaffe*, 5 Colo. 383; *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 505.

8. *Randolph v. McCain*, 34 Ark. 696; *Thompson v. Smith*, 28 Cal. 534; *Martin v. Matfield*, 49 Cal. 42; *Fleming v. Lord*, 1 Root (Conn.) 214; *Low v. Fox*, 56 Iowa 221; *Maxwell v. Campbell*, 45 Ind. 361; *Louisville Rock, etc., Co. v. Kerr*, 78 Ky. 13; *State v. Judge*, 35

away a general or special verdict, and leaves the case as though no trial had taken place.¹ Where a new trial is granted conditionally, the judgment is not thereby absolutely vacated until all the conditions are performed.²

3. New Trial as to Part of the Issues. — An order granting a new trial will be presumed to award a new trial on all of the issues, and to re-open the whole case, unless there are specific directions to the contrary.³ Where all the issues are essential, and each involves the merits of the controversy, the whole case must be

La. Ann. 1104; *Patterson v. Loughridge*, 46 N. J. L. 138. See also article OPENING, VACATING, AND AMENDING JUDGMENTS.

In Criminal Cases. — A remittitur of the Supreme Court granting a new trial in a criminal case need not expressly set aside the verdict and judgment. *State v. Stephens*, 13 S. Car. 285.

Right of Appeal. — An order granting a new trial does not vacate a judgment so as to prevent the adverse party from appealing from the verdict. *Mountain Tunnel Gravel Min. Co. v. Bryan*, 111 Cal. 36; *Pierce v. Birkholm*, 110 Cal. 669.

Where a New Trial Is Had, and a New Judgment Is Rendered, the effect of the new trial is to vacate the previous judgment, although there may be no formal order setting it aside. *Colchen v. Ninde*, 120 Ind. 88.

1. *Edwards v. Edwards*, 22 Ill. 121; *Hidden v. Jordan*, 28 Cal. 301.

Where the Jury Returned a General Verdict, and Also Special Findings, an order granting a new trial sweeps away both the verdict and the special findings, and leaves the case as though no trial had been had. *McCrum v. Corby*, 15 Kan. 112; *State v. Templin*, 122 Ind. 235; *Hollenbeck v. Marshalltown*, 62 Iowa 21.

A Portion of the Findings of the court cannot be set aside without vacating the entire findings and decree. *State v. Templin*, 122 Ind. 235; *Jones v. Swepson*, 94 N. Car. 700.

Joint Defendants. — In a suit for damages against a city and an individual jointly, the court dismissed the suit as to the city, because no cause of action was alleged against it, and a verdict was rendered in favor of the other defendant. It was held that an order granting a new trial only vacated the verdict and did not reopen the case as against the city. *Atlanta v. Anderson*, 90 Ga. 481.

Setting Aside Second Verdict — Judgment on First. — Where a verdict for the plaintiff is set aside and a new trial results in a verdict for the defendant, a court will not set aside the second verdict and render judgment on the first if the motion for judgment is not made until after the second verdict is returned. *Knowles v. Dow*, 22 N. H. 387.

But where a new trial is improperly ordered and the second verdict is set aside, a judgment should be entered on the first verdict. *Brevard v. Graham*, 2 Bibb (Ky.) 177.

Right to Jury Trial. — Where a case tried by the court is reversed and remanded for a new trial the adverse party is entitled to a jury trial as to the whole case, and a judgment cannot be rendered by the court after trying a portion of the issues. *Isler v. Koonce*, 83 N. Car. 55; *Benbow v. Robbins*, 72 N. Car. 422.

Effect in Criminal Cases. — An order granting a new trial in criminal cases leaves the parties in the same condition as though no trial had been had. *Ex p. Bradley*, 48 Ind. 548.

2. *Mabley v. Judge*, 41 Mich. 31.

Conditional Verdict. — Where, in an action in ejectment, a conditional verdict is rendered in favor of the plaintiff upon paying certain sums of money, a rule for a new trial obtained by him will postpone the time for performance of the condition in the verdict until such rule is disposed of. *Jones v. Backus*, 114 Pa. St. 120.

3. *Hidden v. Jordan*, 28 Cal. 302; *Brenner v. Coerber*, 42 Ill. 497; *Chapin v. Thompson*, 80 N. Y. 275; *Converse v. Bloom*, 20 La. Ann. 555; *Zaleski v. Clark*, 45 Conn. 397.

An order that the cause "stand for trial" opens the whole case and does not restrict the issues on a new trial. *Davis v. Stone*, 117 Mass. 486, 120 Mass. 228.

opened.¹ Where the material issues were correctly found upon the first trial, and the error does not touch the merits, a partial new trial to correct that error may be granted.² In some states

1. *Bennett v. Closson*, 138 Ind. 542; *Johnson v. McCulloch*, 89 Ind. 270; *Peed v. Brennehan*, 72 Ind. 288; *Bisel v. Tucker*, 121 Ind. 249; *Hollenbeck v. Marshalltown*, 62 Iowa 21; *Needles v. Burke*, 27 Mo. App. 211; *Holmes v. Godwin*, 71 N. Car. 306; *Merony v. McIntyre*, 82 N. Car. 103; *Jones v. Swepson*, 94 N. Car. 700; *Foster v. Browning*, 4 R. I. 47; *Hamilton v. Prescott*, 73 Tex. 565; *Long v. Garnett*, 45 Tex. 401; *Treat v. Hiles*, 75 Wis. 265.

Where the jury has found some of the issues in favor of the plaintiff, and one in favor of the defendant, and a new trial is granted to the plaintiff on the ground of misdirection by the court in a matter of law pertaining solely to the latter issue, a new trial will not be granted, unless the defendant consents thereto, as to the latter issue alone, but all the issues must be again submitted. *Foster v. Browning*, 4 R. I. 47.

At Common Law a new trial could not be granted in civil cases at the instance of one of several defendants, nor as to a part of the issues. 2 *Tidd's Practice* 911 [citing *Edie v. East-India Co.*, 2 Burr. 1224, 1 W. Bl. 298; *Parker v. Godin*, 2 Stra. 814; *Swain v. Hall*, 3 Wils. 47; *Rex v. Pool*, E. 1734; *Dexter v. Barrowby*, E. 25 Geo. II.; *Barnes* 436].

In an Action on an Administrator's Bond, where several breaches have been assigned, issues joined, and findings made, an order granting a new trial as to one issue has the legal effect of granting a new trial as to all. *State v. Templin*, 122 Ind. 235.

Texas—New Trial as to One Party or One Issue.—Under Rev. Stat. Tex. 1895, art. 1337, providing that "only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law," a new trial cannot be granted as to one party or one issue. *Hume v. Schintz*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1067; *Schintz v. Morris*, 13 Tex. Civ. App. 580; *Long v. Garnett*, 45 Tex. 401; *Gulf, etc., R. Co. v. James*, 73 Tex. 12; *Wootters v. Kauffman*, 67 Tex. 488; *Parker v. Adams*, 2 Tex. Civ. App. 357.

But a new trial may be granted by the Supreme Court on reversal as to

one of the parties where a proper decision is not dependent upon the judgment as to the other, and can therefore be affirmed in part and reversed in part. *Boone v. Hulsey*, 71 Tex. 176; *Hamilton v. Prescott*, 73 Tex. 565.

2. *Alabama*.—*Walker v. Blassingame*, 17 Ala. 810; *Edwards v. Lewis*, 18 Ala. 494.

California.—*San Diego Land, etc., Co. v. Neale*, 78 Cal. 63, and cases cited.

Iowa.—*Dawson v. Wisner*, 11 Iowa 6; *Woodward v. Horst*, 10 Iowa 120.

Massachusetts.—*Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Pratt v. Boston Heel, etc., Co.*, 134 Mass. 300; *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Bardwell v. Conway Mut. F. Ins. Co.*, 118 Mass. 465.

Montana.—*Ramsdell v. Clark*, 20 Mont. 103.

Nevada.—*Lake v. Bender*, 18 Nev. 361.

New Hampshire.—*Lisbon v. Lyman*, 49 N. H. 586.

New York.—*Joseph Schlitz Brewing Co. v. Ester*, 86 Hun (N. Y.) 22; *Lavelle v. Corrignio*, 86 Hun (N. Y.) 135.

North Carolina.—*Holmes v. Godwin*, 71 N. Car. 306.

Ohio.—*Sprague v. Childs*, 16 Ohio St. 107.

South Carolina.—*Laney v. Bradford*, 4 Rich. L. (S. Car.) 1.

But see *contra*, *Johnson v. McCulloch*, 89 Ind. 270; *Morris v. State*, 1 Blackf. (Ind.) 37; *Dale v. Mosely*, 4 Stew. & P. (Ala.) 371.

If the jury omits a matter which goes to the point of the issue, the new trial must be *in toto*, but when all the material facts are found correctly, and the error does not touch the merits, the court may award a writ of inquiry or a restricted new trial to correct the error. *Holmes v. Godwin*, 71 N. Car. 306; *Merony v. McIntyre*, 82 N. Car. 103.

Where Issues Have Been Correctly and Fully Tried or conceded at the former trial the court may direct that such issues shall not be tried again. *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *Hubbell v. Bissell*, 2 Allen (Mass.) 196; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397.

the trial court has the same power as the appellate court to grant a new trial as to some of the issues.¹

4. New Trial as to Some Parties. — The common-law rule that a new trial could not be granted in civil actions at the instance of one of several defendants² does not generally prevail,³ and a new trial may be granted as to one or more of several parties and refused as to others.⁴ Such is the rule under the codes even though but one final judgment can be rendered.⁵

1. *Duff v. Duff*, 101 Cal. 1.

Issue Restricted as to Damages. — When exceptions are sustained on the sole ground of an error in the rejection of evidence which affected the question of damages only, a new trial will be confined to the assessment of damages. *Kent v. Whitney*, 9 Allen (Mass.) 62; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Haley v. Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.) 545; *Boyd v. Brown*, 17 Pick. (Mass.) 453; *Hariston v. Sale*, 6 Smed. & M. (Miss.) 634.

Error as to Cross-complaint. — Under the provisions of the *Iowa* court a court, on finding that an error occurred only in an allowance of the defendant's cross-action, will order a new trial to extend thereto, without disturbing the judgment establishing the plaintiff's claim. *McAfferly v. Hale*, 24 Iowa 355.

Waiver of Condition. — If a motion for a new trial is granted for the purpose of submitting to another jury a single specified question of fact, the party who obtained the verdict may waive the condition in his favor; and if, at the new trial, he puts his case upon another ground, the whole case is thereby opened to the other party. *Seccomb v. Provincial Ins. Co.*, 4 Allen (Mass.) 152.

The Evidence on a New Trial as to One Issue must be restricted to such issue. *Brenner v. Coerber*, 42 Ill. 497; *Kent v. Whitney*, 9 Allen (Mass.) 62; *Lake v. Bender*, 18 Nev. 361; *Amherst Bank v. Root*, 2 Met. (Mass.) 542; *Seccomb v. Provincial Ins. Co.*, 4 Allen (Mass.) 152; *Pratt v. Boston Heel, etc., Co.*, 134 Mass. 300.

Where the error was in the admission of improper evidence to prove one fact, the court may confine the evidence on the new trial to that point. *Wayland v. Ware*, 109 Mass. 248; *Warshauer v. Jones*, 117 Mass. 345; *Robbins v. Townsend*, 20 Pick. (Mass.) 345.

2. The Technical Rule of the Common Law appears to have been that a verdict or judgment was an entirety and could not be set aside at the instance of

one of several defendants. 2 *Tidd's Practice* 819; *Bac. Abr.*, tit. Trial, L, 1; *Buller's N. P.* 326; *Bond v. Spark*, 12 Mod. 275; *Parker v. Godin*, 2 Stra. 814; *Rex v. Mawbey*, 6 T. R. 619; *Berrington's Case*, 3 Salk. 362.

3. Such rule seems to have been disapproved as an unreasonable restriction on the power of the court to grant a new trial in furtherance of justice. *Rex v. Mawbey*, 6 T. R. 619; *Oakley v. Steddiford*, 3 Johns. (N. Y.) 253. See review and criticism of above cases in note 2 by Shaw, C. J., in *Bicknell v. Dorion*, 16 Pick. (Mass.) 478.

4. *Albright v. McTighe*, 49 Fed. Rep. 817; *Seborn v. State*, 51 Ga. 164; *Sims v. State*, 87 Ga. 569; *Huntington First Nat. Bank v. Williams*, 126 Ind. 423; *Houston v. Bruner*, 39 Ind. 376; *Lee v. Fletcher*, 46 Minn. 49; *Clark v. Austin*, 38 Minn. 487; *Brown v. Burrus*, 8 Mo. 26; *Palmer v. Kennedy*, 7 J. J. Marsh. (Ky.) 498; *Terpenning v. Gallup*, 8 Iowa 74; *Gordon v. Pitt*, 3 Iowa 385; *Heffner v. Moyst*, 40 Ohio St. 112; *Hayden v. Woods*, 16 Neb. 306; *Smith v. Foster*, 3 Coldw. (Tenn.) 147.

Contra. — A new trial cannot be granted as to one party. If the evidence is not sufficient as to one party or there is error as to one party, there must be a new trial as to all parties. *Sperry v. Dickenson*, 82 Ind. 132; *Riggs v. Hatch*, 16 Fed. Rep. 839; *Draper v. State*, 1 Head (Tenn.) 262; *Trousdale v. Donnell*, 4 Humph. (Tenn.) 273. See review of above cases in *Albright v. McTighe*, 49 Fed. Rep. 817. See also proceedings in *Schintz v. Morris*, 13 Tex. Civ. App. 580.

5. In *Holborn v. Naughton*, 60 Mo. App. 100, it was said: "The rule that judgments at law are entireties in the sense that they are void or reversible as a whole and as to all the defendants, if they are void or reversible as to one or more defendants, has been disavowed by the Supreme Court in a number of recent decisions. *State v. Tate*, 109 Mo. 265; *Bremen Bank v. Umrath*, 55

5. Conditions of Order Granting New Trial. — Unless the statute restricts the order to mere payment of costs¹ the courts have power to impose such other reasonable terms and conditions as will promote justice and reimburse the adverse party or prevent useless litigation, such as the condition that the new trial shall be confined to certain issues,² that one of several defendants be released,³ that the adverse party waive the right to appeal,⁴ or

Mo. App. 43. The rule as now established is that a judgment against several defendants, invalid as to one or more, may be annulled as to the improper parties and affirmed as to the others, it being the purpose of our code of procedure to apply the rules applicable to decrees in equity in this respect, as far as they are applicable to judgments at law. * * * This construction of the power of the courts over judgments does not, of course, affect the statutory rule that there can be only one final judgment in the action, nor does it contravene the corollary of the statutory rule that such final judgment must dispose of all the parties to the cause."

If, in a civil action against two, a verdict is rendered in favor of one and against the other, a new trial may be granted as to the latter without disturbing the verdict so far as it affects the former. *Bicknell v. Dorion*, 16 Pick. (Mass.) 478, *overruling Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

In Criminal Cases. — A party tried on several complaints, and convicted on evidence which is sufficient to sustain either one only, may be sentenced upon either and have a new trial as to the others. *Com. v. Remby*, 2 Gray (Mass.) 508.

At common law, where two were acquitted and one convicted of a misdemeanor, a new trial could be granted as to the one convicted. See comments on *Rex v. Mawbey*, 6 T. R. 619, in *Bicknell v. Dorion*, 16 Pick. (Mass.) 482.

Joint and Several Liability for Torts. — In an action against joint tortfeasors it is proper to grant a motion for a new trial as to one defendant and overrule it as to other defendants, since they are jointly and severally liable, and the plaintiff may maintain an action against one or all of the defendants. *Albright v. McTighe*, 49 Fed. Rep. 817; *Heffner v. Moyst*, 40 Ohio St. 112; *Hayden v. Woods*, 16 Neb. 306; *Brown v. Burrus*, 8 Mo. 26; *Terpenning v. Gallup*, 3 Iowa 74.

An Indorser or Surety is entitled to a new trial where the evidence was sufficient only as to the maker of a note or the principal on a bond. *Way v. Butterworth*, 106 Mass. 75; *Hubbell v. Bissell*, 2 Allen (Mass.) 196.

1. *Metropolitan St. R. Co. v. McClure*, 58 Kan. 109.

2. *Hubbell v. Bissell*, 2 Allen (Mass.) 196; *Hill v. Southwick*, 9 R. I. 299; *Wallace v. Floyd*, 29 Pa. St. 184.

3. *Irwin v. Riley*, 68 Ga. 605.

Condition as to Former Evidence. — A new trial may be granted to a defendant on condition that he will stipulate that the testimony of a witness for him shall be read as a part of his evidence or that such witness shall be called by him, where the plaintiff claims that such testimony was adverse to the defendant and corroborative of the newly discovered evidence. *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62.

4. Waiver of Appeal — Conditions Required of Both Parties. — In *Garoutte v. Haley*, 104 Cal. 497, an order granting a new trial provided that the defendant should pay the plaintiff, within a certain time, the plaintiff's costs of suit, on condition that the plaintiff file a waiver of his right to appeal from such order. It was held that if the plaintiff failed to file such waiver, the order for new trial would be absolute without the defendant's paying the costs, but if the plaintiff filed the waiver and the defendant failed to pay the costs, the order would become inoperative, and no new trial could be had.

New Trial as a Matter of Right. — Where a party is entitled to a new trial as a matter of right because of some legal error committed on trial, a court has no discretion to grant or withhold a new trial, but, finding error, is bound to reverse the judgment, and cannot impose as a condition that the action should not abate in the event of the death of one of the parties. *Anderson v. Rome, etc., R. Co.*, 54 N. Y. 334.

On granting a new trial in ejectment, the court has no power to impose terms

that the judgment be against certain of the defendants.¹ The conditions imposed must not be oppressive or unreasonable.²

Attorneys' Fees. — In some instances the courts have required the payment of attorneys' fees, in addition to the costs of the former trial, as a condition of granting a new trial.³

beyond the payment of costs required by the statute. *Shaw v. McMaren*, 2 Hill (N. Y.) 417.

1. On motion for new trial by several defendants, the court may order a new trial, unless the plaintiff should elect to take judgment against each of the defendants for specific sums due from each of them; and if the plaintiff elects to take judgment against some of the defendants, such election binds him to take judgment against all of the defendants for the sums specified in the order. *Glencoe First Nat. Bank v. Lincoln*, 39 Minn. 473.

Correction of Decree. — Where, on motion for a new trial, it appeared that the decree erroneously omitted a certain lot which, according to a stipulation of the parties, should have been included, it was held not an abuse of discretion to order a new trial unless the adverse party would consent to a correction of the decree. *Eaton v. Jones*, 107 Cal. 489.

2. **Rescission — Return of Notes.** — In an action for a breach of contract, where the vendee was entitled to recover the value of his notes, it is a proper condition that a new trial be granted unless the defendant surrender the notes, and that if the notes are surrendered the judgment for damages may be reduced to a nominal sum. *Boley v. Walter A. Wood Mowing, etc.*, Mach. Co., 62 Mo. App. 139.

An Order to Bring Money into Court to satisfy the amount of the verdict which may be rendered on a new trial is erroneous, and will not be enforced. *Shuter v. Hallett*, Col. & C. Cas. (N. Y.) 330.

A Defendant Will Not Be Required to Abandon His Defenses of usury or the statute of limitations as a condition, in addition to paying the costs of the former trial, on which the court will grant him a new trial. *Allen v. Mapes*, 20 Wend. (N. Y.) 633.

A Bond for the Payment of Any Judgment which may afterwards be rendered against the defendant is an unreasonable requirement or condition in an order granting a new trial, although the statute authorizes the court

to grant a new trial "on such terms as may be just." *Dewey v. Leonhardt*, 37 Mo. App. 517.

Reconveyance of Title. — Where it appeared on the trial that the defendant was entitled to a rescission, but had failed to tender a reconveyance of the property, the court has no power to grant a new trial on condition that a judgment will be granted on the verdict, if the defendant, within the time specified, execute a reconveyance and deliver 'it to the plaintiff. *De Ford v. Urbain*, 48 Ind. 219, wherein the court said: "We are not aware of any practice by which a party, for the purpose of obviating a motion for a new trial, may do a thing after verdict in his favor which was necessary to be done in order to obtain the verdict, and thereby save the verdict."

The Waiver of the Right of Removal of a cause to the federal courts is a proper and reasonable condition to be imposed on a party seeking a new trial, where a new trial is not a matter of right. *Mabley v. Judge*, 41 Mich. 31.

An Order Vacating an Order for a New Trial After Payment of Costs required as a condition precedent is erroneous, as the party entitled to a new trial acquires a right by paying the costs, of which the court cannot deprive him by a subsequent revocation of its order. *Reiber v. Boos*, 110 Pa. St. 594.

3. **A Reasonable Attorneys' Fee**, in addition to costs of the former trial, may be imposed as a condition of granting a new trial, where the adverse party is without fault and should be reimbursed for the expenses of the trial. *Brooks v. San Francisco, etc.*, R. Co., 110 Cal. 175; *Matter of Ryan*, 70 Hun (N. Y.) 149; *Buena Vista County v. Iowa Falls, etc.*, R. Co., 55 Iowa 157.

Where the statute contains no provisions as to the terms of granting a new trial, but it is provided as to motions in general that "unless otherwise provided by statute, the costs of motions * * * shall be taxed and paid as the court in its discretion may direct," a court has no power to require, as a condition precedent, the payment of a certain sum to the adverse party as

XVII. COSTS ON GRANTING NEW TRIAL — 1. Discretion of Court.

— The taxing of costs as a condition of granting a new trial rests largely in the discretion of the trial court,¹ unless regulated by statute,² or in case a new trial must be granted as a matter of right.³ When the costs are discretionary no fixed rules are applied by the courts, but the costs are imposed in each case according to the circumstances, in order to protect the adverse party from further delay and expense, and to some extent to throw the burden upon the party in fault.⁴ The costs required to be paid are the costs incurred at the trial at which the verdict was rendered, and not all accrued costs or the probable cost of a new trial.⁵ The reasons or grounds upon which the new trial

attorneys' fees and expenses of former trial. *Metropolitan St. R. Co. v. McClure*, 58 Kan. 109.

1. *Hadley v. Pethcal*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 216; *Pennell v. Wilson*, 2 Abb. Pr. N. S. (N. Y. Super. Ct.) 466; *Wentworth v. Candee*, 17 How. Pr. (N. Y. Supreme Ct.) 405; *Den v. Morris*, 8 N. J. L. 213; *Swingle v. State Bank*, 41 Ind. 423; *Williams v. Hodge*, 11 Met. (Mass.) 266; *Kruger v. Adams*, etc., *Harvester Co.*, 9 Neb. 526; *Wallingford v. Burr*, 17 Neb. 137; *Justices v. Fennimore*, 1 N. J. L. 339; *Boswell v. Jones*, 1 Wash. (Va.) 322.

2. *Stoddard v. Treadwell*, 29 Cal. 281; *Bergman v. Ashdill*, 48 Ind. 489.

3. **Real Actions—Costs on New Trial as a Matter of Right** are generally required to be paid as a condition precedent, and are generally regulated by statute. *Blizzard v. Blizzard*, 40 Ind. 344; *Whitlock v. Vancleave*, 39 Ind. 511; *Zimmerman v. Marchland*, 23 Ind. 474; *Ferger v. Wesler*, 35 Ind. 53; *Hays v. May*, 35 Ind. 427; *Crews v. Ross*, 44 Ind. 481; *Golden v. Snellen*, 54 Ind. 282; *Montgomery v. Hays*, 44 Ind. 433; *Rountree v. Talbot*, 89 Ill. 246; *Setzke v. Setzke*, 121 Ill. 30; *Aholtz v. Durfee*, 21 Ill. App. 144; *Dennison v. Genesee Circuit Judge*, 37 Mich. 281.

Costs in Criminal Cases.—The costs in a criminal case on a motion for a new trial are taxed according to the same principles as in civil cases. *Rex v. Ford*, 1 N. & M. 776, 28 E. C. L. 332; *Reg. v. Whitehouse*, *Dears*, C. C. 1.

4. "The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so, for so many reasons relating to the conduct, management, and peculiar circumstances of the trial may exist that it would be impossible

to prescribe any general rules on the subject. * * * The verdict may have gone against him, in some degrees, or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial, yet only upon equitable terms. We cannot interfere with this exercise of discretion unless upon a clear showing that it has been abused or that the terms were grossly unreasonable." *Rice v. Gashirle*, 13 Cal. 53.

Expensive and Unnecessary Litigation—Costs to Abide Result.—In an action for trespass where it appeared the litigation was unnecessary and needlessly expensive, and it was doubtful whether any substantial damages had been sustained, the Supreme Court refused costs to either party and ordered the costs in the lower court to abide the result. *Clark v. Wiles*, 54 Mich. 323.

5. "The order which the court is authorized to make, on granting a new trial, relates to the costs that have already accrued in the cause, and not to those which may afterwards accrue, and we think that the court should make the order as to the costs at the time of granting the new trial. * * * The court is not to make the question depend upon the result of the second trial, but upon the reasons which control it in granting the new trial." *Swingle v. State Bank*, 41 Ind. 423. See also *Carbon v. Stout*, 7 Bush (Ky.) 609.

Costs of Proceedings Vacated Only.— "The granting of a new trial on the ground that the verdict is against evidence, or because the damages are excessive, has always been regarded as a matter of favor rather than of right. The trial having been fairly conducted,

was granted generally control the question of costs.¹

2. Where Adverse Party Without Fault. — Where a new trial is

and there being no error of law or misconduct of the jury, it is very much in the discretion of the court whether the case shall be submitted to another jury. Hence it is that the practice has obtained, when a new trial is awarded under such circumstances, of imposing as a condition the payment of costs. *Jackson v. Thurston*, 3 Cow. (N. Y.) 342. In such cases, the costs which the court has required the party obtaining the new trial to pay, as a condition of the favor granted, are the costs of the former trial and of the motion. There is no reason why the costs of the circuit preceding that at which the trial was had should be paid, any more than the other costs in the cause. The true rule is to charge the party obtaining the favor of a new trial with the costs of such proceedings as are vacated for that purpose." *Ellsworth v. Gooding*, 8 How. Pr. (N. Y. Supreme Ct.) 1.

The only costs to be paid are those of the term at which the trial occurred, and do not include expenses of witnesses at a prior term. *M'Quade v. New York, etc., R. Co.*, 5 Duer (N. Y.) 613.

Costs of Previous Trials Not Included. — An order for reversal and new trial, with costs of both courts, means the costs of that hearing in the appellate court and of the particular trial below wherein the judgment was reversed. It cannot against objection cover all previous trials below, if there have been several. *Jeffery v. Hursh*, 58 Mich. 246.

Costs to Abide Event. — Where a new trial is granted to the plaintiff, with costs to abide the event, and the plaintiff does not recover on the new trial, but a verdict is rendered for the defendant, all the costs of both trials and of opposing the motion for a new trial are to be taxed against the plaintiff. *Koon v. Thurman*, 2 Hill (N. Y.) 357.

Requiring Payment of Expenses of New Trial. — In *Hill v. Southwick*, 9 R. I. 299, it appeared that the defendant was entitled to a new trial, but had been negligent in making a new defense, which he proposed to make on a new trial, and that the plaintiff was a non-resident and would be entitled to a cross-action on the new trial. It was ordered that a new trial be granted

upon condition that the defendant pay the plaintiff all unpaid costs and a certain sum of money for his expenses in attending the trial, and that the new trial should be confined to the issues presented by the new defense.

Items of Costs Taxable — *New York.* — Where the order granting a new trial imposes the payment of costs without specifying the items, such order includes only the costs of the last trial. See items of costs allowable in *M'Quade v. New York, etc., R. Co.*, 5 Duer (N. Y.) 613.

For items of costs and fees allowed in general, see *Ellsworth v. Gooding*, 8 How. Pr. (N. Y. Supreme Ct.) 1; *Lawrence v. Smith*, 18 Abb. Pr. (N. Y. Supreme Ct.) 197; *Jackett v. Judd*, 18 How. Pr. (N. Y. Supreme Ct.) 385; *Scudder v. Gori*, 18 Abb. Pr. (N. Y. Super. Ct.) 207; *Buckingham v. Minor*, 18 How. Pr. (N. Y. Supreme Ct.) 287; *Keil v. Rice*, 24 How. Pr. (N. Y. Supreme Ct.) 228; *Mitchell v. Westervelt*, 6 How. Pr. (N. Y. Supreme Ct.) 265, *affirmed* 6 How. Pr. (N. Y. Supreme Ct.) 311 note; *Selover v. Wisner*, 37 How. Pr. (N. Y. Supreme Ct.) 176; *Stitt v. Rowley*, 37 How. Pr. (N. Y. Supreme Ct.) 179; *Mechanics' Banking Assoc. v. Kiersted*, 4 Duer (N. Y.) 639; *Hicks v. Waltermire*, 7 How. Pr. (N. Y. Supreme Ct.) 370; *Hager v. Danforth*, 8 How. Pr. (N. Y. Supreme Ct.) 448; *Moore v. Cockroft*, 9 How. Pr. (N. Y. Supreme Ct.) 479.

Kansas — Attorneys' Fees Not Costs. — Under Code Civ. Pro. Kan., § 588, "the costs of motions * * * and the like shall be taxed and paid as the court in its discretion may direct." The term "costs" does not include attorneys' fees or expenses of preparing for a new trial, and the same cannot be imposed as a condition for a new trial. *Metropolitan St. R. Co. v. McClure*, 58 Kan. 109.

1. Costs Where Reasons for New Trial Are Not Stated. — Where the order granting a new trial does not state the grounds, the presumption is that it was granted because the verdict was against the weight of evidence, and in such case it is error not to impose the payment of costs as a condition. *Schraer v. Stefan*, 80 Wis. 653; *Cameron v. Mount*, 86 Wis. 477; *Garny v. Katz*, 86 Wis. 321.

Costs on Granting New Trial. NEW TRIAL. Adverse Party Without Fault.

sought on the ground of newly discovered evidence,¹ accident, surprise, or unavoidable casualty,² or other ground which impliedly concedes that the trial was without error and the opposing party without fault, the courts usually require the applicant to pay the costs of the former trial.

An order granting a new trial on condition of the payment of costs, without specifying grounds, will be presumed to be made on the ground of the insufficiency of the evidence, and not upon errors of law, as error will not be presumed. *Henderson v. Henderson*, 5 Abb. N. Cas. (Brooklyn City Ct.) 102.

Order Silent as to Costs.—Where the order granting a new trial is silent as to costs, the party ultimately successful will recover the costs of former trial. *Den v. Morris*, 8 N. J. L. 213.

In all cases where costs are discretionary they cannot be recovered unless awarded in the order. *Myers v. Irvine*, 4 Minn. 553; *Pennell v. Wilson*, 2 Abb. Pr. N. S. (N. Y. Super. Ct.) 466; *Nellis v. De Forrest*, 6 How. Pr. (N. Y. Supreme Ct.) 413; *Savage v. Darrow*, 4 How. Pr. (N. Y. Supreme Ct.) 74.

Costs on Opening the Case for Further Evidence After Submission will not be taxed to the plaintiff. Such order is not like an order granting a new trial after verdict, as no expense will be incurred by the defendant except the expense of defending the newly discovered evidence. *Leary v. Leary*, 68 Wis. 662.

New Trial Denied.—The adverse party recovers his costs incurred in resisting the motion when a new trial is denied. *Williams v. Smith*, 2 Cal. (N. Y.) 253.

Where, on appeal to general term, a new trial was ordered with costs to abide the event, and on appeal this order was reversed and the original judgment affirmed, the successful party is entitled to the costs of the general term. *Sanders v. Townshend*, 11 Abb. N. Cas. (N. Y. C. Pl.) 217.

1. *Jones v. Williams*, 108 Ala. 282; *Comstock v. Dye*, 13 Hun (N. Y.) 113; *Matter of Ryan*, 70 Hun (N. Y.) 149; *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107; *Phelps v. Delmore*, 4 Misc. Rep. (N. Y. Supreme Ct.) 510; *Upington v. Keenan*, (Supreme Ct.) 21 N. Y. Supp. 699; *Smith v. Smith*, 51 Wis. 665.

Waiver by Accepting Costs.—Where a

new trial is granted upon the express condition that the costs of the adverse party be paid, the adverse party waives all objection to the granting of the new trial by accepting his costs. *Cook v. McComb*, (Wis. 1898) 74 N. W. Rep. 353 [*citing Cogswell v. Colley*, 22 Wis. 399; *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover Lumber, etc., Co. v. St. Croix County*, 71 Wis. 319; *Smith v. Coleman*, 77 Wis. 343; *McKinnon v. Wolfenden*, 78 Wis. 237; *Wirth v. Bartell*, 89 Wis. 596].

2. *Parshall v. Klinck*, 43 Barb. (N. Y.) 203; *Seeley v. Chittenden*, 4 How. Pr. (N. Y. Supreme Ct.) 265; *Ryan v. Mooney*, 49 Cal. 33.

Accident.—Where the defendant is not free from laches in permitting a trial in his absence, it is not an abuse of discretion to grant a new trial on condition of payment of all prior costs, including witness fees, and also a reasonable fee for the plaintiff's attorneys. *Ogden v. Rosenthal*, (Neb. 1898) 75 N. W. Rep. 545.

Surprise.—Where a default was entered through a mistake of counsel for the defendant, and on petition for review and trial a judgment for a less sum was entered, the court has no authority to withhold costs from the defendant, unless terms as to costs were imposed on him at the time when his petition for a review was granted. *Williams v. Hodge*, 11 Met. (Mass.) 266.

A new trial for surprise caused by putting an omitted case in the calendar without notice may be granted on costs of the term and need not require payment of accrued costs. *Ryan v. Mooney*, 49 Cal. 33. In such cases costs may be allowed to follow the event of the suit. *New England Mut. F. Ins. Co. v. Lisbon Mfg. Co.*, 22 N. H. 170; *Nashua, etc., R. Co. v. Stimpson*, 35 N. H. 286.

Inadequate Damages.—A defendant who successfully opposes the plaintiff's motion for a new trial on the ground of inadequate damages is entitled to costs. *Williams v. Smith*, 2 Cal. (N. Y.) 253. But not in a case where costs have not been allowed by the court or

3. Where Applicant Not in Fault. — The costs are usually left to abide the event of the suit where the applicant is without fault and has been injured by an erroneous ruling¹ or instruction of the court,² or by the misconduct of the jury³ or disregard by the jury of the instructions of the court,⁴ or where an erroneous nonsuit is entered.⁵

4. Insufficient Evidence. — Where a new trial is granted on the ground that the evidence is insufficient to support the verdict, or that the verdict is contrary to the evidence, the applicant is required to pay the costs of the former trial, as the new trial in such cases is granted as a matter of favor.⁶ But where the ver-

by direction of the statute. *Bull v. Ketchum*, 2 Den. (N. Y.) 188.

Want of Necessary Parties. — Where a new trial is granted for want of necessary parties, on motion of one of the defendants, it is not error to grant the order without requiring the moving party to pay the costs. *Shove v. Shove*, 69 Wis. 425.

1. Error in Admission of Evidence. — *Walker v. Barron*, 6 Minn. 508; *Den v. Hunt*, 20 N. J. L. 487.

Where a report of a referee is set aside and a new trial granted on account of erroneous findings and conclusions of law the costs may abide the event of the suit. *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Smith v. Schanck*, 18 Barb. (N. Y.) 344; *Wentworth v. Candee*, 17 How. Pr. (N. Y. Supreme Ct.) 405.

2. La Farge v. Kneeland, 7 Cow. (N. Y.) 456; *Wilson v. Lester*, 64 Barb. (N. Y.) 431; *German-American Real Estate Co. v. Starke*, 84 Hun (N. Y.) 430; *Den v. Hunt*, 20 N. J. L. 487; *Kayser v. Hartnett*, 67 Wis. 250; *Spafford v. Meagley*, 8 West. L. J. 323; *Casey v. Malidore*, (Wash. 1898) 53 Pac. Rep. 60.

3. An order granting a new trial for misconduct of a juror should require the defendant to pay the costs of the trial, since the verdict against the defendant is not perverse and the plaintiff is not in fault. *Hoffman v. Chicago, etc., R. Co.*, 86 Wis. 471.

4. Van Rensselaer v. Dole, 1 Johns. Cas. (N. Y.) 279; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60; *Robbins v. Hudson River R. Co.*, 7 Bosw. (N. Y.) 1; *Jacobson v. Belmont*, 7 Bosw. (N. Y.) 14; *Territory v. Doty*, 1 Pin. (Wis.) 396.

5. Anonymous, 16 N. J. L. 496.

Costs to Abide Event. — Where a new trial is ordered with costs to abide the event, the prevailing party will be entitled to the accrued costs and costs of

appeal. *Sanders v. Townshend*, 11 Abb. N. Cas. (N. Y. C. Pl.) 217.

The term "event" means the result of all the proceedings incidental to the litigation. *Field v. Great Northern R. Co.*, 3 Exch. Div. 261.

When each party recovers some of the items in issue, the word "event" must be read distributively, as each party is entitled to part of his costs. *Myers v. Defries*, 5 Exch. Div. 15, 180.

Whenever the costs of the former trial are directed to abide the event of suit, the party finally successful is entitled to the costs of both trials. *Carvey v. Rider*, 2 Cow. (N. Y.) 617.

Where a party obtains a new trial upon payment of costs, and upon the new trial the other party again prevails, the prevailing party receives the costs so paid as an indemnity for his trouble and expense, and cannot again recover the same costs. *Eastman v. Cooper*, 11 Pick. (Mass.) 239.

Where a defendant obtained a new trial on payment of costs, and afterwards obtained a judgment as in case of nonsuit, he cannot again recover such costs. *Slocum v. Lansing*, 3 Den. (N. Y.) 259. See generally article ABIDING THE EVENT, vol. 1, p. 59.

Second Verdict Less. — A plaintiff is not entitled to costs where the costs were to abide the event and the second verdict awards a smaller amount of damages. *Hadley v. Pethcal*, 23 Civ. Pro. Rep. (N. Y. Supreme Ct.) 216; *Andrews v. Foster*, 42 N. H. 377. But see *contra*, *Framingham Mfg. Co. v. Barnard*, 2 Pick. (Mass.) 532.

6. Brooks v. San Francisco, etc., R. Co., 110 Cal. 173; *Kelly v. Frazier*, 27 Hun (N. Y.) 314; *Overing v. Russell*, 28 How. Pr. (N. Y. Supreme Ct.) 151; *Henderson v. Henderson*, 2 Abb. N. Cas. (Brooklyn City Ct.) 102; *East River Bank v. Hoyt*, 22 How. Pr. (N.

dict is perverse, that is, so clearly against the weight of evidence or contrary to the evidence as to create a presumption of mistake or improper motives of the jury, a new trial should be granted without imposing costs.¹

Y. Supreme Ct.) 478; *Bailey v. Park*, 5 Hun (N. Y.) 41; *Brock v. Barnes*, 40 Barb. (N. Y.) 521; *Buck v. Webb*, 58 Hun (N. Y.) 185; *Jackson v. Thurston*, 3 Cow. (N. Y.) 342; *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312; *Utica Bank v. Ives*, 17 Wend. (N. Y.) 501; *Mahar v. Simmons*, 47 Hun (N. Y.) 479; *Goodyear v. Ogden*, 4 Hill (N. Y.) 104; *Peck v. Fonda, etc.*, R. Co., (Supreme Ct.) 6 N. Y. Supp. 379; *Murphy v. Haswell*, 65 Barb. (N. Y.) 380; *Brown v. Bradshaw*, 1 Duer (N. Y.) 199; *People v. Holmes*, 5 Wend. (N. Y.) 191; *Ward v. Woodburn*, 27 Barb. (N. Y.) 346; *North v. Sargent*, 14 Abb. Pr. (N. Y. Supreme Ct.) 226, 33 Barb. (N. Y.) 350; *Smith v. Lander*, 48 Wis. 587; *Pound v. Roam*, 45 Wis. 129; *Wilson v. Eau Claire*, 89 Wis. 47; *Baxter v. Payne*, 1 Pin. (Wis.) 501.

Since the adoption of the Code of Procedure the court should not award costs on granting a new trial for insufficiency of the evidence. The entire question of costs in such cases rests in the discretion of the court and may be adjudicated on the final hearing. *Pennell v. Wilson*, 2 Abb. Pr. N. S. (N. Y. Super. Ct.) 466, 2 Robt. (N. Y.) 505.

Contra — Applicant Not in Fault. — The above rule is not approved in *Kansas*. In that state, where a verdict is contrary to the evidence and it appears that an injustice has been done, a new trial should be awarded absolutely and without condition as to costs, it being inequitable to require the defendant to advance costs where he is not in fault and it does not appear that plaintiff should succeed. *Pierson v. Thompson*, 4 Kan. App. 173; *North Center Creek Min., etc., Co. v. Eakins*, 23 Kan. 317; *Spore v. Leeper*, 27 Kan. 68.

1. Perverse Verdict — New Trial Without Costs. — "When a new trial is granted because the verdict is wholly unsupported by the evidence, we are of the opinion that, upon granting such new trial, the costs of the former trial should not be charged to the party obtaining the new trial, as a condition of granting such new trial. A verdict of a jury which is wholly unsupported

by the evidence is clearly a perverse verdict; as much so as if rendered in direct violation of the law of the case as laid down by the court upon the trial of the action." *Schweickhart v. Stuewe*, 75 Wis. 157. See also *Smith v. Lander*, 48 Wis. 587; *Hodgson v. Barvis*, 2 Chit. Rep. 268, 18 E. C. L. 331.

Where the verdict establishes the right of the plaintiff to recover, but arbitrarily and capriciously fixes the damages for a most serious bodily injury at a nominal sum, such verdict is perverse, and a new trial may be granted without imposing the payment of costs as a condition precedent. *Emmons v. Sheldon*, 26 Wis. 648.

Where the jury has disregarded the positive testimony of an unimpeached and uncontradicted witness a new trial will be granted without costs. *Cunningham v. Gans*, 79 Hun (N. Y.) 434.

A Verdict Manifestly Against the Weight of Evidence may be set aside without imposing costs as a condition. *Johnson v. Scribner*, 6 Conn. 185.

A Referee's Report Against Evidence should be vacated and a new trial ordered with costs to abide the event, as such report is similar to the findings of a court and different from a verdict. The rule as to costs on setting aside a verdict on such ground is not applicable. *Wentworth v. Candee*, 17 How. Pr. (N. Y. Supreme Ct.) 405.

But in *Brock v. Barnes*, 40 Barb. (N. Y.) 521, the new trial was in such case granted on condition that the defendant pay the cost of former trial and appeal.

On setting aside a report of a referee on an appeal from a judgment entered on such report, or on setting aside the verdict of a jury on appeal from an order denying a new trial, in cases where such report or verdict is set aside as being clearly and palpably contrary to the evidence, the party obtaining the new trial should not be required to pay more than the costs of the former trial, and the costs of the appeal should be ordered to be costs in the cause to abide the event. *Kennedy v. Harlem R. Co.*, 3 Duer (N. Y.) 659.

Where Misconduct of a Referee is

5. Whether Payment Is a Condition Precedent. — In at least one state the order granting a new trial must be absolute and without condition, and merely directs the payment of the costs.¹ Some courts regard the order as to costs a mere judgment to be enforced by execution, and permit a new trial without requiring the payment of costs as a condition precedent.² But generally the conditions named in the order as to costs and performance of the orders of court are construed as conditions precedent, on the failure to perform which the motion for a new trial will stand overruled.³

caused in part by the defendant, it is unreasonable to require the plaintiff to pay the costs of the reference as a condition of obtaining a new trial. *Clark v. Eldred*, 54 Hun (N. Y.) 5.

Inadequate Damages. — Where a new trial is granted for inadequate damages the order should require the payment of costs as a condition precedent. *Rixey v. Ward*, 3 Rand. (Va.) 52. But if the verdict is perverse, and the damages awarded are arbitrarily and capriciously fixed at a small sum when a large sum should be awarded if any, the court may in its discretion award a new trial without costs. *Emmons v. Sheldon*, 26 Wis. 648; *Robbins v. Hudson River R. Co.*, 7 Bosw. (N. Y.) 1.

1. Texas. — An order granting a new trial must be absolute, and not upon any condition as to payment of costs. *Secrest v. Best*, 6 Tex. 199; *Gorman v. McFarland*, 13 Tex. 237.

An order directing that "defendant pay all costs of witnesses * * * as a condition upon which" a new trial is awarded is construed to be an absolute order for a new trial, which takes effect when granted, and is not contingent upon the defendant's paying such costs. *Fenn v. Gulf, etc., R. Co.*, 76 Tex. 380. See also *Hargrave v. Boero*, (Tex. Civ. App. 1893) 23 S. W. Rep. 403; *Galveston, etc., R. Co. v. Borden*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1100.

2. Ex p. Beavers, 34 Ala. 71; *Johnson v. Taylor*, 3 Smed. & M. (Miss.) 92; *Gaines v. Dailey*, 1 J. J. Marsh. (Ky.) 478; *Rodgers v. Cherry*, 7 Jones L. (N. Car.) 539.

Where a verdict is set aside because against the weight of evidence, and a new trial is granted "upon the plaintiff's paying the costs of the present term" within twenty days, the payment of the costs is not imposed as a condition precedent, as it is the strict legal duty of the court to grant a new

trial in such cases. "Whether costs are paid or not paid, the order stands; the new trial is granted; the remaining portion of the order is to be enforced as orders or judgments are usually enforced; and an execution for costs may be had, which is the proper remedy. Even if such execution were fruitless, it would be an unwise exercise of justice to deprive a man of his legal right to a new trial because he was unable to pay for it." *Heffner v. Scranton*, 27 Ohio St. 579.

A provision that a new trial be granted on payment of costs is not such a condition precedent as to authorize a judgment on an illegal verdict if the costs are not paid. It is a condition on which a party may obtain a new trial, an order which may be enforced by attachment. If the plaintiff fails to pay the costs the court may dismiss for want of prosecution. *Gilliland v. Rappleyea*, 15 N. J. L. 138.

Waiver of Right to New Trial. — Where a party in whose favor a new trial was granted takes an appeal or brings a writ of error, he waives his right to comply with the terms imposed and to a new trial. *Stephens v. Brodnax*, 5 Ala. 258; *Edwards v. Lewis*, 18 Ala. 494; *Tannenbaum v. Tankersly*, 52 Ala. 489.

Condition Precedent — Abuse of Discretion. — The requirement as a condition precedent that the applicant pay the costs within a certain number of days is an abuse of discretion, as being oppressive. *Ammerman v. Gallimore*, 50 Ind. 131; *Sunman v. Brewin*, 52 Ind. 141.

3. Alabama. — *Ex p. Jones*, 35 Ala. 706; *Ex p. Dillard*, 68 Ala. 594; *Ex p. Shear*, 92 Ala. 596.

California. — *Garoutte v. Haley*, 104 Cal. 497; *Garoutte v. Williamson*, 108 Cal. 135; *Brown v. Cline*, 109 Cal. 156.

Illinois. — *Adams v. Neeley*, 15 Ill. 380; *Buntain v. Mosgrove*, 25 Ill. 152.

XVIII. RENEWAL OF MOTION — Second Motion. — After a motion for a new trial has been absolutely denied a second motion for a new trial upon substantially the same grounds will not be considered,¹ as the matters embraced in the former motion have become *res adjudicata*.² But in some states it is held that dur-

Indiana. — *Chambers v. Bass*, 18 Ind. 3; *Moberly v. Davar*, 5 Blackf. (Ind.) 409.

Iowa. — *Grundy Center First Nat. Bank v. Brown*, 81 Iowa 208.

Kentucky. — *Myers v. Lummis*, 80 Ky. 456.

New Jersey. — *Somers v. Sloan*, 18 N. J. L. 46.

Pennsylvania. — *Ward v. Patterson*, 46 Pa. St. 372.

Virginia. — *Central Land Co. v. Obenchain*, 92 Va. 130; *Haupt v. Tebault*, 94 Va. 184; *Hudgins v. Simon*, 94 Va. 659; *Prunty v. Mitchell*, 30 Gratt. (Va.) 247.

Where an order granting a new trial directs the payment of costs of the first trial, without saying that they shall be paid before a new trial is had, their payment before the new trial will nevertheless be considered a condition precedent. *Rixey v. Ward*, 3 Rand. (Va.) 52.

Waiver of Condition. — The objection that the conditions of the order have not been complied with must be made before entering upon a new trial, or such objection is waived. *Watts v. Green*, 30 Ind. 98; *Marsh v. Elliott*, 51 Ind. 547; *Vernia v. Lawson*, 54 Ind. 485; *Haupt v. Tebault*, 94 Va. 184; *Hudgins v. Simon*, 94 Va. 659; *Central Land Co. v. Obenchain*, 92 Va. 130.

Failure to Comply — Extension of Time. — A failure to pay the costs within the time required operates as a denial of a new trial, and the court has no power to make a further order granting a new trial. *Brown v. Cline*, 109 Cal. 156; *Garoutte v. Williamson*, 108 Cal. 135; *Garoutte v. Haley*, 104 Cal. 497; *Adams Express Co. v. Gregg*, 23 Kan. 376. See *contra*, *Smith v. Grover*, 74 Wis. 171.

A plaintiff failed to pay the costs required by an order granting a new trial, but agreed to pay them to the clerk, and the clerk entered his receipt for the money of record within the required time, but the money was not in fact paid at that time. It was held that the plaintiff had sufficiently complied with the order, and was entitled

to a new trial. *Grundy Center First Nat. Bank v. Brown*, 81 Iowa 208.

In *Wisconsin*, after the time has elapsed for the payment of costs required by an order granting a new trial, the court may extend the time by another order, as such power is expressly given by Rev. Stat., § 2831. *Smith v. Grover*, 74 Wis. 171.

Where a new trial was ordered unless the defendant should file a renunciation within a certain time, and his counsel filed a renunciation, the court may extend such time on holding such renunciation bad for want of authority, and allow counsel to obtain the personal renunciation of his client. *Hill v. Printup*, 67 Ga. 731.

1. *California*. — *Waggenheim v. Hook*, 35 Cal. 216; *Coombs v. Hibberd*, 43 Cal. 453; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168; *Egan v. Egan*, 90 Cal. 15.

Illinois. — *Neulander v. Rothschild*, 67 Ill. App. 288.

Iowa. — *Boardman v. Beckwith*, 18 Iowa 292; *Clinton Nat. Bank v. Graves*, 48 Iowa 228.

Kentucky. — *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449.

Missouri. — *State v. Dusenberry*, 112 Mo. 277.

New York. — *Cudahy v. Rhinehart*, 133 N. Y. 675, 30 N. E. Rep. 1004.

Oklahoma. — *Lookabaugh v. Cooper*, 5 Okla. 102.

Rhode Island. — *Hayes v. Kenyon*, 7 R. I. 531.

Texas. — *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96.

Vermont. — *Stilphen v. Read*, 64 Vt. 400.

Wisconsin. — *Branger v. Buttrick*, 28 Wis. 450; *Moll v. Benckler*, 28 Wis. 611; *Rogers v. Hoenig*, 46 Wis. 361; *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 357.

New York — Successive Applications. — After a motion for a new trial is made on the minutes and denied, another motion may be made upon a case and exceptions. *Anderson v. Carter*, 24 N. Y. App. Div. 462.

2. *Lookabaugh v. Cooper*, 5 Okla. 102.

ing the same term at which the new trial was refused the court may vacate the order, and, on rehearing, may grant a new trial.¹ If new grounds are discovered after the motion is decided such grounds may be incorporated in the motion by amendment before the time for filing the motion has expired,² or if this cannot be done a separate and second motion is proper.

XIX. VACATING ORDER — REHEARING. — To prevent a failure of justice a court may vacate its order granting or refusing a new trial, and change such order.³ But such power must be exercised during term⁴ or within the time fixed for hearing motions for new trials.⁵ The motion cannot be sustained if it is in effect a

In *Egan v. Egan*, 90 Cal. 15, it was said: "In making her motion it was incumbent upon her [the defendant] to present to the court all the grounds upon which she had a right to have it granted. After a motion for a new trial in a cause has been denied by the court, a party is not at liberty to make a second motion therefor, either upon any grounds on which the court has once denied it, or upon any grounds which might have been presented in the first instance. The doctrine of *res adjudicata* applies to a decision of a motion for a new trial as fully as to the judgment in the cause."

A denial of a motion for a new trial in a District Court of New York city, on the coming in of the verdict, does not deprive a party of the right under N. Y. Laws 1896, c. 748, to move to set aside the verdict on motion within five days after its rendition. *Douglass v. Seifert*, 18 Misc. Rep. (N. Y. Supreme Ct.) 188.

1. *Bryorly v. Clark*, 46 Tex. 345; *Linn v. Le Compte*, 47 Tex. 440; *Puckett v. Reed*, 37 Tex. 308; *Snow v. Vandever*, 33 Neb. 735; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169. See also *infra*, XIX. *Vacating Order — Rehearing*.

2. *Dutton v. Seevers*, 89 Iowa 302. See also *supra*, VII. 5. *Time When Motion Must Be Made*.

3. *Beckett v. Northwestern Masonic Aid Assoc.*, 67 Minn. 298; *Douglass v. Seifert*, 18 Misc. Rep. (N. Y. Supreme Ct.) 188; *Matthews v. Hertfelder*, 60 Hun (N. Y.) 521; *Snow v. Vandever*, 33 Neb. 735; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169. But see *contra*, *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168.

The entry of a final judgment or order does not prevent the court from setting aside such order and entering

a contrary order. *Herzig v. Metzger*, 62 How. Pr. (N. Y. Marine Ct.) 355.

Where a court refused to vacate a judgment, and afterwards sustained a motion for leave to renew such motion to vacate on substantially the same grounds as specified in the original motion, and a new trial was had, it was contended that no second motion to set aside the judgment was made, but that the judgment was vacated upon the motion for leave to make a second motion. In sustaining this order, the court said: "We think the technical questions of practice raised by appellants are without any substantial merit, for in our opinion the court should have set aside the judgment upon the first application, upon the showing made. * * * Conceding for the purposes of this case that the court had no authority to entertain a second motion upon the same grounds as the former, we think that in considering it upon appeal we should go back to the original wrong, and that was the denying of the first motion to vacate. Otherwise the respondent would probably be without any remedy. * * * Appellate courts should look at the substance of what was done rather than the manner in which it was done." *Clein v. Wandschneider*, 14 Wash. 257.

4. *Wells v. Melville*, 25 Tex. 337; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169; *Brooks v. Hanauer*, 22 Ark. 174.

Rehearing After Time Has Expired. — After the statutory time for making a motion for a new trial has elapsed, leave cannot be granted for a rehearing or for a hearing on an amendment to the motion incorporating additional grounds for a new trial, as the court has no power to extend such time. *Mundee v. Freeman*, 23 Fla. 529.

5. *Coombs v. Hibberd*, 43 Cal. 452;

motion to vacate a judgment, and is made after the court has lost control over its judgment.¹ But there is a distinction as to orders refusing and orders granting new trials, as the latter form of order operates as a continuance, and the court has control over the cause until a judgment is entered.²

It is discretionary with the court whether it will vacate its order and receive additional affidavits after the hearing is closed and the decision announced.³ Ordinarily a tardy application after term will be refused if new rights have accrued.⁴

XX. PROCEEDINGS BY PETITION FOR NEW TRIAL AFTER TERM —

1. *Nature of Proceeding* — Grounds Discovered After Term. — The codes⁵ provide in substance that when the grounds for a new

People v. Center, 61 Cal. 194; *Dorland v. Cunningham*, 66 Cal. 486; *Louisville Rock, etc., Co. v. Kerr*, 78 Ky. 12; *Stierle v. Union R. Co.*, 11 Misc. Rep. (N. Y. C. Pl.) 124.

Although an order granting or refusing a new trial cannot be vacated or modified, if the order was inadvertently or prematurely made by the court it may be vacated and a rehearing granted. *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 169; *Morris v. De Celis*, 41 Cal. 331; *Coombs v. Hibberd*, 43 Cal. 453.

Conformity to Recent Decisions. — During the term the court may in its discretion vacate an order refusing a new trial and grant a new trial in conformity to a recent decision of the Supreme Court on a similar question. *Snow v. Vandever*, 33 Neb. 735.

Rehearing at Special Term. — An order denying a motion for a new trial made at circuit cannot be vacated and a rehearing had at special term after adjournment of the circuit, as the power to grant a new trial expired with the term. In such case the only remedy is by appeal. *Mellen v. Mellen*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 99, 21 Civ. Pro. Rep. (N. Y.) 301.

The Effect of a Motion for Rehearing is to continue the motion for a new trial, so that if made on the same day the motion for a new trial is overruled, a judgment cannot be entered on the verdict. *Van Vliet v. Conrad*, 95 Pa. St. 494.

1. See article OPENING, VACATING, AND AMENDING JUDGMENTS.

Power After Term. — The power of a court to grant a rehearing of an order refusing a new trial is not limited by section 724 of the New York Code. The court may, in its own discretion and in the exercise of the control over

its judgments, open them for sufficient reason in the furtherance of justice after the term has expired. See dictum in *Croner v. Farmers' F. Ins. Co.*, 18 N. Y. App. Div. 263.

2. *Effect of Motion for Rehearing.* — The effect of a motion for a new trial is to suspend the judgment from term to term until decided. But a motion to set aside an order overruling a motion for a new trial does not suspend the judgment, and must therefore be decided during the term; otherwise the court will lose control over such order. *Louisville Rock, etc., Co. v. Kerr*, 78 Ky. 12.

The granting of a new trial reinstates the cause upon the docket as though no trial had been had, and at a subsequent term the court has authority to set aside the order granting a new trial and to refuse a new trial. *San Antonio v. Dickman*, 34 Tex. 647.

3. *Snow v. Vandever*, 33 Neb. 735; *Scott v. Moore*, 41 Vt. 205; *Slocum v. Fairchild*, 7 Hill (N. Y.) 292; *Bloomington v. Steubing*, 10 Misc. Rep. (N. Y. City Ct.) 229.

After the close of the hearing it is not an abuse of discretion for a judge to refuse to open the case and to consider an affidavit handed to him on the street after the argument. *Grace v. Martin*, 83 Ga. 245.

4. *Rebhun v. Swartwout*, (City Ct.) 3 N. Y. Supp. 419; *Petty v. Merrill*, 12 Blatchf. (U. S.) 11.

5. *Horner's Annot. Stat. Ind.* 1896, § 563; *Gen. Stat. Kan.* 1897, § 320 (formerly section 310 of the Civil Code); *Code Ky.* 1895, § 344; *Code Civ. Pro. Neb.*, 1897, § 318; *Bates's Annot. Stat. Ohio* 1897, § 5309.

Not Applicable to Criminal Cases. — This provision for a new trial by petition is not applicable to criminal cases,

trial could not, with reasonable diligence, have been discovered before, but are discovered after, the term at which the judgment is entered, the application may be by petition¹ filed as in other cases.²

Nature of Remedy. — The remedy thus provided is in the nature of a bill in equity for a new trial on the ground of newly discovered evidence,³ and supersedes such remedy.⁴

2. Necessary Allegations. — All the facts necessary to obtain a new trial must be stated in the petition,⁵ and must be stated

as the provisions of the criminal code are exclusive. *Bradshaw v. State*, 19 Neb. 644. But see *contra*, *Bradish v. State*, 35 Vt. 452.

1. Whether by Motion or Petition. — The code provisions require the motion for a new trial to be filed a certain time after verdict or decision, and also provide that when the grounds could not be discovered with reasonable diligence during term, but are discovered after term, the application must be made by petition. These statutes, when construed together, require the application for a new trial on the ground of newly discovered evidence to be made by motion if made during the term, and by petition when made after term. *Tama City First Nat. Bank v. Murdough*, 40 Iowa 26.

Application by motion is the proper remedy if filed during term on the ground of newly discovered evidence. Such motion may be amended at the hearing at the next term to include evidence discovered after the term. *Moore v. Coates*, 35 Ohio St. 177.

Where the time for filing the motion for a new trial was extended by stipulation for sixty days the motion may include the ground of newly discovered evidence although discovered after term. *Eckel v. Walker*, 48 Iowa 225.

Waiver of Objection to Motion. — An application for a new trial for new evidence discovered after the expiration of the time for filing a motion should be by petition. But where the case was submitted on its merits the objection is waived that the application was entitled a "motion for rehearing and new trial" instead of "petition" for a new trial. *State v. Stevenson*, 104 Iowa 50.

3. The petition should be filed in the original cause. A separate suit in equity cannot be maintained for any ground for a new trial, since there is an adequate remedy at law. *Hintrager v. Sumbargo*, 54 Iowa 604.

The petition may be filed with the clerk, as in other cases, and need not be filed in open court during term. *Scott v. Scott*, 82 Ky. 328.

Necessary Parties. — All parties in the former action are necessary parties in the action for a new trial after term. *Carver v. Compton*, 51 Ind. 451.

3. *Moore v. Coates*, 35 Ohio St. 177. A petition for a rehearing of a suit in equity containing substantially the averments of a petition for a new trial will be treated as a petition for a new trial, since the former remedy is superseded, and defect in form may be amended. *Myres v. Myres*, 6 Ohio St. 221.

4. Proceedings in Equity Superseded. — A suit in equity to enjoin the enforcement of a judgment at law on the ground of fraud cannot be maintained, since the plaintiff has an adequate remedy at law by a petition for a new trial on the same ground. *Hintrager v. Sumbargo*, 54 Iowa 604.

All remedies in equity to vacate and modify decrees are superseded by the code provisions, except the remedy by bill of review. *Myres v. Myres*, 6 Ohio St. 221.

Amendment of Petition. — A petition for a new trial cannot be amended to include the defense that the administrator was not legally appointed, where the defense in the original petition was merely that the intestate never signed the note sued on and that the administrator had been prevented from making a defense. Such proposed amendment would require a new process to be issued on the petition. *Garrett v. Ashcraft*, 19 Ky. L. Rep. 38, (Ky. 1897) 39 S. W. Rep. 51.

5. *Shewalter v. Williamson*, 125 Ind. 373; *Blackburn v. Crowder*, 110 Ind. 127; *Hines v. Driver*, 100 Ind. 315.

The complaint must show on its face a case for a new trial, so that, should it be demurred to and thereby be admitted, the court would act finally

affirmatively,¹ and the petition must be verified.²

Allegations of Newly Discovered Evidence.—Where the ground is newly discovered evidence, it must appear from the facts stated in the petition:³ first, that the evidence was discovered after the trial;⁴ second, that the plaintiff was not negligent in failing to discover the evidence in time;⁵ third, that the newly discov-

upon it. It must contain in allegation what must be shown in proof." *Glide-well v. Daggy*, 21 Ind. 95.

1. An allegation that the plaintiff "has learned since said term of court" certain matters constituting the ground for new trial is not sufficient, as the facts must be stated affirmatively and not upon information. *Axtell v. Warden*, 7 Neb. 186.

In a similar case it was alleged that "it has learned, and plaintiff verily believes that it is in a condition to prove," certain facts. The court held the petition insufficient, saying: "While the verification of the petition need only be made upon belief that the facts stated therein are true, yet the allegations in the petition must be direct and positive, and not by way of inference." *Omaha, etc., R. Co. v. O'Donnell*, 24 Neb. 753.

2. *Cox v. Hutchings*, 21 Ind. 219; *McDaniel v. Graves*, 12 Ind. 465; *East v. McKee*, 14 Ind. App. 45. But see *contra*, *Moody v. Branham*, 47 Kan. 314; *Allen v. Gillum*, 16 Ind. 234.

3. See statement of the propositions of the text in *East v. McKee*, 14 Ind. App. 45. See also *Rickart v. Davis*, 42 Ind. 164.

4. *Bryorly v. Clark*, 48 Tex. 345.

The date of the discovery must be stated in order to make it appear that the party could not have obtained relief at the same term by motion. "If a party neglects to proceed by motion in a pending case, when that is the proper course, he cannot after the close of the term institute an independent proceeding. It is not sufficient to allege that the evidence was not discovered until after the trial; it must be averred that it was not discovered during the term." *Hines v. Driver*, 100 Ind. 315, citing *Hiatt v. Ballinger*, 59 Ind. 303. See also *Ragsdale v. Matthews*, 93 Ind. 589; *Mercer v. Mercer*, 114 Ind. 558; *Kitch v. Oates*, 79 Ind. 96.

The date when the evidence was discovered must be stated, since the codes require the application to be made not later than the second term after discovery. *East v. McKee*, 14 Ind. App. 45.

5. Plaintiff Must State Facts Showing Diligence.—An allegation in general terms that the plaintiff could not with reasonable diligence have discovered the evidence sooner, or a mere denial of negligence, is not sufficient. The facts constituting diligence must be specifically set out in the complaint, in order that the court can determine whether the evidence might with reasonable diligence have been discovered. *Keisling v. Readle*, 1 Ind. App. 240; *Allen v. Bond*, 112 Ind. 523; *Ward v. Voris*, 117 Ind. 368; *Hines v. Driver*, 100 Ind. 315, and cases cited and discussed; *McCauley v. Murdock*, 97 Ind. 229; *Graham v. Payne*, 122 Ind. 403; *Toney v. Toney*, 73 Ind. 34; *Johnson v. Herr*, 88 Ind. 280; *Schnurr v. Stults*, 119 Ind. 429; *Barnes v. Dewey*, 58 Ind. 418; *Anderson v. Hathaway*, 130 Ind. 528; *Osgood v. Smock*, 144 Ind. 387; *Nordman v. Stough*, 50 Ind. 280; *Miller v. Hall*, 12 Tex. 556; *Anderson v. Sutherland*, 59 Tex. 409; *Johnson v. Parrotte*, 34 Neb. 26; *Burlington, etc., R. Co. v. Dobson*, 17 Neb. 450.

Contra—Allegation of Evidence Not Required.—An allegation in a petition for a new trial for newly discovered evidence, that the defendant could not with reasonable diligence have discovered the testimony before the trial, is a sufficient allegation of diligence, although in the language of the statute "what was done by defendant to procure evidence, or what facts existed showing that the exercise of diligence could not have procured the testimony, is a matter of evidence." *Woodman v. Dutton*, 49 Iowa 398.

The Affidavits of New Witnesses and the Bill of Exceptions should be attached to the petition for a new trial. Although the general rule is that evidence should not be pleaded, and that a paper not the foundation of an action cannot be made a part of the pleadings by filing it as an exhibit, yet in an action for review, or in a petition for a new trial, the newly discovered evidence must be incorporated into the petition by attaching the affidavits of

ered evidence is material;¹ fourth, that such evidence is not merely impeaching;² fifth, that it is not merely cumulative;³ sixth, that such evidence will probably change the result if a new trial is granted.⁴

3. What Grounds May Be Alleged. — The codes permit the application by petition to include any of the statutory grounds for a

the newly discovered witnesses and also the bill of exceptions containing the evidence taken at the former trial. "The difference between the cases governed by the general rule becomes more striking when it is brought to mind that ordinarily it is improper to plead evidence; while in such a case as this it is not only proper but indispensably necessary. As the evidence must be pleaded, it is only necessary to plead the instruments which contain it. Any other rule than this would uselessly encumber the record, for it would require the instruments to be made exhibits and the evidence itself to be rehearsed in the body of the complaint, and surely no good purpose would be accomplished by such a practice." *Hines v. Driver*, 100 Ind. 315.

Diligence in Making Inquiries — How Alleged. — If the diligence alleged consists in making inquiries, the time, place, and circumstances must be stated, that the court may know that the inquiries were well directed. "It is not sufficient to state generally that they had been diligent in making inquiries of those whom they supposed likely to know anything of the case; all the facts constituting the diligence must be shown." *Osgood v. Smock*, 144 Ind. 387 [*citing* *Debolt v. Debolt*, 86 Ind. 521; *Morrison v. Carey*, 129 Ind. 277; *McDonald v. Coryell*, 134 Ind. 493]. See also *Davis v. Davis*, 145 Ind. 4.

Ignorance of Evidence as Excuse for Inactivity. — In *Ward v. Voris*, 117 Ind. 368, the rule is stated as follows: "A party asking to be relieved of a judgment must affirmatively show facts that will constitute diligence; and if he has made no efforts to ascertain or procure such evidence, he must show an absence of knowledge of facts and circumstances which require him to make inquiry, and show such a state of facts as justify and excuse his inactivity." *Citing Test v. Larsh*, 100 Ind. 562; *McCauley v. Murdock*, 97 Ind. 229; *Ragsdale v. Matthews*, 93 Ind. 589; *Toney v. Toney*, 73 Ind. 34; *Du*

Souchet v. Dutcher, 113 Ind. 249; *Arms v. Beitman*, 73 Ind. 85; *Allen v. Bond*, 112 Ind. 523; *Gardner v. State*, 94 Ind. 489; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *Hines v. Driver*, 100 Ind. 315; *Marks v. State*, 101 Ind. 353.

1. Materiality of New Evidence — How Made to Appear. — It is held that in order to show that the new evidence is material the complaint must show: "1, the issues in the original action; 2, the evidence given on the trial of the cause; 3, the newly discovered evidence; and, 4, the diligence exercised to discover the evidence before the trial." *East v. McKee*, 14 Ind. App. 45.

The evidence given on the trial of the cause must be set out as an exhibit. It cannot be stated in substance in the petition. *Indiana State Spiritual Assoc. v. Reynolds*, 61 Ind. 104; *Yates v. George*, 51 Ind. 324; *Anderson v. Lane*, 32 Ind. 102.

The character of the action and the materiality of the evidence must be set forth in the body of the complaint, and not left to inference from the pleadings and evidence exhibited therewith. *Anderson v. Hathaway*, 130 Ind. 528; *Blackburn v. Crowder*, 110 Ind. 127; *Davis v. Davis*, 145 Ind. 4; *Shewalter v. Williamson*, 125 Ind. 373.

Where the newly discovered evidence consists of receipts found after trial, their materiality must be shown by stating the issues at the former trial, showing that payment was denied and that the receipts cover the items in dispute. *Shewalter v. Williamson*, 125 Ind. 373; *Blackburn v. Crowder*, 110 Ind. 127.

2. Not Merely for Impeaching the Witness. — Where the only effect of the newly discovered evidence will be to impeach the plaintiff, the petition is insufficient. *Brown v. Grove*, 116 Ind. 84.

3. Not Merely Cumulative. — *Schnurr v. Stults*, 119 Ind. 429.

4. Probably Sufficient to Change Result. — *Hines v. Driver*, 100 Ind. 325; *Schnurr v. Stults*, 119 Ind. 429.

new trial which may be discovered after term.¹ This would not, of course, include errors of law duly excepted to at the time.² The most common ground in such applications is newly discovered evidence; but misconduct of the jury,³ unavoidable casualty or misfortune,⁴ fraud practiced by the successful party,⁵ and other grounds which could not be discovered during term with reasonable diligence, may be alleged in the petition.

4. Time of Filing Petition. — The codes generally provide that the petition for a new trial must be made not later than the second term after the discovery of the ground for the new trial,⁶ and not later than one, two, or three⁷ years after the judgment attacked, otherwise the petition will be dismissed. The petition may be filed pending an appeal.⁸

5. Summons — Process. — The summons is to be issued and served as in other cases,⁹ or service may be made by publication of the summons,¹⁰ or it may be served upon the attorney of the adverse party.¹¹

1. *Nelson v. Johnson*, 18 Ind. 329; *Stanley v. Peeples*, 13 Ind. 232; *Glide-well v. Daggy*, 21 Ind. 95; *Lafever v. Stone*, 55 Iowa 49.

The term "grounds for a new trial [which] could not, with reasonable diligence, have been discovered before," Code Civ. Pro. Neb., § 318, refers to the statutory grounds enumerated in section 314 of the code. *Thompson v. Sharp*, 17 Neb. 69.

2. *Reed v. Wilson*, 13 Kan. 153.

The Question of Insufficiency of the Evidence to sustain the findings or judgment must be presented by motion filed during term, and not by petition for a new trial. *Suman v. Cornelius*, 78 Ind. 506.

3. Misconduct of Jury. — *Burlington, etc., R. Co. v. Dobson*, 17 Neb. 450; *Gottlieb v. Jasper*, 27 Kan. 770.

4. Unavoidable Casualty or Misfortune. — *Reed v. Wilson*, 13 Kan. 153; *Wishard v. McNeil*, 78 Iowa 40; *Spencer v. Kinnard*, 12 Tex. 180.

5. Fraud Practiced by Successful Party. — A petition under section 3155 of the Iowa Code need not allege that the judgment was procured by fraud, and charge fraud in terms, but it is sufficient to allege the facts constituting the fraud, or amounting in law to fraud. *Lafever v. Stone*, 55 Iowa 49.

6. See Code Ky. 1895, § 344; *Nickell v. Fallen*, 15 Ky. L. Rep. 389.

7. See the code provisions of the various states.

8. *Cook v. Smith*, 58 Iowa 607.

When Time Commences to Run — Pendency of Appeal. — Where the statute provides that the petition for a new trial after term must be filed within one year from the date of the judgment, the time commences to run from the entry of the decree, and not from its affirmance on appeal. *Gray v. Coan*, 48 Iowa 424.

Where the time is fixed at two years from the rendition of the judgment, it is to be computed from the last day of the term at which the judgment is rendered. *Bradish v. State*, 35 Vt. 452.

Amendment After Time Has Expired. — Where an amendment is asked after the time for filing the petition has expired, it may be refused because the cause set forth therein is barred by the statute of limitation. *Butt v. Carson*, 5 Okla. 160.

9. See sections of codes providing for petition for new trial.

Constructive Service. — Where the statute provides for service as in other cases, the summons may be served in another state by leaving the same at the usual place of residence of the adverse party, as constructive service is sufficient. *Darrance v. Preston*, 18 Iowa 396.

10. *Bates's Annot. Stat. Ohio*, § 5309. See also reasoning in *Darrance v. Preston*, 18 Iowa 396.

11. **Service on Attorney.** — *Bradish v. State*, 35 Vt. 452; *Ward v. Sebring*, 4 Wash. (U. S.) 472; *Oglesby v. Attrill*, 12 Fed. Rep. 227.

6. **Demurrer.** — If the petition does not state all the essential facts, it is subject to demurrer.¹

7. **Answer.** — No answer is necessary, as under the codes the facts stated in the petition will be considered as denied.² All defenses to the application may be deferred until after a new trial is granted.³

8. **Trial.** — On the trial the court proceeds to hear the case as a motion, and may receive evidence in the form of oral testimony, affidavits, depositions, statement of the case, or a bill of exceptions. The court must first determine the grounds for vacating the judgment before determining the merits of the action,⁴ and in doing so passes upon questions of fact without

1. *Shewalter v. Williamson*, 125 Ind. 373; *Hiatt v. Ballinger*, 59 Ind. 303; *Hines v. Driver*, 100 Ind. 315, and case cited; *Shigley v. Snyder*, 45 Ind. 543; *Sanders v. Loy*, 45 Ind. 229; *Axtell v. Warden*, 7 Neb. 186.

Judgment on Demurrer. — A judgment for the defendant may be rendered if the demurrer is sustained and the plaintiff does not ask leave to amend. *Morrow v. Chicago, etc., R. Co.*, 61 Iowa 487; *Cohol v. Allen*, 37 Iowa 449.

Form of Demurrer. — In *Hart v. Brainerd*, 68 Conn. 50, the demurrer to a petition for new trial was substantially as follows: "The evidence is not newly discovered. It could have been discovered before the former trial by the use of due diligence. It fails to make it clear that injustice was in fact done at the former trial. It is not alleged, and does not appear, that the testator 'could not have been both in Portland and New York on one and the same day.' The evidence is merely cumulative in its character, and might be met by other and opposite cumulative evidence on the part of the defendants. It is not sufficient to show that if a new trial were granted a different result would be produced."

2. Under the *Iowa Code*, "the facts stated in the petition shall be considered as denied without answer." *Tama City First Nat. Bank v. Murdough*, 40 Iowa 26; *Alger v. Merritt*, 16 Iowa 121; Annot. *Code Iowa* 1897, § 4092.

3. Upon a petition for a new trial no answer is allowable. An answer setting up facts constituting an estoppel will not be considered at the hearing on the petition, but if a new trial is granted the defense may be then interposed. *Bennett v. Carey*, 72 Iowa 476.

4. "The application [for a new

trial], when made after judgment and at a subsequent term of the court, must, as we have seen, be regarded as an independent proceeding, and must set out the issues upon the former trial and the evidence given on such trial, with the newly discovered evidence. An issue must be formed on the complaint, and the issue thus formed must be tried by the court. Upon such trial the plaintiff should introduce in evidence the record of the former trial, prove what the evidence was upon such trial, the newly discovered evidence, and show that it had been discovered since the term when the case was formerly tried, and what diligence he had used to discover the evidence before the former trial. The defendant should in like manner introduce his evidence orally before the court. If the new trial is refused, the party appealing to this court should put into the record by a bill of exceptions all the evidence, documentary and oral, which was offered and considered by the court in the application for a new trial." *Sanders v. Loy*, 45 Ind. 229, approved in *Kitch v. Oatis*, 79 Ind. 96.

Where the application is by verified petition no affidavits are required. But where it is by motion it must be accompanied by affidavits of both the applicant and the new witness, filed with the motion and made a part thereof. See distinction made in *Hill v. Roach*, 72 Ind. 57; *Sanders v. Loy*, 45 Ind. 229.

Stenographer's Notes. — Under *Rev. Stat. Wisconsin*, § 2879, no bill of exceptions containing the testimony at the trial is necessary, as the statute permits a motion for a new trial upon the ground of newly discovered evidence to be heard upon motion supported by a copy of the reporter's

the assistance of a jury.¹

XXI. REVIEW OF ORDER GRANTING OR DENYING NEW TRIAL —

1. At Common Law. — At common law a motion for a new trial was addressed to the sound legal discretion of the trial court, and its decision on such motion was not the subject of review;² and this seems still to be the rule in a few of the states of this country, in the absence of statute.³

In Federal Courts the granting or refusal of a motion for a new trial is held to be addressed to the discretion of the court, and is not the subject of review.⁴

minutes of the evidence taken and filed in the action, and by affidavits containing the newly discovered evidence. *Smith v. Smith*, 51 Wis. 665.

1. Right to Jury Trial. — On the hearing of a petition for a new trial, neither party is entitled to a jury. *Houston v. Bruner*, 59 Ind. 25; *Carpenter v. Brown*, 50 Iowa 451; *Bennett v. Carey*, 72 Iowa 476.

The provision of section 3155 of the Iowa Code that the case shall be tried as other cases refers to the mode of producing the evidence as distinguished from the mode of sustaining and controverting the allegations by affidavits. *Carpenter v. Brown*, 50 Iowa 451.

2. See *Brown v. Bradley*, 6 App. Cas. (D. C.) 207; *Barney v. Scherling*, 40 Miss. 320; *Kearney v. Snodgrass*, 12 Oregon 311; *Beekman v. Hamlin*, 23 Oregon 313.

3. Connecticut. — *Gladwin v. Lewis*, 6 Conn. 49; *Magill v. Lyman*, 6 Conn. 59; *Norwich, etc., R. Co. v. Cahill*, 18 Conn. 484; *Ray v. Fitch*, 1 Root (Conn.) 290; *Kimball v. Cady, Kirby* (Conn.) 41; *Granger v. Bissell*, 2 Day (Conn.) 364. See also *White v. Trinity Church*, 5 Conn. 187.

Delaware. — *State v. Layton*, 3 Harr. (Del.) 469.

Kentucky. — *Stewart v. Stewart*, 2 T. B. Mon. (Ky.) 85.

Louisiana. — *Brooks v. Weyman*, 3 Martin (La.) 16; *Walton v. Louisiana State M. & F. Ins. Co.*, 2 Rob. (La.) 562; *Hemphill v. Braun*, McGloin (La.) 326.

Maine. — *Moulton v. Jose*, 25 Me. 76.

Maryland. — *Sittig v. Birkestack*, 38 Md. 158; *Kirk v. Grant*, 67 Md. 418; *Anderson v. State*, 5 Har. & J. (Md.) 174.

Michigan. — *Dibble v. Rogers*, 2 Mich. 404; *Bourke v. James*, 4 Mich. 336; *Cuddy v. Major*, 12 Mich. 368; *Sleight v. Henning*, 12 Mich. 371;

Pennsylvania Min. Co. v. Brady, 14 Mich. 260; *Final v. Backus*, 18 Mich. 218; *People v. Wayne Circuit Judge*, 20 Mich. 220; *Davis v. Bush*, 28 Mich. 432; *Jones v. Hobson*, 37 Mich. 36; *Stork v. Judge*, 41 Mich. 5; *Alderman v. Montcalm Circuit Judge*, 41 Mich. 550; *Toulman v. Swain*, 47 Mich. 82; *Hake v. Buell*, 50 Mich. 89; *People v. Francis*, 52 Mich. 575; *Nelson v. Lumberman's Min. Co.*, 65 Mich. 288; *Graham v. Myers*, 67 Mich. 277; *Wiest v. Luyendyk*, 73 Mich. 661; *Moore v. Dalber*, 92 Mich. 402.

Oregon. — *Bowen v. State*, 1 Oregon 270; *State v. Fitzhugh*, 2 Oregon 236; *State v. Wilson*, 6 Oregon 429; *Hallock v. Portland*, 8 Oregon 29; *State v. Mackey*, 12 Oregon 156; *Kearney v. Snodgrass*, 12 Oregon 311; *State v. Becker*, 12 Oregon 318; *State v. Clements*, 15 Oregon 243; *Beekman v. Hamlin*, 23 Oregon 313; *McBride v. Northern Pac. R. Co.*, 19 Oregon 64.

Pennsylvania. — *Cathcart v. Com.*, 37 Pa. St. 108; *Burd v. Dansdale*, 2 Binn. (Pa.) 80; *Wright v. Small*, 2 Binn. (Pa.) 93.

Vermont. — *Newton v. Brown*, 49 Vt. 16; *Stearn v. Clifford*, 62 Vt. 92. See also *Chase v. Davis*, 7 Vt. 476.

See also *Collins v. Claypole*, 1 Ill. 212; *Cornelius v. Boucher*, 1 Ill. 32; *Sawyer v. Stephenson*, 1 Ill. 24; *Street v. Blue*, 1 Ill. 261; *Miller v. Baker*, 20 Pick. (Mass.) 285.

4. *Henderson v. Moore*, 5 Cranch (U. S.) 11; *Blunt v. Smith*, 7 Wheat. (U. S.) 248; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *U. S. v. Buford*, 3 Pet. (U. S.) 12; *Life, etc., Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291; *Doswell v. De La Lanza*, 20 How. (U. S.) 29; *Warner v. Norton*, 20 How. (U. S.) 448; *Pomeroy v. Indiana State Bank*, 1 Wall. (U. S.) 592; *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *Laber v. Cooper*, 7 Wall. (U. S.) 565; *Ewing v. Howard*, 7 Wall. (U. S.) 499; *Home Ins. Co. v.*

2. Under Statute — a. APPEAL FROM ORDER GRANTING OR DENYING. — In accordance with the common-law rule, a statute expressly authorizing it is essential to an appeal from an order granting or refusing a new trial.¹ Such statutes, however, have

Barton, 13 Wall. (U. S.) 603; Erskine v. Hohnbach, 14 Wall. (U. S.) 613; Republican River Bridge Co. v. Kansas Pac. R. Co., 92 U. S. 315; Cambus-ton v. U. S., 95 U. S. 285; Young v. U. S., 95 U. S. 641; Kerr v. Clappitt, 95 U. S. 188; San Antonio v. Mehaffy, 96 U. S. 312; Newcomb v. Wood, 97 U. S. 581; Kansas Pac. R. Co. v. Twombly, 100 U. S. 78; Boogher v. New York L. Ins. Co., 103 U. S. 90; Jones v. Buckell, 104 U. S. 554; Embry v. Palmer, 107 U. S. 3; Terre Haute, etc., R. Co. v. Struble, 109 U. S. 381; Mis-souri Pac. R. Co. v. Chicago, etc., R. Co., 132 U. S. 191; Morning Journal Assoc. v. Rutherford, 51 Fed. Rep. 513; Alexander v. U. S., 57 Fed. Rep. 828; Atchison, etc., R. Co. v. Howard, 49 Fed. Rep. 206; McClellan v. Pyeatt, 50 Fed. Rep. 686; Ayers v. Watson, 137 U. S. 584; Northern Pac. R. Co. v. Charless, 51 Fed. Rep. 562; Parsons v. Bedford, 3 Pet. (U. S.) 433; Minor v. Tillotson, 2 How. (U. S.) 392; Barreda v. Silsbee, 21 How. (U. S.) 146; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (U. S.) 237; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291; New York Cent., etc., R. Co. v. Fraloff, 100 U. S. 24; Fishburn v. Chicago, etc., R. Co., 137 U. S. 60; Wilson v. Everett, 139 U. S. 616; Aetna L. Ins. Co. v. Ward, 140 U. S. 76; New York, etc., R. Co. v. Winter, 143 U. S. 60.

The Decisions of the Circuit and District Courts upon motions for a new trial are not reviewable. It is held that the motion for a new trial is designed only to invoke the judgment of the trial court upon the alleged errors set out in the motion, and that its office and function are limited to that court. Alexander v. U. S., 57 Fed. Rep. 828.

Rule Applicable to Circuit Court of Appeals. — The rule laid down in the text applies not only in the Supreme Court of the United States, but also in the Circuit Court of Appeals. Alexander v. U. S., 57 Fed. Rep. 828.

Construction of United States Statute Relating to District of Columbia. — In Metropolitan R. Co. v. Moore, 121 U. S. 558, it was held that Rev. Stat. U. S., § 804, relating to the District of Columbia, empowering a trial judge

in his discretion to entertain motions for new trial upon exceptions taken at the trial, does not limit the cases in which an appeal may be taken from his decision on such motions to the three cases enumerated, construing that section in connection with section 772, giving an appeal from the special term to the general term from any order, judgment, or decree, "if the same involve the merits of the action or proceeding." Rulings on motions for new trial based upon other grounds, such as that the verdict is against the weight of evidence, are equally appealable as are those enumerated in section 804. See also Inland, etc., Coasting Co. v. Hall, 124 U. S. 121.

1. Alabama. — Ketchum v. Dennis, 41 Ala. 183; Lockhart v. Wyatt, 42 Ala. 31; Broyles v. Maddox, 43 Ala. 357; Bridges v. Miller, 3 Ala. 746.

Connecticut. — Granger v. Bissell, 2 Day (Conn.) 368; Wallace v. Middlebrook, 28 Conn. 464.

District of Columbia. — Johnston v. Johnston, (D. C.) 19 Wash. L. Rep. 85.

Georgia. — Evans v. Adams, 12 Ga. 44.

Illinois. — J. W. Reedy Elevator Mfg. Co. v. Pitwowsky, 35 Ill. App. 364.

Louisiana. — State v. Cole, 39 La. Ann. 938; Brooks v. Weyman, 3 Martin (La.) 11; Walton v. Louisiana State M. & F. Ins. Co., 2 Rob. (La.) 562.

Maryland. — Zitzer v. Jones, 48 Md. 116.

Missouri. — Emmerson v. Harriet, 11 Mo. 413; Byers v. Butterfield, 33 Mo. 376; McDonough v. Nicholson, 46 Mo. 35; Martin v. Hays, 5 Mo. 62; Richmond v. Wardlaw, 36 Mo. 313.

New York. — Baldwin's Bank v. Butler, 133 N. Y. 564, 44 N. Y. St. Rep. 75; People v. Trezza, 128 N. Y. 529, 40 N. Y. St. Rep. 481; Smith v. Pryor, 16 Daly (N. Y.) 169; Williams v. Delaware, etc., R. Co., (Ct. App.) 37 N. Y. St. Rep. 143.

Ohio. — Hauff v. Cincinnati, etc., R. Co., 5 Ohio Cir. Ct. Rep. 470.

Pennsylvania. — Hambleton v. Yocum, 108 Pa. St. 304; McClain v. Com., 110 Pa. St. 263; Gray v. Com., 101 Pa. St. 384; McGinnis v. Com., 102 Pa. St. 66; Thompson v. Barkley, 27 Pa. St. 263; Howser v. Com., 51 Pa. St. 332.

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been enacted in many of the states, expressly authorizing an appeal, at least where a question of law is involved.¹ Where a

South Carolina.—*State v. Davenport*, 38 S. Car. 348; *Sams v. Hoover*, 33 S. Car. 401.

Texas.—*Sanger v. Henderson*, 85 Tex. 404.

United States.—*Laber v. Cooper*, 7 Wall. (U. S.) 565; *Pittsburgh, etc., R. Co. v. Heck*, 102 U. S. 120; *Ayers v. Watson*, 137 U. S. 584; *Lewisburg Bank v. Sheffey*, 140 U. S. 445; *Smith v. Sun Printing, etc., Assoc.*, 55 Fed. Rep. 240; *McClellan v. Pyeatt*, 50 Fed. Rep. 686; *Alexandria v. Stabler*, 50 Fed. Rep. 689.

In *Wisconsin* the right of appeal from an order granting or refusing a new trial, although formerly authorized, was taken away by Laws 1895, c. 212. *Davison v. Brown*, 93 Wis. 85; *Brown v. Edward P. Allis Co.*, 98 Wis. 120; *Welbes v. Dieter*, 97 Wis. 166.

1. *Alabama.*—*Cobb v. Malone*, 92 Ala. 630; *White v. Blair*, 95 Ala. 147; *Dillard v. Savage*, 98 Ala. 598; *Lee v. De Bardeleben Coal, etc., Co.*, 102 Ala. 628; *Sheppard v. Dowling*, 103 Ala. 563; *Holland v. Howard*, 105 Ala. 538; *Bray v. Ely*, 105 Ala. 553; *Bank of Commerce v. Eureka Brick, etc., Co.*, 108 Ala. 89; *Terst v. O'Neal*, 108 Ala. 250; *Davis v. Miller*, 109 Ala. 598.

Arkansas.—*Trowbridge v. Sanger*, 4 Ark. 179.

California.—*Tyson v. Wells*, 1 Cal. 378; *Riddle v. Baker*, 13 Cal. 302; *Waggenheim v. Hook*, 35 Cal. 216; *Coombs v. Hibberd*, 43 Cal. 453; *McCreery v. Everding*, 44 Cal. 284; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168; *Dorland v. Cunningham*, 66 Cal. 484; *Kimple v. Conway*, 69 Cal. 71; *Hartman v. Rogers*, 69 Cal. 643; *Larkin v. Larkin*, 76 Cal. 323; *Romine v. Cralle*, 80 Cal. 626.

Florida.—*Schultz v. Pacific Ins. Co.*, 14 Fla. 74.

Indiana.—*Hines v. Driver*, 89 Ind. 339.

Iowa.—*Jourdan v. Reed*, 1 Iowa 135; *Stewart v. Ewbank*, 3 Iowa 191; *Cook v. Sypher*, 3 Iowa 484; *Newell v. Sanford*, 10 Iowa 396; *Caffrey v. Groome*, 10 Iowa 548; *State v. Tomlinson*, 11 Iowa 401; *Baldwin v. Foss*, 71 Iowa 389; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Millard v. Singer*, 2 Greene (Iowa) 144; *Shaw v. Sweeney*, 2 Greene (Iowa) 587.

Kentucky.—*McCall v. Hitchcock*, 9 Bush (Ky.) 66.

Minnesota.—*Converse v. Burrows*, 2 Minn. 229; *Schuek v. Hagar*, 24 Minn. 339; *Chittenden v. German-American Bank*, 27 Minn. 143; *Ashton v. Thompson*, 28 Minn. 330; *Dodge v. Bell*, 37 Minn. 382; *Little v. Leighton*, 46 Minn. 201.

Nevada.—*Solomon v. Fuller*, 13 Nev. 276.

New York.—*Simar v. Canaday*, 53 N. Y. 298; *Matthews v. Meyberg*, 63 N. Y. 656; *Whitney v. Davis*, 148 N. Y. 256; *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y. Ct. App.) 104; *Clark v. Brooks*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 385; *Morange v. Morris*, 12 Abb. Pr. (N. Y. Supreme Ct.) 164; *Moore v. Wood*, 19 How. Pr. (N. Y. Supreme Ct.) 405; *Lane v. Bailey*, 45 Barb. (N. Y.) 119; *Winter v. Cross-town St. R. Co.*, 8 N. Y. Misc. Rep. (Buffalo Super. Ct.) 363; *Levy v. Joyce*, 1 Bosw. (N. Y.) 622; *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120; *Clark v. Eldred*, 54 Hun (N. Y.) 5.

North Carolina.—*Moore v. Edmiston*, 70 N. Car. 471; *Winburne v. Bryan*, 73 N. Car. 47; *Johnson v. Bell*, 74 N. Car. 355; *Carson v. Dellinger*, 90 N. Car. 226; *Braid v. Lukins*, 95 N. Car. 123.

South Carolina.—*Byrd v. Small*, 2 S. Car. 388; *Durant v. Philpot*, 16 S. Car. 116; *Boyd v. Munro*, 32 S. Car. 249.

South Dakota.—*Williams v. Chicago, etc., R. Co.*, 10 S. Dak. 336.

West Virginia.—*Tompkins v. Stephens*, 10 W. Va. 156; *Gwynn v. Schwartz*, 32 W. Va. 487.

In *Alabama* it was formerly held that an order granting or refusing a new trial was addressed to the discretion of the court, and was not appealable. *Spence v. Tuggle*, 10 Ala. 538; *Walker v. Blassingame*, 17 Ala. 810; *Benje v. Creagh*, 21 Ala. 151; *Martin v. Higgins*, 23 Ala. 775; *Ketchum v. Dennis*, 41 Ala. 183; *Shelby Iron Co. v. Cobb*, 55 Ala. 636; *Phleming v. State, Minor (Ala.)* 42. But by the Act of 1890-91, p. 779, decisions granting or refusing motions for new trial are made appealable. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514. And see *Alabama cases in note supra*.

No Application to Criminal Cases.—The overruling of a motion for a new

separate appeal from an order granting or refusing a new trial is permitted by statute, it will not be dismissed because an appeal is

trial in a criminal case is not reviewable, although an appeal is given by statute in a civil case. *Jolly v. State*, 94 Ala. 19; *Reeves v. State*, 95 Ala. 33; *Hawthorn v. State*, 100 Ala. 26; *Knight v. State*, 103 Ala. 48; *Lowery v. State*, 103 Ala. 50; *Jones v. State*, 104 Ala. 30.

In Florida, by statute, orders granting or refusing motions for new trial may be assigned for matter and cause of error, upon a writ of error from the final judgment in the cause. *Bridier v. Yulee*, 9 Fla. 481. Or, "upon the entry of an order granting a new trial at law, the party aggrieved by such order may, without waiting for a final judgment in the cause, prosecute a writ of error to the proper appellate court, which shall review the said order," etc.

In Kansas a petition in error will lie in the Supreme Court to review an erroneous order of a District Court granting a new trial, although the action may still be pending, undisposed of, in the District Court. *Ottawa v. Washabaugh*, 11 Kan. 124. See also *Thompson v. Wheeler, etc., Mfg. Co.*, 29 Kan. 479.

In Idaho, by Rev. Stat. 1887, § 4807, it is provided that an appeal may be taken from an order granting or refusing a new trial.

In Missouri, according to the earlier decisions, no appeal would lie from the decision on a motion for a new trial, but the action of the court might be assigned as error and reviewed on appeal from the final judgment. *Gilstrap v. Felts*, 50 Mo. 431; *State v. Burns*, 66 Mo. 227; *Fretwell v. Laffoon*, 77 Mo. 26; *Blanchard v. Wolff*, 6 Mo. App. 200; *Wright v. Missouri Pac. R. Co.*, 20 Mo. App. 481; *Smith, etc., Imp. Co. v. Wheeler*, 27 Mo. App. 16; *Bank v. Armstrong*, 92 Mo. 277. But by the Act of 1891 (Sess. Acts 1891, p. 70, § 2246), it is expressly provided that the party aggrieved may appeal from an order granting a new trial, or may have the action of the court reviewed on appeal from the final judgment. *Ess v. Griffith*, 128 Mo. 50; *Morris v. Morris*, 60 Mo. App. 96; *Taylor v. Scharpe, etc., Co.*, 47 Mo. App. 257. Where, however, the party, without appealing from an order granting a new trial, participates in the retrial, he waives his right to have the order reviewed on

appeal from the final judgment. *Ess v. Griffith*, 128 Mo. 50.

In West Virginia an appeal may be taken "in any civil case where there is an order granting a new trial or rehearing," and in such cases an appeal may be taken from the order without waiting for the new trial or rehearing to be had. Code of W. Va., p. 828. See also *Gwynn v. Schwartz*, 32 W. Va. 487.

Distinction Between Order During and After Term.—In *Nebraska* it is held that an order setting aside a verdict of a jury, and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and is not reviewable by proceedings in error. *Artman v. West Point Mfg. Co.*, 16 Neb. 572.

But that error will lie from a judgment granting a new trial on proceedings commenced after the adjournment of the term, on the ground of newly discovered evidence, see *Iler v. Darnell*, 5 Neb. 192; *Axtell v. Warden*, 7 Neb. 186; *Kruger v. Adams', etc., Harvester Co.*, 9 Neb. 526; *Johnson v. Parrotte*, 34 Neb. 26.

In *Indiana* the Supreme Court, in holding that an order granting a new trial upon complaint for causes, after the term, is a final judgment from which an appeal will lie, said: "Much of the apparent conflict between the cases referred to in argument has arisen from a failure to observe the essential difference between an application for a new trial made during the term and an independent proceeding to obtain a new trial instituted after the close of the term. In the first case, the order which disposes of the application is only an interlocutory order, subject to the control of the court until final judgment, and only capable of being reviewed in connection with other proceedings in the cause in which it was made. In the latter case, the proceeding being an independent one and having but a single object in view, the order which makes a final disposition of the cause is necessarily a final order, and hence a final judgment, within the meaning of section 632 of the Civil Code." *Hines v. Driver*, 89 Ind. 339.

Appeal from Denial of Motion on Judge's Minutes.—In *New York* the denial of a motion for a new trial upon the min-

also pending from the judgment,¹ or because a prior motion for a new trial was made and denied before entry of judgment.²

Stipulation as to Judgment Absolute on Appeal from Order Granting.—In some jurisdictions it is provided that on appealing from an order granting a new trial the appellant must stipulate that if the order is affirmed judgment absolute shall be rendered against him.³

b. REVIEW ON APPEAL FROM FINAL JUDGMENT.—In a number of jurisdictions it is provided that, while no appeal or writ of error will lie from a decision of the court granting or refusing a new trial, yet such decision may be assigned for error on appeal from the final judgment.⁴

utes cannot be reviewed upon an exception thereto, but only on appeal from the order. *Matthews v. Meyberg*, 63 N. Y. 656; *Howard v. Hayes*, 47 N. Y. Super. Ct. 89; *Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 236; *Moorehead v. Holden*, 7 Civ. Pro. Rep. (N. Y. City Ct.) 188. So where it is sought to review the decision upon the facts. *Dart v. Gillies*, 46 N. Y. Super. Ct. 560.

Order Appealable Whether Judgment Entered or Not.—In *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120, it is held that the Supreme Court may entertain an appeal from an order granting or denying a motion for a new trial without regard to the question whether judgment has been entered or not.

Appeal from Order After Expiration of Time to Appeal from Judgment.—In *Voisin v. Commercial Mut. Ins. Co.*, 56 Hun (N. Y.) 215, it was held that under Code Civ. Pro. N. Y., § 1347, in the Supreme Court the right exists in the defeated party to bring to a hearing on appeal, and dispose of, the motion for a new trial, although final judgment may have been entered, the time to appeal therefrom may have expired, and the judgment itself may have been enforced.

1. *Humphrey v. Havens*, 9 Minn. 318.

2. *Schuek v. Hagar*, 24 Minn. 339.

3. *Wilson v. Palmer*, 11 Hun (N. Y.) 325; *Byrd v. Small*, 2 S. Car. 388.

In *Wilson v. Palmer*, 11 Hun (N. Y.) 325, which was an action brought to establish a mechanics' lien and recover a personal judgment against both defendants, the complaint was dismissed at the circuit. Upon appeal, the general term reversed the judgment and ordered a new trial, holding in its opinion, however, that the plaintiff was not entitled to a personal judgment. From this order the defendants ap-

pealed, stipulating that judgment absolute might be rendered against them in case of its affirmance. The Court of Appeals having affirmed the order, the plaintiff entered a judgment establishing the lien, and also the personal liability of the defendants. Upon an appeal from an order denying a motion by the defendants to strike out so much thereof as established their personal liability, it was held that the judgment was proper; that the former judgment having been reversed, the action stood as if there had been no determination of the issues, and the consent to an absolute judgment had the effect of a stipulation that the court might determine said issues in favor of the plaintiff.

4. *Dakota*.—*Stevens v. Gale*, 2 Dakota 370.

Illinois.—*Kennedy v. Illinois Cent. R. Co.*, 68 Ill. App. 601.

Mississippi.—*Barney v. Scherling*, 40 Miss. 320; *Brown v. Carraway*, 47 Miss. 668; *Rankin County Sav. Bank v. Johnson*, 56 Miss. 125.

Montana.—*U. S. v. Smith*, 2 Mont. 487; *Territory v. Rehberg*, 6 Mont. 467.

Ohio.—*Conord v. Runnels*, 23 Ohio St. 601; *Young v. Shallenberger*, 53 Ohio St. 291.

Tennessee.—*State v. Perry*, 4 Baxt. (Tenn.) 438; *Louisville, etc., R. Co. v. Conley*, 10 Lea (Tenn.) 531.

Utah.—*Watson v. Mayberry*, 15 Utah 265; *Bacon v. Thornton*, (Utah 1897) 51 Pac. Rep. 153.

See also *Leppar v. Enderton*, 9 Ind. 353; *Cook v. Otto*, 13 Ind. 380; *Goldsbey v. Robertson*, 1 Blackf. (Ind.) 21; *Victor Sewing Mach. Co. v. Heller*, 41 Wis. 657.

"Error lies to the judgment, but not to the decision of the motion; though that decision may be made a ground for the reversal of the judgment. It

c. **DISTINCTION BETWEEN ORDER GRANTING AND ORDER DENYING.** — In some jurisdictions it has been held that it is not competent to review an order granting a new trial, on the ground that such an order is not final and that it does not affect a substantial right.¹ But even where such an order is held to be review-

has long been settled in this state that 'an order of the court granting or overruling a motion to set aside the verdict of a jury and grant a new trial is not a final judgment or order, for the reversal of which error can be prosecuted before the final disposition of the case.' *Conord v. Runnels*, 23 Ohio St. 601. Such a motion, it is held in that case, is addressed to the sound discretion of the court. If granted, it does not determine the action, but merely compels the parties to retry their case before the same tribunal; and, if overruled, it simply permits the determination of the action already reached to stand. It may be said that sustaining the motion has the effect of preventing a judgment in favor of the successful party at the trial, and affects a substantial right of his by subjecting him to the costs and uncertainties of another trial, and it undoubtedly does temporarily prevent final judgment, but not eventually; and the costs and uncertainties of another trial is the result of some error which the court in the exercise of its discretion deems sufficient to warrant it. And so, if the motion be overruled, the unsuccessful party must incur the expense of a proceeding in error, if he is dissatisfied with the result; but neither the overruling or sustaining of the motion is, within the meaning of the code, such final order as may, itself, be the foundation of a proceeding in error." *Young v. Shallenberger*, 53 Ohio St. 291.

In *Massachusetts* it was early provided by statute that "on motions for a new trial, and in all cases [whether criminal or civil], a party aggrieved by an opinion, ruling, direction, or judgment of the court, in matters of law, may allege exceptions thereto." *Lowell Gas Light Co. v. Bean*, 1 Allen (Mass.) 274.

In *Utah* an order granting or refusing a new trial is not a final judgment, from which an appeal will lie, though any errors committed by the trial court in granting or refusing to grant a new trial, and any affidavits used on said motion, if properly identified and em-

bodied in a bill of exceptions, or otherwise properly preserved in the record, may be reviewed on appeal from the judgment. *White v. Pease*, 15 Utah 170; *Watson v. Mayberry*, 15 Utah 265; *Bear River Valley Orchard Co. v. Hanley*, 15 Utah 506; *Bacon v. Thornton*, (Utah 1897) 51 Pac. Rep. 153.

In *Tennessee* the earlier decisions seem to have held that an order granting or refusing a new trial was appealable. *White v. Hembree*, 1 Overt. (Tenn.) 529; *Cassel v. Franklin*, 2 Overt. (Tenn.) 201; *Kelton v. Bevins*, *Cooke* (Tenn.) 90; *Howell v. Cheatham*, *Cooke* (Tenn.) 247. Yet according to later decisions it is provided that while a bill of exceptions should be taken to an order granting a new trial, a prayer for appeal at that time will not bring up the case after final judgment. The appeal should be prayed for and granted after final judgment. *Louisville, etc., R. Co. v. Conley*, 10 Lea (Tenn.) 531; *Morgan v. Merchants' Nat. Bank*, 13 Lea. (Tenn.) 234; *State v. Perry*, 4 Baxt. (Tenn.) 438; *King v. Miller*, 8 Baxt. (Tenn.) 382.

In *Washington Territory* it was held that the refusal of a trial court to set aside the verdict of a jury and grant a new trial is an exercise of discretion not to be reviewed by an appellate court unless it can be shown that there was an abuse of discretion, or unless there be a great preponderance of evidence against the verdict. *Page v. Rodney*, 2 Wash. Ter. 461. See also, to the same effect, *Gove v. Moses*, 1 Wash. Ter. 7; *Jones v. Wiley*, 1 Wash. Ter. 603.

1. *District of Columbia*. — *Philp v. Gardner*, 1 MacArthur (D. C.) 165; *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

Georgia. — *Evans v. Adams*, 12 Ga. 44; *McWhorter v. McMurrain*, 26 Ga. 164.

Illinois. — *Harmison v. Clark*, 2 Ill. 131; *Brookbank v. Smith*, 3 Ill. 78; *Weaver v. Crocker*, 49 Ill. 461; *Williams v. LaValle*, 64 Ill. 110; *Martin v. Chambers*, 84 Ill. 579.

Kentucky. — *Coldwell v. Wright*, 8 B. Mon. (Ky.) 525.

able, the courts will be more reluctant, it seems, to disturb an order granting a new trial than one refusing it, since a refusal to grant a new trial operates as a final adjudication of the rights of the party.¹ Where, however, a new trial is erroneously granted

Louisiana.—*Wheeler v. Maillot*, 15 La. Ann. 659; *McWillie v. Perkins*, 20 La. Ann. 168; *State v. Cole*, 39 La. Ann. 938.

Missouri.—*Helm v. Bassett*, 9 Mo. 52; *Byers v. Butterfield*, 33 Mo. 376; *McDonough v. Nicholson*, 46 Mo. 35.

Ohio.—*Conord v. Runnels*, 23 Ohio St. 601; *Smith v. Board of Education*, 27 Ohio St. 44.

Oregon.—*Fisk v. Henarie*, 15 Oregon 90.

Tennessee.—*Huggins v. Moore*, 3 Head (Tenn.) 426; *King v. Miller*, 8 Baxt. (Tenn.) 382.

Texas.—*Houston v. Starr*, 12 Tex. 424; *Dial v. Collins*, 40 Tex. 367.

In *Spafford v. Bradley*, 20 Ohio 74, the court said: "Since the right of appeal has been taken away from the parties in actions at law, this court has often interposed, under the Act of 1845, to reverse a judgment, for the reason that the court in which it was rendered had unreasonably refused a new trial, the verdict being manifestly against the evidence. This is, in effect, a second trial upon the weight of the testimony before a different tribunal, and the power conferred by the statute upon this court is sometimes necessarily called into exercise to prevent a total failure of justice. Not so, however, where the error assigned is that the court below sustained the motion for a new trial and set aside the verdict or judgment. No irreparable wrong can be done in such a case, as it only compels the parties to retrace their steps, and submit their proofs and allegations a second time to the same tribunal. Hence, although by the terms of the statute the party supposing himself aggrieved would seem entitled to his writ of error, as well where a motion for a new trial is sustained as where it is refused, no case has occurred in practice where this court has seen fit to reverse the proceedings of a subordinate tribunal for the sole reason that it has, on motion, set aside a verdict as against evidence, and ordered a new trial."

"A judgment granting a new trial is interlocutory, and not final, operating only a postponement or a continuance.

It does not cause an irreparable injury, therefore no appeal lies in this case." *McWillie v. Perkins*, 20 La. Ann. 168.

Contra.—*Belt v. Davis*, 1 Cal. 134; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168; *Dorland v. Cunningham*, 66 Cal. 484; *Sweetser v. Mellick*, (Idaho 1898) 51 Pac. Rep. 985; *Hines v. Driver*, 89 Ind. 339; *Ottawa v. Washabaugh*, 11 Kan. 124; *McCall v. Hitchcock*, 7 Bush (Ky.) 615; *Terry v. Robins*, 5 Smed. & M. (Miss.) 291; *Bennett v. Brooklyn*, 19 How. Pr. (N. Y. Supreme Ct.) 310; *Clallam County v. Clump*, 15 Wash. 593.

If a new trial is improperly granted, where the first verdict was correct, and a bill of exceptions taken to the granting of the same, and a second trial is had resulting in a verdict adverse to the first, the court will set the last verdict aside and uphold the first. *Moore v. Ayres*, 5 Smed. & M. (Miss.) 310.

1. *California.*—*Moore v. Los Angeles Infirmary*, 49 Cal. 669.

Georgia.—*Oliver v. Pace*, 6 Ga. 185; *McGregor v. Christie*, 37 Ga. 557; *Robbe v. Hewitt*, 54 Ga. 260.

Indiana.—*Nagle v. Hornberger*, 6 Ind. 69; *Hill v. Goode*, 18 Ind. 207; *Hines v. Driver*, 89 Ind. 344.

Iowa.—*Ruble v. McDonald*, 7 Iowa 90; *Newell v. Sanford*, 10 Iowa 396; *Chapman v. Wilkinson*, 22 Iowa 541; *White v. Poorman*, 24 Iowa 108; *Robinson v. Bacon*, 24 Iowa 409; *Roberts v. Jones*, 30 Iowa 525; *New York Piano Forte Co. v. Mueller*, 38 Iowa 552.

Kansas.—*Ottawa v. Washabaugh*, 11 Kan. 124; *Howell v. Pugh*, 25 Kan. 97; *Atchison, etc., R. Co. v. Brown*, 26 Kan. 456; *Sedan v. Church*, 29 Kan. 190.

Kentucky.—*Ewing v. Price*, 3 J. J. Marsh. (Ky.) 520. See also *Miller v. Ashcraft*, 98 Ky. 314.

Texas.—*Parrott v. Underwood*, 10 Tex. 48.

West Virginia.—*Reynolds v. Tompkins*, 23 W. Va. 229.

The Exercise of Discretion in an inferior court in granting a new trial will not be interfered with on appeal, unless an abuse of discretion is shown; and the evidence thereof should be

on a ground not discretionary, the action of the court will be corrected on appeal as readily as though the new trial had been refused.¹ An order denying a motion for a new trial is, however, in effect, one which determines the question, and is, as a rule, reviewable on appeal, when not based upon a question resting in the discretion of the trial judge, and his decision rests upon questions of fact.²

d. REVIEW UPON FACTS OR QUESTIONS OF LAW. — Regardless of the question whether an order granting or refusing a new trial is assignable as error upon an appeal from a final judgment, or whether such order is itself appealable, the general rule is that the decision of the trial court is reviewable only where some question of law has influenced its decision, and is not reviewable where such decision rests solely upon questions of fact.³ This being

stronger to justify an interference where a new trial has been granted than where it has been refused. *House v. Wright*, 22 Ind. 383; *Shepherd v. Brenton*, 15 Iowa 84; *Whitney v. Blunt*, 15 Iowa 283; *McNair v. McComber*, 15 Iowa 368.

1. *Manson v. Ware*, 63 Iowa 345.

2. *California*. — *Larkin v. Larkin*, 76 Cal. 323.

Idaho. — *Wyatt v. Wyatt*, 2 Idaho 219; *Schultz v. Keeler*, 2 Idaho 305.

Iowa. — *State v. Tomlinson*, 11 Iowa 401; *Matter of Coffman*, 12 Iowa 491.

Minnesota. — *Dodge v. Bell*, 37 Minn. 382.

Missouri. — *Rickroad v. Martin*, 43 Mo. App. 597.

New York. — *Suydam v. Grand St., etc., R. Co.*, 41 Barb. (N. Y.) 375; *Cook v. New York Floating Dry Dock Co.*, 18 N. Y. 229.

"There is an obvious distinction between the granting and refusing of a new trial. By granting it the cause is kept open, another opportunity is afforded for investigation of the merits, and the injury, if any, is merely the delay; whereas a refusal precludes a party from all redress in the future, and the injury committed is irreparable." *Rickroad v. Martin*, 43 Mo. App. 597.

Motion Must Have Been Prosecuted Below. — A party cannot appeal from an order overruling a motion for a new trial when he fails to prosecute his motion in the court below. *Mahoney v. Wilson*, 15 Cal. 42; *Green v. Doane*, 15 Cal. 303.

3. *Massachusetts*. — *Doyle v. Dixon*, 97 Mass. 208; *Merritt v. Morse*, 113 Mass. 271; *Greene v. Farlow*, 138 Mass.

146; *Lowell Gas Light Co. v. Bean*, 1 Allen (Mass.) 274; *Kinnicutt v. Stockwell*, 8 Cush. (Mass.) 73.

North Carolina. — *Moore v. Edmiston*, 70 N. Car. 471; *Thomas v. Myers*, 87 N. Car. 31; *Munden v. Casey*, 93 N. Car. 97; *Braid v. Lukins*, 95 N. Car. 123; *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500; *Long v. Gantley*, 4 Dev. & B. L. (N. Car.) 313; *Bryan v. Heck*, 67 N. Car. 322; *Winburne v. Bryan*, 73 N. Car. 47; *Johnson v. Bell*, 74 N. Car. 355; *Clegg v. New York White Soap Stone Co.*, 67 N. Car. 302; *Carson v. Dellinger*, 90 N. Car. 226.

South Carolina. — *Massey v. Adams*, 3 S. Car. 265; *Winsmith v. Walker*, 5 S. Car. 473; *Gibbes v. Elliott*, 8 S. Car. 50; *Brickman v. South Carolina R. Co.*, 8 S. Car. 173; *Clarke v. Harper*, 8 S. Car. 256; *Bardin v. Drafts*, 10 S. Car. 493; *Lanier v. Griffin*, 11 S. Car. 584; *Steele v. Charlotte, etc., R. Co.*, 11 S. Car. 589; *Warren v. Lagrone*, 12 S. Car. 46; *Charleston First Nat. Bank v. Gary*, 14 S. Car. 572; *State v. Clark*, 15 S. Car. 407; *Donaldson v. Ward*, 20 S. Car. 585; *Blakely v. Frazier*, 20 S. Car. 144; *Altee v. South Carolina R. Co.*, 21 S. Car. 559; *Epstein v. Brown*, 21 S. Car. 599; *Walker v. Columbia, etc., R. Co.*, 25 S. Car. 141; *State v. Nance*, 25 S. Car. 168; *Wolfe v. Port Royal, etc., R. Co.*, 25 S. Car. 379; *Glover v. Burbidge*, 27 S. Car. 305; *Dial v. Agnew*, 28 S. Car. 454; *Riggs v. Wilson*, 30 S. Car. 172; *McCord v. Blackwell*, 31 S. Car. 126; *Brown v. Thomson*, 31 S. Car. 436; *Cantrell v. Fowler*, 32 S. Car. 589; *Johnston v. Holmes*, 32 S. Car. 434; *Du Rant v. Du Rant*, 36 S. Car. 49; *Frick v. Wilson*, 36 S. Car. 65; *Pelzer Mfg. Co. v.*

the case, the appellate court will not usually disturb a decision on a motion for a new trial on the ground of insufficiency of the evidence, or that the verdict is against the weight of evidence,¹ on the ground of newly discovered evidence,² or on the ground that the damages awarded are excessive or inadequate.³

3. Waiver of Right to Appeal—*a. EXCEPTIONS AND OBJECTIONS.*—The failure to make objections and preserve exceptions to the order granting or refusing a new trial will deprive a party of the right of appeal from such order.⁴

b. TAKING PART IN NEW TRIAL.—Where an order refusing a new trial is not appealable a party must preserve his exceptions and appeal after a judgment is rendered on the new trial. If the adverse party takes part in the new trial he is held to have waived his right to have his exceptions reviewed.⁵ His remedy is to

Sun Fire Office, 36 S. Car. 213; State v. Haines, 36 S. Car. 505; Webber v. Ahrens, 36 S. Car. 585; Durant v. Philpot, 16 S. Car. 116; Boyd v. Munro, 32 S. Car. 249; Agnew v. Adams, 26 S. Car. 101; Hornsby v. South Carolina R. Co., 26 S. Car. 187; Byrd v. Small, 2 S. Car. 388; Floyd v. Abney, 1 S. Car. 114; Elmore v. Scurry, 1 S. Car. 139; Abrahams v. Kelly, 2 S. Car. 235.

In New York it is held that the Court of Appeals will not entertain appeals from orders granting or refusing new trials in jury cases where the order was made upon the facts. The general term (now the appellate division) may, however, review an order in such a case. Baldwin's Bank v. Butler, 133 N. Y. 564, 44 N. Y. St. Rep. 75. See also Tracey v. Altmeyer, 46 N. Y. 598; Selden v. Delaware, etc., Canal Co., 29 N. Y. 634; Bedell v. Chase, 34 N. Y. 386; Lawrence v. Ely, 38 N. Y. 42; Scoville v. Landon, 50 N. Y. 686.

An appeal will not lie to the New York Court of Appeals from an order of the general term, granting a new trial in a case tried by a jury, if any material and controverted question of fact was involved, and the general term might have granted a new trial upon such questions of fact. Harris v. Burdett, 73 N. Y. 136. See also, in this connection, Snebly v. Conner, 78 N. Y. 218; Kennicutt v. Parmalee, 109 N. Y. 650, 15 N. Y. St. Rep. 515; Whitson v. David, 81 N. Y. 645; American Nat. Bank v. Wheelock, 82 N. Y. 118; People v. Conroy, 97 N. Y. 62; People v. Stevens, 104 N. Y. 668, 5 N. Y. St. Rep. 720; Bowen v. Becht, 35 Hun (N. Y.) 434.

1. Georgia.—Bull v. St. Johns, 39 Ga. 78.

Kentucky.—Daniel v. Daniel, 1 T. B. Mon. (Ky.) 262.

Massachusetts.—Lowell Gas Light Co. v. Bean, 1 Allen (Mass.) 274; Hadley v. Citizens' Sav. Inst., 123 Mass. 301; Com. v. Ruisseau, 140 Mass. 363; Groustra v. Bourges, 141 Mass. 7; Perry v. Shedd, 159 Mass. 200.

Missouri.—Eversole v. Miller, 18 Mo. 120; Walsh v. Warren, 18 Mo. 157; Holliday v. Atterbury, 22 Mo. 512.

North Carolina.—Boykin v. Perry, 4 Jones. L. (N. Car.) 325; Redmond v. Stepp, 100 N. Car. 212; Ferrell v. Thompson, 107 N. Car. 420; Grant v. Grant, 103 N. Car. 710.

Ohio.—House v. Elliott, 6 Ohio St. 497.

South Carolina.—Abrahams v. Kelly, 2 S. Car. 235; Steele v. Charlotte, etc., R. Co., 11 S. Car. 589; Walker v. Columbia, etc., R. Co., 25 S. Car. 141; Hornsby v. South Carolina R. Co., 26 S. Car. 187; Riggs v. Wilson, 30 S. Car. 172; Stickley v. Mobile Ins. Co., 37 S. Car. 56; Doty v. Crawford, 39 S. Car. 1; Whaley v. Bartlett, 42 S. Car. 454; Jones v. Fitzpatrick, 47 S. Car. 40.

2. Massachusetts.—Gifford v. Brownell, 2 Allen (Mass.) 534; Behan v. Williams, 123 Mass. 366; Perry v. Shedd, 159 Mass. 200.

North Carolina.—Vest v. Cooper, 68 N. Car. 131; McCulloch v. Doak, 68 N. Car. 267; Munden v. Casey, 93 N. Car. 97; Houck v. Adams, 98 N. Car. 519; Redmond v. Stepp, 100 N. Car. 212.

3. Merritt v. Morse, 113 Mass. 271; Goodson v. Mullin, 92 N. Car. 211.

4. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

5. Taking Part in New Trial.—A party may except to the order granting a new trial, refuse to take part in

permit a default at the new trial and appeal.¹ This appears to be an evasion of the rule that an appeal cannot be taken from an order granting a new trial. A more reasonable rule is that a party may preserve his exceptions, comply with the order for a new trial, take part therein, and appeal after the new trial terminated, without waiving his rights.²

4. Appeal from Order and Appeal from Judgment. — It is the general rule that in order to secure a review of questions relating to the evidence, or of facts stated in the affidavits for a new trial, an appeal should be taken from the order granting or refusing a new trial.³ If the appeal is taken from the judgment alone the court

the new trial, and then appeal from the final judgment. *Smith, etc., Implement Co. v. Wheeler*, 27 Mo. App. 16; *Gilstrap v. Felts*, 50 Mo. 431; *Fretwell v. Laffoon*, 77 Mo. 26.

1. Where a party excepts to the order granting a new trial, but fails to appeal from such order and takes part in the second trial, he waives his right to a review of the order granting a new trial. *Davis v. Davis*, 8 Mo. 56; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Ess v. Griffith*, 128 Mo. 50; *Samuel v. Morton*, 8 Mo. 633.

2. No Waiver by Taking Part in New Trial. — Where an order granting a new trial is not appealable a party must preserve his exception to such order, take part in the second trial, and appeal from the judgment. His rights are not waived by taking part in the second trial. *Gann v. Worman*, 69 Ind. 458.

3. California. — *Ingraham v. Gildermester*, 2 Cal. 483; *Green v. Butler*, 26 Cal. 595; *Racouillat v. Rene*, 32 Cal. 450.

Montana. — *Allport v. Kelley*, 2 Mont. 343.

Nevada. — *State v. Northern Belle Mill, etc., Co.*, 15 Nev. 385.

New York. — *Willis v. Weaver*, 58 N. Y. 681; *Schoonmaker v. Niver*, 51 Hun (N. Y.) 642, 4 N. Y. Supp. 254; *Whitney v. Ticonderoga*, 53 Hun (N. Y.) 214, *affirmed* 127 N. Y. 40; *Doud v. Donnelly*, 59 Hun (N. Y.) 615, 12 N. Y. Supp. 396; *Williamsburgh Sav. Bank v. Solon*, 65 Hun (N. Y.) 166 (judgment *modified* 136 N. Y. 465); *Carlson v. Winterson*, 1 Misc. Rep. (N. Y. City Ct.) 207, *reversed* 3 Misc. Rep. (N. Y. C. Pl.) 63; *Momeyer v. New Jersey Sheep, etc., Co.*, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 814; *Davis v. Willis*, 67 Hun (N. Y.) 650, 22 N. Y. Supp. 339; *Passey v. Craighead*, 89 Hun (N. Y.) 76; *Walsh v.*

Manhattan R. Co., 13 Misc. Rep. (N. Y. Super. Ct.) 505; *American Medicine Co. v. Keisler*, 44 N. Y. Super. Ct. 557; *Hughes v. Hughes*, 10 Misc. Rep. (N. Y. C. Pl.) 180; *Marquart v. La Farge*, 5 Duer (N. Y.) 559.

South Dakota. — *Pierce v. Manning*, 2 S. Dak. 517; *Barnard, etc., Mfg. Co. v. Galloway*, 5 S. Dak. 205; *Miller v. Way*, 5 S. Dak. 468; *Baird v. Gleckler*, 7 S. Dak. 284; *Hagaman v. Gillis*, 9 S. Dak. 61.

New York. — In order that the general term may review questions of fact on appeal, the appeal must be taken from the order granting or refusing a new trial as well as from the judgment. *Peil v. Reinhart*, 127 N. Y. 381.

Upon an appeal to the general term of the Supreme Court from an interlocutory judgment of the special term, and upon motion for a new trial made, the judgment was affirmed and the motion for a new trial denied, one order embracing both decisions. It was held that an appeal from that order was well taken, so far as related to the order denying a new trial. *Kelsey v. Sargent*, 104 N. Y. 663, 10 N. E. Rep. 269.

By the New York Code of Civil Procedure, the Court of Appeals has jurisdiction to review every actual determination made at general term where a final judgment has been rendered, and to review an order granting or refusing a new trial. It is further provided that where a judgment has been reversed, and a new trial ordered, there can be no appeal from the judgment of reversal, but on appeal from the order the judgment must be reviewed; and an appeal to the general term from a final judgment on a verdict can only be taken on questions of law, the facts being reviewable only on appeal from an order on a motion for

is limited to a review of questions of law.¹ But it has also been held that where a motion for a new trial is made during the trial term it is so directly connected with the judgment² that an order refusing a new trial may be reviewed on appeal from the final judgment,³ while a motion or petition for a new trial filed at a subsequent term from the entry of the judgment⁴ is a separate and distinct proceeding, resulting in a final order which can only

a new trial. In *Pharis v. Gere*, 112 N. Y. 408, on appeal from a judgment and order denying a new trial, the general term refused to consider the facts, but heard the appeal from the judgment. It was held that the Court of Appeals had jurisdiction of an appeal from the order of the general term granting a new trial, and on such appeal was required to review the judgment of reversal.

Under N. Y. Code Civ. Pro., § 1316, providing that an interlocutory judgment or intermediate order may be reviewed with the final judgment, an order denying a new trial on the minutes may, if specified in the notice of appeal, be reviewed in connection with the final judgment. *Bramfield v. Hill*, 54 Hun (N. Y.) 638, 8 N. Y. Supp. 143. But the practice is to take a separate appeal from the order denying a new trial. *McMicken v. Lawrence*, 39 N. Y. Super. Ct. 540; *Howard v. Hayes*, 47 N. Y. Super. Ct. 89; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Fry v. Bennett*, 7 Abb. Pr. (N. Y. Super. Ct.) 352, 16 How. Pr. (N. Y.) 385.

For review at general and special terms and in the Court of Appeals, see article APPEALS, vol. 2, p. 137.

California.—An error of law in the admission or exclusion of testimony may be reviewed on appeal from the judgment although it was assigned as error in a motion for a new trial and no appeal was taken from the order denying the motion. *Carpentier v. Williamson*, 25 Cal. 154.

No Judgment on Verdict.—Where the statute provides that an appeal may be taken from an order refusing a new trial, such order may be reviewed although no judgment has been rendered on the verdict. *Baldwin v. Foss*, 71 Iowa 389.

1. Effect of Appeal from Judgment Only.—*Olmstead v. Reed*, 7 Civ. Pro. Rep. (N. Y. Supreme Ct.) 190 note; *Jones v. Sparks*, (Supreme Ct.) 1 N. Y. St. Rep. 476; *Dixon v. Dixon*, (Supreme Ct.) 12 N. Y. St. Rep. 505; *Levy v. Coogan*,

16 Daly (N. Y.) 137; *Boyle v. Williams*, 1 Misc. Rep. (N. Y. C. Pl.) 112; *Bradley Fertilizer Co. v. South Pub. Co.*, 4 Misc. Rep. (N. Y. C. Pl.) 172, (*reversing*) 1 Misc. Rep. (N. Y. City Ct.) 512, 21 N. Y. Supp. 472; *Wilson v. Ritson*, 10 Misc. Rep. (N. Y.) 786, (City Ct.) 30 N. Y. Supp. 1068; *Chaimson v. Henshing*, 12 Misc. Rep. (N. Y.) 651, (City Ct.) 33 N. Y. Supp. 271; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Rogers v. King*, 66 Barb. (N. Y.) 495; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87.

An appeal from a judgment based on a verdict of a jury presents only questions of law for examination; but an appeal from an order denying a motion for a new trial on the minutes of the court brings up the whole case, and gives the general term jurisdiction to review the facts to ascertain and determine whether a verdict rendered is supported by the evidence. *Martine v. Huyler*, 55 Hun (N. Y.) 611, 8 N. Y. Supp. 734.

2. See article APPEALS, vol. 2, p. 137.

3. *Marzion v. Pioche*, 8 Cal. 537; *Carpentier v. Williamson*, 25 Cal. 167; *Spanagel v. Dellinger*, 38 Cal. 284; *Carroll v. Byers*, (Arizona 1894) 36 Pac. Rep. 499; *Mower v. Hanford*, 6 Minn. 535.

4. *Harvey v. Fink*, 111 Ind. 249; *Leary v. Leary*, 68 Wis. 66.

Order After Entry of Judgment.—An appeal from the judgment does not present to the Supreme Court for review an order granting or denying a new trial entered after the entry of the judgment. *Barnard, etc., Mfg. Co. v. Galloway*, 5 S. Dak. 205; *Granger v. Roll*, 6 S. Dak. 611; *Gade v. Collins*, 8 S. Dak. 322; *Morris v. Niles*, 67 Wis. 341.

A motion for a new trial is directly and not collaterally connected with the judgment, and so long as it remains disposed of there can be no final judgment within the meaning of the statute relating to final orders. *New York, etc., R. Co. v. Doane*, 105 Ind. 92.

be reviewed by appeal from such order. At the present time the subject is largely regulated by statutes, which should be consulted.

5. Record on Appeal — a. SUFFICIENCY OF RECORD — Contents — In General. — In order to secure a review of the ruling of the trial court on a motion for a new trial the record must contain the motion for a new trial,¹ setting forth the grounds of the motion,² also the notice of the motion, the affidavit used on the hearing,³ the evidence and instructions,⁴ the order of the court granting or denying a new trial,⁵ and the exceptions to the order.⁶

b. MOTION AND STATEMENT OF GROUNDS. — In some jurisdictions the motion for a new trial is regarded as a pleading which should be included in the transcript of the record and should not be included in the bill of exceptions.⁷ But the general

1. *Arkansas.* — *Berman v. Wolf*, 40 Ark. 251.

Georgia. — *Cruce v. State*, 63 Ga. 159.

Illinois. — *Springfield F. & M. Ins. Co. v. Newman*, 31 Ill. App. 393; *Horn v. Eckert*, 63 Ill. 522.

Indiana. — *Patterson v. State*, 91 Ind. 364; *Davis v. Binford*, 58 Ind. 457; *Kissell v. Anderson*, 73 Ind. 485; *Keesling v. Ryan*, 84 Ind. 89; *La Follette v. Higgins*, 109 Ind. 241; *Earnest v. Shoemaker*, 10 Ind. App. 696; *New Albany v. Iron Substructure Co.*, 141 Ind. 500; *Anheuser-Busch Brewing Assoc. v. George*, 14 Ind. App. 1; *Johnson v. Bedwell*, 15 Ind. App. 236.

Kansas. — *Ferguson v. Graves*, 12 Kan. 39; *Hover v. Cockins*, 17 Kan. 518; *Parker v. Remington Sewing-Mach. Co.*, 24 Kan. 31; *Morse v. Brunswick*, 34 Kan. 378; *Tyler v. Sooy*, 19 Kan. 593.

Missouri. — *Rotchford v. Creamer*, 65 Mo. 48; *McCarty v. McGinniss*, 8 Mo. App. 585; *State v. Burckhardt*, 83 Mo. 430; *Furber v. Conway*, 23 Mo. App. 412; *Ward v. Quinlvin*, 65 Mo. 453.

Montana. — *Helena First Nat. Bank v. McAndrews*, 5 Mont. 251; *Gum v. Murray*, 6 Mont. 10.

Nebraska. — *Scroggin v. National Lumber Co.*, 41 Neb. 195.

Washington. — *Clarke County v. Clarke County Com'rs*, 1 Wash. Ter. 250.

Wyoming. — *Murrin v. Ullman*, 1 Wyoming 36; *Garbanati v. Uinta County*, 2 Wyoming 257; *Geer v. Murrin*, 1 Wyoming 37.

2. The Grounds of the Motion Must Appear in the Record — *Iowa.* — *Kennedy v. Des Moines*, 84 Iowa 187.

Kansas. — *Cooper v. Brinkman*, 38 Kan. 442; *Illingsworth v. Stanley*, 40 Kan. 61; *White v. Douglas*, 51 Kan. 402; *Cole v. Bower*, 53 Kan. 468.

Kentucky. — *Boaton v. Floyd County*, 13 Ky. L. Rep. 877.

Minnesota. — *Clark v. C. N. Nelson Lumber Co.*, 34 Minn. 289.

New York. — *Alfaro v. Davidson*, 39 N. Y. Super. Ct. 463; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Dresser v. Batmen's F. & M. Ins. Co.*, 47 Hun (N. Y.) 153; *Stedman v. Batchelor*, 54 Hun (N. Y.) 638, 28 N. Y. St. Rep. 436; *McDermott v. Conley*, 58 Hun (N. Y.) 602, 33 N. Y. St. Rep. 560.

Ohio. — *Randall v. Turner*, 17 Ohio St. 262.

Virginia. — *McArter v. Grigsby*, 84 Va. 159.

3. That affidavits must be incorporated in the bill of exceptions see *infra*, XXI. 5. *c. Affidavits.*

4. See generally article **BILLS OF EXCEPTIONS**, vol. 3, p. 374.

5. See *infra*, XXI. 5. *h. Order or Decision on the Motion.*

6. See article **EXCEPTIONS AND OBJECTIONS**, vol. 8, p. 153.

7. *Arkansas.* — *Johnson v. State*, 43 Ark. 391, *overruling* previous decisions to the contrary; *Coonrod v. Atkinson*, 55 Ark. 354; *Sanders v. State*, 55 Ark. 365.

Georgia. — *Cox v. Weems*, 64 Ga. 165.

Indiana. — *Hill v. Newman*, 47 Ind. 187; *Nichol v. Thomas*, 53 Ind. 42; *Schnewind v. Hackett*, 54 Ind. 248; *Bishop v. Welch*, 54 Ind. 527; *Block v. Ebner*, 54 Ind. 544; *Cooper v. Howard County*, 64 Ind. 520; *Hunter v. Hatfield*, 68 Ind. 416.

Iowa. — *Mays v. Deaver*, 1 Iowa 223.

Kansas. — *McCullagh v. Allen*, 10 Kan. 150.

rule is that a motion for a new trial must be incorporated into the bill of exceptions or statement of the case in order to be preserved for review on appeal.¹

Time of Filing Motion. — It must appear from the record that the motion was filed in time.²

c. NOTICE OF MOTION. — The notice of the motion or notice of intention to move for a new trial is not a part of the record,

Missouri. — *State v. Martin*, (Mo. 1888) 8 S. W. Rep. 217; *Haarstick v. Shields*, 8 Mo. App. 601.

Nebraska. — *Romberg v. Fokken*, 47 Neb. 198; *Leach v. Renwald*, 45 Neb. 207; *Jones v. Hayes*, 36 Neb. 526; *Barr v. State*, 45 Neb. 458.

No bill of exceptions is necessary where the motion for a new trial as of right is made in term time. *Powers v. Nesbit*, 127 Ind. 497.

A motion for a new trial and all other motions and orders required by the statute to be filed with the clerk and entered upon the journal of the court should not be embodied in a bill of exceptions, since the object of such bill is to bring into the record matter which is not otherwise a part of the record. *Eaton v. Carruth*, 11 Neb. 231.

A motion for a new trial not being a part of the record, the fact that the judge indorses it as "correct" does not make it so. *Thompson v. Backenstos*, 1 Oregon 17.

Where the motion for a new trial and the grounds therefor have been duly indorsed as filed and the filing entered on the order book of the Court of Appeals, they become a part of the record without being incorporated into the bill of exceptions. *McAllister v. Connecticut Mut. L. Ins. Co.*, 78 Ky. 531.

On appeal to the Supreme Court of the United States from the Court of Claims, a motion for a new trial need not be embodied in the record when not essential to a review of the evidence. *Kellogg v. U. S.*, 19 Ct. of Cl. 73.

Mississippi. — An order on a motion for a new trial will not be reviewed where the motion appears only in a bill of exceptions. It must be certified with the record. *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242; *Melius v. Houston*, 41 Miss. 59; *Byrne v. Cummings*, 41 Miss. 192.

1. *Arizona.* — *Snead v. Tietjen*, (Arizona 1890) 24 Pac. Rep. 324; *Maricopa County v. Osborn*, (Arizona 1895) 40 Pac. Rep. 313.

Illinois. — *Boyle v. Levings*, 28 Ill. 314; *Daniels v. Shields*, 38 Ill. 197; *St. Louis, etc., R. Co. v. Dorsey*, 68 Ill. 326; *Nason v. Letz*, 73 Ill. 371; *Butt v. Lee*, 27 Ill. App. 419; *Ward v. Ware*, 29 Ill. App. 22; *Ging v. Robinson*, 31 Ill. App. 511; *Griffith v. Welsh*, 32 Ill. App. 396; *Foreman v. Johnson*, 37 Ill. App. 452; *Burnett v. Snapp*, 39 Ill. App. 237; *Dignan v. Gilbert*, 43 Ill. App. 536; *Spangenberg v. Charles*, 44 Ill. App. 526; *Engel v. Sellers*, 51 Ill. App. 577; *Mt. Vernon v. Satterfield*, 53 Ill. App. 39; *French v. Hotchkiss*, 60 Ill. App. 580.

Michigan. — *Cuddy v. Major*, 12 Mich. 368.

Missouri. — *Stevenson v. Saline County*, 65 Mo. 425; *Shaughnessy v. St. Louis, etc., R. Co.*, 7 Mo. App. 591; *McCarthy v. McGinnis*, 76 Mo. 344; *McKee v. Calvert*, 80 Mo. 348; *Berkley v. Kobes*, 13 Mo. App. 502; *McCullom v. Hedges*, 20 Mo. App. 688; *Puller v. Thomas*, 36 Mo. App. 105; *Perkins v. Bakrow*, 39 Mo. App. 331; *Nicol v. Hyre*, 58 Mo. App. 134; *State v. Reed*, 89 Mo. 168; *Turley v. Barnes*, 131 Mo. 548.

Oklahoma. — *McMechan v. Christy*, 3 Okla. 301.

Oregon. — *Oregonian R. Co. v. Wright*, 10 Oregon 162.

Texas. — *Washington v. State*, (Tex. App. 1891) 16 S. W. Rep. 653.

Wyoming. — *Perkins v. McDowell*, 3 Wyoming 328; *Seibel v. Bath*, 5 Wyoming 409; *Rubel v. Willey*, 5 Wyoming 427.

2. *Pennsylvania Co. v. Sedwick*, 59 Ind. 336; *Wallace v. Ransdell*, 90 Ind. 173; *Rowen v. Sommers*, 101 Iowa 734; *Morrison v. Wells*, 48 Kan. 494; *Winkelmeyer Brewing Assoc. v. Wolff*, 53 Kan. 323; *Welsh v. St. Louis*, 73 Mo. 71; *Clark v. Clark*, 8 Mo. App. 601; *Bollinger v. Carrier*, 79 Mo. 318; *Duff v. Neilson*, 90 Mo. 93; *Bruns v. Capstick*, 62 Mo. App. 57.

It must appear that the motion for a new trial was filed within the time allowed by law, and it is not sufficient

and must be incorporated into the statement of the case or the bill of exceptions,¹ when the sufficiency of the notice has been assigned as error.²

d. EVIDENCE INTRODUCED ON HEARING OF MOTION. — All the evidence introduced at the hearing must be incorporated into the record in order to secure a review of the evidence considered by the lower court in deciding the motion; otherwise the decision will not be disturbed.³

e. AFFIDAVITS. — The affidavits introduced on the hearing of the motion for a new trial must be made a part of the record by being incorporated into the bill of exceptions or statement of the case.⁴

that such fact is shown by the record outside of the bill of exceptions. *Demske v. Hunter*, 23 Mo. App. 466; *Morrison v. Wells*, 48 Kan. 494.

But it must appear that the objection was first made in the lower court. *Twist v. Kelly*, 11 Nev. 377.

1. *Hook v. Hall*, 68 Cal. 22; *Girdner v. Beswick*, 69 Cal. 112; *Dominguez v. Mascotti*, 74 Cal. 269; *Alpers v. Schammel*, 75 Cal. 590; *Richardson v. Eureka*, 92 Cal. 64; *Nye v. Marysville, etc., St. R. Co.*, 97 Cal. 461; *Randall v. Duff*, 79 Cal. 115; *Monterey County v. Cushing*, 83 Cal. 507; *Perego v. Dodge*, 9 Utah 3.

A recital in an order denying a motion for a new trial that the motion was made upon grounds set forth in the notice of motion is a sufficient showing in the record that the notice was given. *Randall v. Duff*, 79 Cal. 115.

Where a motion for a new trial is made on affidavits alone, no statement of the case or bill of exceptions is necessary. In such case the notice of intention to move for a new trial need not be incorporated in the statement of the case where it appears in the transcript of the record. *Arnold v. Sinclair*, 12 Mont. 248.

2. The notice of a motion for a new trial or notice of intention to move for a new trial need not be made a part of the record on appeal where no objection has been made thereto. *Pico v. Cohn*, 78 Cal. 384; *Gage v. Downey*, 79 Cal. 140; *Scott v. Wood*, 81 Cal. 398; *Searles v. Thompson*, 18 Minn. 316.

A decision will not be reviewed where the record fails to show that a notice of the motion for a new trial was served and filed. *Helena First Nat. Bank v. McAndrews*, 5 Mont. 251; *Gum v. Murray* 6 Mont. 10.

3. *Arkansas.* — *Matthews v. Lanier*, 33 Ark. 91; *Overton v. State*, 57 Ark. 60.

California. — *Branger v. Chevalier* 9 Cal. 353.

Colorado. — *Schoolfield v. Brunton*, 20 Colo. 139.

Florida. — *Mountain v. Roche*, 13 Fla. 581.

Georgia. — *Hyfield v. Sims*, 87 Ga. 280.

Indiana. — *Cincinnati, etc., R. Co. v. McClelland*, 15 Ind. 225; *Harper v. State*, 101 Ind. 109; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58; *Prilliman v. Mendenhall*, 120 Ind. 279.

Iowa. — *Brown v. Brown*, 40 Iowa 695; *Wagner v. Condron*, 73 Iowa 753.

Nebraska. — *Wohlenberg v. Melchert*, 35 Neb. 803; *National Lumber Co. v. Ashby*, 41 Neb. 292.

Nevada. — *Leete v. Sutherland*, 20 Nev. 71.

Texas. — *Land v. Miller*, 7 Tex. 463; *Spencer v. James*, 10 Tex. Civ. App. 327.

West Virginia. — *Shrewsbury v. Miller*, 10 W. Va. 115.

Wisconsin. — *Hoffman v. Chicago, etc., R. Co.*, 86 Wis. 471; *Bowen v. Malbon*, 20 Wis. 491.

4. *California.* — *Von Glahn v. Brennan*, 81 Cal. 261.

Colorado. — *Anderson v. Sloan*, 1 Colo. 33.

Florida. — *Reynolds v. State*, 33 Fla. 301.

Illinois. — *Vanderbilt v. Johnson*, 4 Ill. 48; *Troy v. Reilley*, 4 Ill. 259; *Cummings v. McKinney*, 5 Ill. 57; *Saunders v. McCollins*, 5 Ill. 419; *Mann v. Russell*, 11 Ill. 586; *Van Pelt v. Dunford*, 58 Ill. 145; *Cairo, etc., R. Co. v. Easterly*, 89 Ill. 156; *Gregory v. Spencer*, 3 Ill. App. 80; *Rockenfeller v. Tobias*, 3 Ill. App. 461; *Alley v.*

f. EVIDENCE ON THE TRIAL AND INSTRUCTIONS — Effect of Recitals in the Motion. — The evidence given on the trial and instructions to the jury cannot be properly brought into the record by mere recitals in a motion for a new trial, but must be incorporated in a statement or in a bill of exceptions.¹ Unless the evidence

Limbert, 35 Ill. App. 592; Spangenberg v. Charles, 44 Ill. App. 526.

Indiana. — Matlock v. Todd, 19 Ind. 130; Blackwell v. Acton, 38 Ind. 425; Wray v. Tindall, 45 Ind. 517; Martin v. Harrison, 50 Ind. 270; Fryberger v. Perkins, 66 Ind. 19; Heath v. West, 68 Ind. 548; Lewis v. Ewing, 70 Ind. 282; McDaniel v. Mattingly, 72 Ind. 349; Williams v. Potter, 72 Ind. 354; Wood v. Crane, 75 Ind. 207; Lefever v. Johnson, 79 Ind. 554; Washington v. Small, 86 Ind. 462; Compton v. State, 89 Ind. 338; Rudolph v. Landwerlen, 92 Ind. 34; Lafayette v. Weaver, 92 Ind. 477; Applegate v. Baxley, 93 Ind. 147; Alderman v. Cobb, 94 Ind. 602; Harrison School Tp. v. McGregor, 96 Ind. 185; Hodgson v. Marion County, 97 Ind. 604; McConnell v. Huntington, 108 Ind. 405; Jerauld v. Watkins, 1 Ind. App. 466; Gross v. Haisley, 2 Ind. App. 23; Iddings v. Iddings, 134 Ind. 322; Rees v. Blackwell, 6 Ind. App. 506; Lake Erie, etc., R. Co. v. Arnold, 8 Ind. App. 297; Hoskinson v. Caven-der, 143 Ind. 1; Smith v. Stump, 12 Ind. App. 359; Thornburg v. Buck, 13 Ind. App. 446; Aetna Ins. Co. v. Le Roy, 15 Ind. App. 49.

Kentucky. — Faulkner v. Wilcox, 2 Litt. (Ky.) 369.

Mississippi. — Ross v. Garey, 7 How. (Miss.) 47.

Nebraska. — Ray v. Mason, 6 Neb. 101; Dolen v. State, 15 Neb. 405; Val-lindingham v. Scott, 30 Neb. 187; Van Etten v. Butt, 32 Neb. 285; Hunter v. Bell, 33 Neb. 249; Payne v. Jones, 33 Neb. 260; Wohlenberg v. Melchert, 35 Neb. 803; National Lumber Co. v. Ashby, 41 Neb. 292; Gray v. Godfrey, 43 Neb. 672; Chicago, etc., R. Co. v. Griffith, 44 Neb. 690.

Nevada. — Dean v. Pritchard, 9 Nev. 232.

Oklahoma. — Berry v. Smith, 2 Okla. 345.

Texas. — Arnold v. Williams, 21 Tex. 413; Frizzell v. Johnson, 30 Tex. 31.

Utah. — Perego v. Dodge, 9 Utah 3.

United States. — Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383; Evans v. Stettinisch, 149 U. S. 605.

Affidavits concerning incompetency of jurors must be brought into the record either by order of court or by incorporating them into a bill of exceptions. Elbert v. Hoby, 73 Ind. 111; Pence v. Waugh, 135 Ind. 143.

Such affidavits will not be considered when not certified to by the judge, though they are incorporated in the bill of exceptions. Crumrine v. Crum-rine, 14 Ind. App. 641.

Depositions. — Error in failing to suppress certain portions of a deposition will not be reviewed where there is no bill of exceptions showing motion to suppress and the portions of the depo-sition complained of. Bargis v. Tar-rar, 45 Ind. 41.

Affidavits in the Transcript. — Where affidavits used in connection with a motion for a new trial are certified as a part of the transcript of the record, they will be considered as properly in the record where they have been iden-tified by the signature of the judge and ordered to be filed of record. Schmertz v. Johnson, 72 Ga. 472.

Iowa. — Under section 4482 of the Iowa code affidavits attached to a mo-tion for a new trial in a criminal case and filed with it become a part of the record, and may be certified by tran-script on appeal. State v. Whalen, 98 Iowa 662; State v. LaGrange, 99 Iowa 10.

Indiana. — Section 662, Burns's Rev. Stat. 1894, providing that affidavits may be made a part of the record by order of court, applies to affidavits used on the hearing of a motion for a new trial. Nichol v. Thomas, 53 Ind. 42. Such provision relates exclusively to civil actions. In criminal cases the affidavits can be brought into the rec-ord only by embodying them into a bill of exceptions. Graybeal v. State, 145 Ind. 623; Naanes v. State, 143 Ind. 209; Townsend v. State, 132 Ind. 315; Leverich v. State, 105 Ind. 277; Mere-dith v. State, 122 Ind. 514.

1. *The Motion Cannot Take the Place of a Bill of Exceptions.* — Berry v. Singer, 10 Ark. 483; Carroll v. Bowler, 40 Ark. 168; Chambers v. Campbell, 15 Conn. 427; Parrish v. Pensacola, etc., R. Co., 28 Fla. 251; Grover, etc., Sewing

is in the record, the order granting or refusing a new trial cannot be reviewed and must therefore be affirmed.¹

Mach. Co. v. Newby, 58 Ind. 570; *Burnett v. Overton*, 67 Ind. 557; *Butterfield v. Davenport*, 84 Ind. 590; *Clouser v. Ruckman*, 104 Ind. 588; *Nickless v. Pearson*, 126 Ind. 477; *Luttrell v. Martin*, 112 N. Car. 593; *Ballew v. Casey*, (Tex. 1888) 9 S. W. Rep. 189; *Taylor v. Davis*, (Tex. 1890) 13 S. W. Rep. 642.

The Charge of the Court cannot be made part of the record by copying it into the motion for a new trial. *Bates v. State*, 72 Ind. 434; *Zehner v. Aultman*, 74 Ind. 24; *Claffin v. Cottman*, 77 Ind. 58; *Adams v. Stringer*, 78 Ind. 175; *Gheens v. Golden*, 90 Ind. 427; *Whetton v. Clayton*, 111 Ind. 360; *Henley v. Bronnenberg*, (Ind. App. 1892) 31 N. E. Rep. 583; *Garland v. Wholebaw*, 20 Iowa 271.

Scope of Motion.—The object of a motion for a new trial is to assign and specify the errors and irregularities occurring at the trial, and not to set out the evidence of the errors and irregularities or prove them. The motion does not of itself prove any statement of fact contained therein. *State v. Foster*, 115 Mo. 448; *State v. Welsor*, 117 Mo. 570.

Improper Argument of Counsel.—Where a motion for a new trial is made upon the ground of improper remarks by the plaintiff's counsel in the opening, and such matter appears only in the motion, and not by a bill of exceptions, it is not in the record and cannot be reviewed. *Hood v. Tyner*, 3 Ind. App. 51. See also article ARGUMENTS OF COUNSEL, vol. 2, p. 751.

1. *California*.—*Matter of Yoakam*, 103 Cal. 503; *Oakland Gaslight Co. v. Dameron*, 57 Cal. 292.

Florida.—*Tompkins v. Eason*, 8 Fla. 14.

Georgia.—*Farmers' Alliance Exch. v. Crown Cotton Mills*, 91 Ga. 178.

Illinois.—*Cornelius v. Boucher*, 1 Ill. 32; *Wheeler v. Shields*, 3 Ill. 348; *Brown v. Clement*, 68 Ill. 192; *Chicago, etc., R. Co. v. Marseilles*, 107 Ill. 313.

Indiana.—*Atkinson v. Gwin*, 8 Ind. 376; *Irwin v. Anthony*, 8 Ind. 470; *Brown v. New Castle, etc., R. Co.*, 9 Ind. 181; *Jolly v. Terre Haute Drawbridge Co.*, 9 Ind. 417; *Applegate v. Boyles*, 10 Ind. 435; *McCole v. Wynne*, 12 Ind. 317; *Heavenridge v. Mondy*,

34 Ind. 28; *Jewett v. Pleak*, 43 Ind. 368; *Poffenberger v. Blackstone*, 57 Ind. 288; *Pickereil v. Frankem*, 64 Ind. 25; *Flynn v. Hayes*, 69 Ind. 59; *Beck v. State*, 72 Ind. 250; *Baltimore, etc., R. Co. v. Johnson*, 83 Ind. 57; *Price v. Price*, 89 Ind. 90; *Lawrenceburgh Furniture Mfg. Co. v. Hinke*, 119 Ind. 47; *Kohli v. Hall*, 141 Ind. 411; *Johnson v. Bedwell*, 15 Ind. App. 236; *Huhn v. Hammond First Nat. Bank*, 6 Ind. App. 702.

Iowa.—*Talty v. Lusk*, 4 Iowa 469; *Childs v. Heaton*, 11 Iowa 271; *Kienne v. Anderson*, 13 Iowa 565; *Bowen v. Hale*, 4 Iowa 430; *State v. Harty*, 80 Iowa 769.

Kentucky.—*Siller v. Cooper*, 4 Bibb (Ky.) 90; *Beauchamp v. Morris*, 1 A. K. Marsh. (Ky.) 520; *Blue v. Kibby*, 1 T. B. Mon. (Ky.) 195; *Rhodes v. Welton*, (Ky. 1896) 35 S. W. Rep. 1129.

Louisiana.—*State v. Spooner*, 41 La. Ann. 780.

Massachusetts.—*Spaulding v. Knight*, 118 Mass. 528.

Mississippi.—*Phipps v. Morton*, 33 Miss. 211; *Wright v. Alabama Bank*, 6 Smed. & M. (Miss.) 251.

Missouri.—*Searcy v. Devine*, 4 Mo. 626.

Montana.—*Anderson v. O'Laughlin*, 1 Mont. 81.

Nebraska.—*Latham v. Schal*, 25 Neb. 535; *Spotswood v. National Bank of Commerce*, 44 Neb. 1.

South Carolina.—*Potts v. Bonds*, 10 S. Car. 498.

Texas.—*James v. Fulcrod*, 5 Tex. 512; *Goss v. Pilgrim*, 28 Tex. 263; *Roberts v. Heffner*, 19 Tex. 129.

Virginia.—*Mallory v. Taylor*, 90 Va. 348.

West Virginia.—*Wustland v. Potterfield*, 9 W. Va. 438; *Zumbro v. Stump*, 38 W. Va. 325; *Campbell v. Hughes*, 12 W. Va. 183.

Wisconsin.—*Meyer v. Prairie du Chien*, 9 Wis. 233; *Bowen v. Malbon*, 20 Wis. 491.

Newly Discovered Evidence.—Unless the evidence taken at the trial is preserved in the record, an order refusing a new trial on the ground of newly discovered evidence cannot be reviewed.

Arkansas.—*Collins v. McPeak*, 10 Ark. 556.

California.—*Sirkus v. Central R. Co.*, (Cal. 1892) 30 Pac. Rep. 790.

g. BILL OF EXCEPTIONS OR STATEMENT OF THE CASE. — Where a bill of exceptions or statement of the case has been prepared for use on the hearing of a motion for a new trial, such bill or statement may be used on appeal from the order granting or refusing a new trial.¹ But on appeal from the judgment such bill of exceptions or statement will not be sufficient unless there is a stipulation that it may be used on such appeal.² See in general articles BILLS OF EXCEPTIONS, vol. 3, p. 374; CASE MADE ON APPEAL, vol. 3, p. 879.

h. ORDER OR DECISION ON THE MOTION. — The order granting or refusing a new trial must be incorporated into the record³

Indiana. — *Cones v. Ryman*, 9 Ind. 277; *Swift v. Wakeman*, 9 Ind. 552; *Walpole v. Atkinson*, 18 Ind. 434; *Crawford v. Martin*, 19 Ind. 370; *Cleveland v. State*, 20 Ind. 444; *Ruddick v. Ruddick*, 21 Ind. 163; *Jackson v. Fowler*, 63 Ind. 85; *Harsh v. Kegley*, 72 Ind. 398; *Crow v. Brunson*, 1 Ind. App. 268; *Walter v. Uhl*, 3 Ind. App. 219.

Kansas. — *Thom v. Davis*, 16 Kan. 22. *Louisiana.* — *State v. Belden*, 35 La. Ann. 823.

Minnesota. — *State v. Lautenschlager*, 23 Minn. 290; *Scofield v. Walrath*, 35 Minn. 356.

Tennessee. — *Chambers v. Brown*, *Cooke* (Tenn.) 292; *Turnley v. Evans*, 3 *Humph.* (Tenn.) 222.

Texas. — *Thompson v. Callison*, 27 Tex. 438; *Yeiser v. Burdett*, 10 Tex. Civ. App. 155.

Virginia. — *Callaghan v. Kippers*, 7 Leigh (Va.) 608.

Wisconsin. — *Carroll v. Hangartner*, 66 Wis. 511.

1. *California.* — *Kidd v. Laird*, 15 Cal. 161; *Burdge v. Gold Hill*, etc., *Water Co.*, 15 Cal. 198; *Walden v. Murdock*, 23 Cal. 540; *Treadwell v. Davis*, 34 Cal. 601; *Bedan v. Turney*, 99 Cal. 649.

Idaho. — *Bradbury v. Idaho*, etc., *Land Imp. Co.*, 2 Idaho 221.

Montana. — *Kleinschmidt v. McDermott*, 12 Mont. 309.

Nevada. — *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313; *O'Neale v. Cleaveland*, 3 Nev. 485; *Johnson v. Wells*, 6 Nev. 224.

United States. — *Head v. Hargrave*, 105 U. S. 45; *Alexander v. U. S.*, 57 Fed. Rep. 828, 15 U. S. App. 158.

A statement may be sufficient on appeal although filed too late to be available for a motion for a new trial. *Elder v. Frevert*, 18 Nev. 278.

2. A statement of the evidence on a motion for a new trial forms no part of the transcript on appeal from the judgment unless it is specified that it may be used as a statement on appeal. *Grounds v. Ralph*, 1 Arizona 227; *Casgrave v. Howland*, 24 Cal. 457; *Thompson v. Connolly*, 43 Cal. 636.

Although Code Civ. Pro. Cal., § 950, allows any statement or bill of exceptions used on a motion for a new trial to be used on the appeal from the final judgment, such statement cannot be used on appeal unless it was also used on the hearing of a motion and was prepared and served within the ten days required by section 659. *Jue Fook Sam v. Lord*, 83 Cal. 159. But see *Rumpel v. Oregon Short Line*, etc., R. Co., (Idaho 1894) 35 Pac. Rep. 700.

But a statement which has been prepared exclusively as a statement on a motion for a new trial cannot be considered as a statement on appeal from the judgment. *Robinson v. Benson*, 19 Nev. 331.

3. *The Order Must Be in the Record.* — The order granting or refusing a new trial must be incorporated into the record or such order will not be reviewed. *Fleury v. Jackson*, 1 Arizona 361; *Doe v. Herr*, 8 Ind. 23; *Martin v. State F. Ins. Co.*, 58 Iowa 609; *Ft. Scott v. Deeds*, 36 Kan. 621; *Granite Sav. Bank*, etc., *Co. v. Weinberg*, 62 Minn. 202; *New Orleans*, etc., R. Co. *v. Pressley*, 45 Miss. 66; *Rotchford v. Creamer*, 65 Mo. 48; *Victory v. Foran*, 56 N. Y. Super. Ct. 507; *Levy v. Coogan*, 16 Daly (N. Y.) 137; *Blohm v. Bamber*, (Brooklyn City Ct.) 10 N. Y. Supp. 98; *Richardson v. Hartmann*, 68 Hun (N. Y.) 9; *Carroll v. O'Shea*, 2 Misc. Rep. (N. Y. C. Pl.) 437 (*affirming* 19 N. Y. Supp. 374); *Gridley v. College of St. Francis Xavier*, 63 Hun (N. Y.) 628, 17 N. Y. Supp. 653.

or it must appear that the motion was disposed of by some ruling,¹ otherwise it will not appear that there was a final disposition of the case or a final judgment rendered from which an appeal can be taken. See article APPEALS, vol. 2, p. 137.

i. EXCEPTIONS TO THE ORDER. — An exception to the order must appear of record,² and the order must also be assigned as error on appeal.³

1. **Motion Not Ruled Upon** — *Arkansas*. — *Kearney v. Moose*, 37 Ark. 37.

California. — *Myers v. Casey*, 14 Cal. 542; *Strathern v. Dakin*, 63 Cal. 478.

District of Columbia. — *Sinclair v. Washington, etc., R. Co.*, 4 MacArthur (D. C.) 13.

Illinois. — *Illinois Cent. R. Co. v. O'Keefe*, 49 Ill. App. 320.

Kansas. — *Wilson v. Kestler*, 34 Kan. 61.

Kentucky. — *King v. Ohio Valley R. Co.*, (Ky. 1889) 10 S. W. Rep. 631, 10 Ky. L. Rep. 748.

Missouri. — *State v. Lanham*, 6 Mo. App. 577; *State v. Gaither*, 77 Mo. 304.

Nebraska. — *Jones v. Hayes*, 36 Neb. 526; *Leach v. Renwald*, 45 Neb. 207; *Barr v. State*, 45 Neb. 458.

New York. — *Ball v. Davis*, (Supreme Ct.) 1 N. Y. St. Rep. 517; *Victory v. Foran*, 56 N. Y. Super. Ct. 507; *National Park Bank v. Steele, etc., Mfg. Co.*, 58 Hun (N. Y.) 81; *Cohen v. New York*, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 270, *affirmed* 128 N. Y. 594; *McArdle v. Smith*, 1 Misc. Rep. (N. Y. City Ct.) 3; *Meyers v. Cohn*, 3 Misc. Rep. (N. Y. City Ct.) 145; *Bradley Fertilizer Co. v. South Pub. Co.*, 4 Misc. Rep. (N. Y. C. Pl.) 172; *Chalmerson v. Menshing*, 12 Misc. Rep. (N. Y.) 651, (City Ct.) 33 N. Y. Supp. 271; *Mass v. Ellis*, (City Ct.) 9 N. Y. St. Rep. 512; *Smith v. Simmons*, 66 Hun (N. Y.) 628, 21 N. Y. Supp. 47; *Jagan v. Goetz*, 11 Misc. Rep. (N. Y. C. Pl.) 380.

2. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 296. See also the following cases:

Arkansas. — *Vaden v. Ellis*, 18 Ark. 355; *Berman v. Wolf*, 40 Ark. 251.

Illinois. — *Miller v. Dobson*, 6 Ill. 572; *Deitrich v. Waldron*, 90 Ill. 115; *Stern v. People*, 96 Ill. 475; *Robertson v. Morgan*, 38 Ill. App. 137; *Barton v. Harris*, 39 Ill. App. 106; *Illinois Cent. R. Co. v. O'Keefe*, 49 Ill. App. 320; *Smith v. Kahill*, 17 Ill. 67; *Block v. Jacksonville*, 36 Ill. 301; *Drew v. Beall*, 62 Ill. 164; *McClurkin v. Ewing*, 42 Ill. 283; *McCormick Harvesting Mach. Co. v. Adele*, 47 Ill. App. 542.

Indiana. — *Scott v. State*, 29 Ind. 219; *Kline v. Sinnissippi Ins. Co.*, 29 Ind. 293; *Henley v. McNoun*, 76 Ind. 380; *Indiana Imp. Co. v. Wagner*, 138 Ind. 658; *Johnson v. Bell*, 10 Ind. 363.

Michigan. — *Knop v. National F. Ins. Co.*, 101 Mich. 359.

Mississippi. — *Fondren v. Durfee*, 39 Miss. 324; *Fisher v. Fisher*, 43 Miss. 212; *Campbell v. Pittman*, (Miss. 1888) 3 So. Rep. 455.

Missouri. — *McIrvine v. Thompson*, 81 Mo. 647; *Hart v. Walker*, 31 Mo. 26; *Bateson v. Clark*, 37 Mo. 34; *State v. Marshall*, 36 Mo. 403; *Wentzville Tobacco Co. v. Walker*, 123 Mo. 662; *Zimmerman v. Downey*, 66 Mo. App. 106, 2 Mo. App. Rep. 1315; *State v. Gaither*, 77 Mo. 305; *Wilson v. Haxby*, 76 Mo. 345; *State v. Harvey*, 105 Mo. 316.

West Virginia. — *Snodgrass v. Copenhaver*, 34 W. Va. 171.

Wisconsin. — *Cotton v. Watkins*, 6 Wis. 629; *Webster v. Modlin*, 12 Wis. 368.

Contra. — No exception is necessary to an order denying a new trial. *State v. Central Pac. R. Co.*, 17 Nev. 259; *Doyle v. Gill*, 59 Wis. 518.

3. See article ASSIGNMENT OF ERRORS, vol. 2, p. 920.

If the Transcript Fails to Show Any Exception by either party on the trial an order granting a new trial for "errors of law occurring at the trial and duly excepted to by the defendants" will be set aside. *Mazkewitz v. Pimentel*, 83 Cal. 450.

The Exception Need Not Be Stated in Terms if it clearly appears on record that the appellant did object to the overruling of its motion for a new trial. *Van Winkle v. Blackford*, 28 W. Va. 670.

Where the order overruling a motion recites that the defendant was allowed thirty days to file a bill of exceptions it sufficiently appears that the order refusing a new trial was excepted to. *Gilmer v. Sydenstricker*, 42 W. Va. 52.

The Sufficiency of the Evidence to Sustain the Verdict may be reviewed if the

6. Review — a. REVIEW OF ERRORS ASSIGNED ONLY. — An appeal from the order granting or refusing a new trial does not, in most states, bring up the whole case for review, but only the errors assigned in the motion.¹ But the practice is not uniform.² On appeal from the order the appellate court will not review the pleadings or rulings thereon.³

Review Limited to Grounds in the Motion Assigned as Error. — The Supreme Court will consider only such questions as were presented to the lower court by a motion for a new trial, and not other errors or exceptions not included as grounds for a new trial.⁴ But criminal

facts appear in the record, although the bill of exceptions does not recite the filing of a motion for a new trial or its refusal and exception thereto. *Fleischman v. Shoemaker*, 2 Ohio Cir. Ct. Rep. 152.

1. *Alabama*. — *Mobile v. Murphree*, 96 Ala. 141.

California. — *Meerholz v. Sessions*, 9 Cal. 277; *Martin v. Matfield*, 49 Cal. 42; *Thompson v. Patterson*, 34 Cal. 542; *Matter of Westerfield*, 96 Cal. 113; *Evans v. Paige*, 102 Cal. 132; *Riverside Water Co. v. Gage*, 108 Cal. 240; *Andrews v. Wilbur*, (Cal. 1895) 41 Pac. Rep. 790.

Connecticut. — *Shoninger v. Peabody*, 59 Conn. 588.

Georgia. — *Nunez v. Southern Express Co.*, 45 Ga. 314.

Indiana. — *Robinson v. Wise*, 74 Ind. 46.

Nevada. — *McWilliams v. Herschman*, 5 Nev. 263; *Barnes v. Sabron*, 10 Nev. 217; *Simpson v. Ogg*, 18 Nev. 28.

Ohio. — *Marietta, etc., R. Co. v. Strader*, 29 Ohio St. 448.

South Carolina. — *Webber v. Ahrens*, 36 S. Car. 585.

Wisconsin. — *Smith v. Welch*, 10 Wis. 91.

United States. — *Kerr v. Clappitt*, 95 U. S. 188; *Sparrow v. Strong*, 4 Wall. (U. S.) 584.

2. *Contra*. — *Hanscom v. Tower*, 17 Cal. 518; *Walden v. Murdock*, 23 Cal. 540; *Stevenson v. Smith*, 28 Cal. 102; *Wolf v. Great Falls Water Power, etc., Co.*, 15 Mont. 49; *Keyes v. Devlin*, 3 E. D. Smith (N. Y.) 518; *Gaffney v. Chapman*, 4 Robt. (N. Y.) 275; *Hynes v. McDermott*, 7 Abb. N. Cas. (N. Y. C. Pl.) 98; *Tate v. McCormick*, 23 Hun (N. Y.) 218; *Mass v. Ellis*, (City Ct.) 9 N. Y. St. Rep. 512.

8. Review of Pleadings and Rulings Thereon — *California*. — *Jenkins v. Frink*, 30 Cal. 586; *Heilbron v. Centre-*

ville, etc., Irrigation Ditch Co., 76 Cal. 8; *Wheeler v. Kassabaum*, 76 Cal. 90; *Bode v. Lee*, 102 Cal. 583; *Goodnow v. Parker*, 112 Cal. 437; *Taylor v. Hill*, 115 Cal. 143.

Indiana. — *Cincinnati, etc., R. Co. v. Washburn*, 25 Ind. 259; *Gray v. Singer*, 137 Ind. 257; *Standard Oil Co. v. Bowker*, 141 Ind. 12.

Minnesota. — *Minneapolis, etc., R. Co. v. Home Ins. Co.*, 64 Minn. 61.

Montana. — *Scherrer v. Hale*, 9 Mont. 63.

New York. — *Hendricks v. Decker*, 35 Barb. (N. Y.) 298.

Wisconsin. — *Flanagan v. Chicago, etc., R. Co.*, 45 Wis. 98.

4. *Alabama*. — *Mobile v. Murphree*, 96 Ala. 141.

Arkansas. — *Mills v. Jones*, 27 Ark. 506.

California. — *Himmelmahn v. Hoadley*, 44 Cal. 213; *Moore v. Murdock*, 26 Cal. 514; *Crowther v. Rowlandson*, 27 Cal. 376; *Vassault v. Seitz*, 31 Cal. 225; *Hawkins v. Abbott*, 40 Cal. 639.

Illinois. — *Clause v. Bullock Printing Press Co.*, 20 Ill. App. 113; *Stuve v. McCord*, 52 Ill. App. 331; *Ottawa, etc., R. Co. v. McMath*, 91 Ill. 104; *Hardy v. Chicago, etc., R. Co.*, 58 Ill. App. 278; *McClurkin v. Ewing*, 42 Ill. 283; *Baylor v. Baylor*, 9 Ill. App. 410; *St. Louis Consol. Coal Co. v. Schaefer*, 135 Ill. 210; *Hintz v. Graupner*, 138 Ill. 158; *Radeke v. Cook*, 21 Ill. App. 595; *Geist v. Pollock*, 58 Ill. App. 429.

Indiana. — *Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Vesey v. Reynolds*, 14 Ind. 444; *Myers v. State*, 47 Ind. 293; *Kernodle v. Gibson*, 114 Ind. 451.

Iowa. — *Gray v. Chicago, etc., R. Co.*, 75 Iowa 100.

Kansas. — *Leavenworth, etc., R. Co. v. Whitaker*, 42 Kan. 634.

Kentucky. — *McLain v. Dibble*, 13 Bush (Ky.) 297; *Farmer v. Gregory*, 78

cases may be reversed for grounds not specified in the motion.¹ The court will also refuse to consider such grounds as were not assigned as error on appeal.²

b. OBJECTIONS NOT PRESENTED TO LOWER COURT. — Objections to the form and sufficiency of the notice and motion, and to the regularity of the proceedings, must be made in the lower court and a ruling obtained thereon, or they will not be considered on appeal.³

Ky. 475; Slater *v.* Sherman, 5 Bush (Ky.) 206; Bland *v.* Gaither, (Ky. 1889) 11 S. W. Rep. 423.

Mississippi. — Bell *v.* Flaherty, 45 Miss. 694; Barney *v.* Scherling, 40 Miss. 320.

Missouri. — Hildreth Printing Co. *v.* Stokes, 14 Mo. App. 591; Bollinger *v.* Carrier, 79 Mo. 318; Krum *v.* Jones, 25 Mo. App. 71; Middleton Grocer Co. *v.* Day, 54 Mo. App. 419.

Montana. — Griswold *v.* Boley, 1 Mont. 545; Caron *v.* Wood, 10 Mont. 500.

North Carolina. — Leak *v.* Covington, 99 N. Car. 559.

North Dakota. — Illstad *v.* Anderson, 2 N. Dak. 167.

Ohio. — Remington *v.* Harrington, 8 Ohio 507.

Oklahoma. — Walter A. Wood Mowing, etc., Co. *v.* Farnham, 1 Okla. 375.

South Dakota. — Tootle *v.* Petrie, 8 S. Dak. 19.

Texas. — Bonnell *v.* Prince, 11 Tex. Civ. App. 399; Marsalis *v.* Crawford, 8 Tex. Civ. App. 485, *disapproving* Hammond *v.* Garcia, (Tex. Civ. App. 1894) 25 S. W. Rep. 823.

West Virginia. — Gregory *v.* Ohio River R. Co., 37 W. Va. 606.

1. *Criminal Cases.* — Dunn *v.* State, 2 Ark. 229; State *v.* Pratt, 20 Iowa 267; Johnson *v.* Com., 9 Bush (Ky.) 224.

The general rule, however, is that in criminal cases exceptions must be taken and errors assigned in the motion for a new trial as in civil cases.

Illinois. — Steffy *v.* People, 130 Ill. 98.

Indiana. — Hufford *v.* State, 6 Ind. 365; Leyner *v.* State, 8 Ind. 490; State *v.* Smith, 8 Ind. 485; Nutter *v.* State, 9 Ind. 178; Jones *v.* State, 11 Ind. 357; Simons *v.* State, 25 Ind. 331; Cheek *v.* State, 37 Ind. 533; Cox *v.* State, 49 Ind. 568; Schlicht *v.* State, 56 Ind. 173; Beard *v.* State, 57 Ind. 8; Gillooly *v.* State, 58 Ind. 182; Adams *v.* State, 65 Ind. 565; McClary *v.* State, 75 Ind. 260; Stout *v.* State, 78 Ind. 492; State

v. Newkirk, 80 Ind. 131; Powers *v.* State, 87 Ind. 144; Stout *v.* State, 90 Ind. 1; State *v.* Riggs, 92 Ind. 336; Garber *v.* State, 94 Ind. 219; State *v.* Lindley, 98 Ind. 48; Leverich *v.* State, 105 Ind. 277; Rauck *v.* State, 110 Ind. 384; Coleman *v.* State, 111 Ind. 563; Sutherlin *v.* State, 108 Ind. 389; Waterman *v.* State, 116 Ind. 51; Grubb *v.* State, 117 Ind. 277; Benson *v.* State, 119 Ind. 488; Archibald *v.* State, 122 Ind. 122; Marshall *v.* State, 123 Ind. 128; Drew *v.* State, 124 Ind. 9; Farley *v.* State, 127 Ind. 419; State *v.* Kern, 127 Ind. 465; Nichols *v.* State, 127 Ind. 406.

Iowa. — State *v.* Day, 60 Iowa 100.

Kentucky. — Colley *v.* Com., (Ky. 1889) 12 S. W. Rep. 132.

Massachusetts. — Com. *v.* Meserve, 154 Mass. 64.

Michigan. — People *v.* Murphy, 56 Mich. 546; People *v.* Haas, 79 Mich. 449.

Missouri. — State *v.* Meyers, 99 Mo. 107; State *v.* Luke, 104 Mo. 563; State *v.* Doyle, 107 Mo. 36.

Nebraska. — Heldt *v.* State, 20 Neb. 492; Bohanan *v.* State, 18 Neb. 57.

New York. — People *v.* Nooman, 60 Hun (N. Y.) 578, 14 N. Y. Supp. 519; People *v.* McKenna, 58 Hun (N. Y.) 609, 35 N. Y. St. Rep. 938.

Oregon. — State *v.* Gallo, 18 Oregon 423.

Tennessee. — Ring *v.* State, 91 Tenn. 617.

Texas. — Wampler *v.* State, 28 Tex. App. 352; Rowlett *v.* State, 23 Tex. App. 191.

Virginia. — Lawrence *v.* Com., 86 Va. 573.

Wisconsin. — Sisson *v.* State, 77 Wis. 273; Knoll *v.* State, 55 Wis. 249.

2. See article ASSIGNMENT OF ERRORS, vol. 2, p. 920.

3. Brady *v.* O'Brien, 23 Cal. 244; Hibernia Sav., etc., Soc. *v.* Moore, 68 Cal. 156; Sowden *v.* Idaho Quartz Min. Co., 55 Cal. 443; Dickinson *v.* Mann, 69 Ga. 729; Watts *v.* Kilburn, 7 Ga.

c. **GROUND AND REASONS OF LOWER COURT — Assigning Wrong Reason for Correct Decision.** — If on review of the whole record it appears that a new trial was properly granted, the order will not be reversed merely because the lower court assigned a wrong reason for its rulings, or based its decisions on an insufficient ground.¹ The appellate court is not confined to a consideration

354; *Cleveland v. Chambliss*, 64 Ga. 352; *Darrance v. Preston*, 18 Iowa 396; *Nudd v. Home Ins. etc., Co.*, 25 Minn. 100; *Chesley v. Mississippi, etc., Boom. Co.*, 39 Minn. 83; *Bradshaw v. Davis*, 12 Tex. 336. See *contra*, *McWilliams v. Herschman*, 5 Nev. 263.

Proceedings Not in Time. — The objection that the proceedings for a new trial were not commenced in time cannot be made for the first time on appeal. *Hodgdon v. Griffin*, 56 Cal. 610; *Brichman v. Ross*, 67 Cal. 601; *Hegard v. California Ins. Co.*, 72 Cal. 535; *Smith v. Adair*, 61 Ga. 281.

The Failure to Give Notice of intention to move for a new trial must be objected to in the lower court. *Gage v. Downey*, (Cal. 1888) 19 Pac. Rep. 113; *Beck v. Thompson*, 22 Nev. 109.

Failure to Settle Case. — Where a motion on the ground of newly discovered evidence has been heard upon affidavits it is too late on appeal to object that the motion was not made on a case as provided by the *New York Code Civ. Pro.*, § 997. *Russell v. Randall*, 123 N. Y. 436, *reversing* 56 Hun (N. Y.) 642, 9 N. Y. Supp. 327.

Where no objection is made to the correctness of a transcript of the entire evidence on a motion for a new trial, it is too late to object on appeal from an order granting a new trial that the motion should have been made on a case settled. *Boyd v. Boyd*, 11 Misc. Rep. (N. Y. C. Pl.) 357, *reversing* 10 Misc. Rep. (N. Y. City Ct.) 498.

Failure to Sign Motion. — The objection that the motion for a new trial was not signed by a party or his attorney cannot be made for the first time on appeal. *Crust v. Evans*, 37 Kan. 263.

I. Bolton v. Stewart, 29 Cal. 615; *Grant v. Moore*, 29 Cal. 644; *Coghill v. Marks*, 29 Cal. 673; *McCreary v. Cockrill*, 3 Kan. 37; *Siller v. Cooper*, 4 Bibb (Ky.) 90; *Morrow v. St. Paul City R. Co.*, 65 Minn. 382; *Munro v. Potter*, 34 Barb. (N. Y.) 358; *Gillespie v. Torrance*, 7 Abb. Pr. (N. Y. Super. Ct.) 462; *Deland v. Richardson*, 4 Den. (N. Y.) 95; *Davis v. Spencer*, 24 N. Y. 386; *Scott v. Pilkington*, 15 Abb. Pr.

(N. Y. Supreme Ct.) 280; *Mills v. Van Voorhies*, 20 N. Y. 412; *Shrewsbury v. Miller*, 10 W. Va. 115.

If an order granting a new trial can be justified on grounds of error in law occurring during the trial, it should be affirmed although the trial court assigned a wrong reason for granting a new trial. *Shanklin v. Hall*, 100 Cal. 26.

Where it is clear that a new trial was granted on one ground of the motion, the only question for the appellate court is whether the trial court erred in granting the motion on that ground. *Georgia R. Co. v. Letchworth*, 73 Ga. 88.

The Supreme Court reviews the action of the court below, and not the reasons upon which the action is based. Thus, where a trial judge assigned as a reason for overruling a motion for a new trial and for sustaining a judgment for damages against a city, that the city could appeal without a bond and had plenty of money, the Supreme Court refused to reverse such ruling, the verdict being correct as rendered. *Galveston v. Hemmis*, 72 Tex. 558.

Section 2241, Rev. Stat. Mo. 1889, providing that every order allowing a new trial shall specify of record the ground on which it is granted, does not prevent the appellate court from sustaining the order on any ground set out in the motion although it is not assigned in the opinion as a reason for granting the new trial. *Hewitt v. Steele*, 118 Mo. 463; *Burke v. Kansas City*, 34 Mo. App. 570. But see *contra*, *Kaufman-Wilkinson Lumber Co. v. Christophel*, 59 Mo. App. 80; *Millar v. Madison Car Co.*, 130 Mo. 517.

The appellate court is not confined to the reasons given by the trial court. If the order granting a new trial can be justified on any of the grounds on which the motion is based it will be affirmed. *Nally v. McDonald*, 77 Cal. 284.

Where it is clear that a new trial was granted on the ground that all of the instructions given by the court were erroneous, it cannot be urged that the order should be affirmed because some

of the reasons advanced by the lower court.¹

7. Presumptions — a. THAT DECISION IS CORRECT. — The presumption is that the decision of the trial court on a motion for a new trial is in accordance with the law and facts of the case, unless the contrary clearly appears.²

of the instructions are erroneous. *Stuber v. Gannon*, 98 Iowa 228.

1. Review of Reasons for Decision of Trial Court. — Where the statute requires the grounds upon which a new trial is granted to be specified of record, and the trial court specifies but two of the grounds in the motion as sufficient for granting the new trial, this in effect overrules the motion as to the other grounds stated therein. *Bradley v. Reppell*, 133 Mo. 545.

On appeal the appellant need only show that the grounds of the decision of the trial court are without merit. If, however, the party in whose favor the order for a new trial goes can make it clear from the record brought up (on his adversary's appeal) that the order was right for reasons assigned in his motion other than those on which the trial judge based the order, such order will be affirmed on the general principle that an appellate court should always sustain a correct result though it may have been brought about by an erroneous process of reasoning. *Ittner v. Hughes*, 133 Mo. 679.

See also article APPEALS, vol. 2, p. 372.

2. Alabama. — *McGehee v. Hansell*, 13 Ala. 17.

Arkansas. — *Turner v. Huggins*, 14 Ark. 21.

California. — *Hammel v. Stone*, (Cal. 1887) 14 Pac. Rep. 675; *Patrick v. Morse*, 64 Cal. 462; *Austin v. Gagan*, (Cal. 1892) 30 Pac. Rep. 790; *Minturn v. Bliss*, 77 Cal. 90.

Connecticut. — *Hoey v. Hoey*, 36 Conn. 386.

District of Columbia. — *Schwartz v. Reesch*, 2 App. Cas. (D. C.) 440.

Georgia. — *Comer v. Grannis*, 66 Ga. 255.

Indiana. — *Jones v. Jones*, 4 Blackf. (Ind.) 140; *Hau v. Wilson*, 28 Ind. 296; *Beach v. Zimmerman*, 106 Ind. 495; *Garrigan v. Dickey*, 1 Ind. App. 421; *Cleveland, etc., R. Co. v. Davis*, 10 Ind. App. 342.

Iowa. — *Hallenbeck v. Garst*, 96 Iowa 509; *Seekel v. Norman*, 71 Iowa 264; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Finley v. David*, 7 Iowa 3; *Wetmore v. Mellinger*, 64 Iowa 741.

Kansas. — *Tilton v. Knapp*, 14 Kan. 310.

Kentucky. — *Gist v. Higgins*, 1 Bibb (Ky.) 303; *Bank of Com. v. Hiles*, 4 Dana (Ky.) 598.

Minnesota. — *Nudd v. Home Ins., etc., Co.*, 25 Minn. 100.

Nevada. — *Phillipotts v. Blasdel*, 8 Nev. 61.

New York. — *Anderson v. Sherwood*, (Supreme Ct.) 9 N. Y. St. Rep. 636; *Martin v. Platt*, 61 Hun (N. Y.) 626, 16 N. Y. Supp. 115, affirming 26 Abb. N. Cas. (N. Y.) 382.

Texas. — *Goss v. Pilgrim*, 28 Tex. 263; *Ashcroft v. Pouns*, 1 Tex. 594.

Utah. — *Darke v. Ireland*, 4 Utah 192.

United States. — *Fowler v. Equitable Trust Co.*, 141 U. S. 384.

As to Presumptions on Appeal generally, see article APPEALS, vol. 2, p. 420.

Presumption as to Abuse of Discretion. — It will always be presumed that the discretion of the trial court has been rightly exercised unless the contrary plainly appears. *Edsall v. Ayres*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Finley v. David*, 7 Iowa 3; *Ruble v. McDonald*, 7 Iowa 90.

Where the reasons for granting a new trial are not stated by the trial court or requested by the parties, the Supreme Court will presume that the trial judge properly exercised his discretion. *East Tennessee, etc., R. Co. v. Lee*, 90 Tenn. 570.

The appellate court will not disturb an order granting a new trial which is in the discretion of the trial court, though founded in part on an erroneous proposition of facts, where there is nothing in the record to show that the court based its conclusions solely on such proposition. *Reed v. Chicago, etc., R. Co.*, 71 Wis. 399.

Presumption as to Grounds of Decision. — Where the grounds of the decision are required by statute to be set forth in the order granting or refusing a new trial, it is presumed on appeal that the court based its decision on the grounds specified in the order. *Millar v. Madison Car Co.*, 130 Mo. 517.

Presumption of Prejudice. — Where the

b. AS TO REASONS FOR GRANTING NEW TRIAL — Where Several Grounds Were Included in Motion. — Where a motion for a new trial is based upon several grounds and is granted by the court without assigning any one of the grounds, the appellate court will presume that the lower court based its decision upon a sufficient ground rather than upon an insufficient one.¹

c. AS TO REASONS FOR REFUSING NEW TRIAL. — Where a new trial was denied the presumption is that the court acted on sufficient reasons, but it is not clear whether it should be presumed that the new trial was refused because the motion was not filed in time² or because the showing was not sufficient to justify

trial court has granted a new trial on the ground of the submission of an improper issue to the jury, the Supreme Court will, in the absence of evidence, presume that such submission was prejudicial to the appellee. *Stutz v. Chicago, etc., R. Co.*, 69 Wis. 312.

Presumption that Trial Court Decided Question of Passion and Prejudice. — "It must be admitted that the damages awarded plaintiff were small. * * * But the weight of the evidence and the amount of damages to be awarded were for the consideration of the jury, who had the opportunity of meeting the witnesses face to face and of observing their demeanor on the witness stand. The trial judge had the same opportunities, and if there had been anything justifying the imputation that the verdict was the result of bias or prejudice, it must be presumed that he would have set the verdict aside and granted a new trial." *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579.

Presumption as to Law Question. — Where a new trial has been granted or refused upon some proposition of law there is no especial presumption in favor of the correctness of the ruling. *Santa Marina v. Connolly*, 79 Cal. 517; *Byington v. Woodward*, 9 Iowa 360.

1. *Oullahan v. Starbuck*, 21 Cal. 413; *Taylor v. Central R., etc., Co.*, 79 Ga. 330; *White v. Beck*, 64 Iowa 122; *Wightman v. Butler County*, 83 Iowa 691; *Barney v. Dudley*, 40 Kan. 247; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *State v. Adams*, 84 Mo. 310.

Where error is alleged in sustaining a motion for a new trial, it must appear affirmatively, before a reversal can be had, that none of the grounds of the motion is sufficient. *Ryan v. Topeka Bridge Co.*, 7 Kan. 207.

On appeal, where the order overruling a motion for a new trial is assigned

as error, and it appears that it was assigned as cause for a new trial that "the court erred in giving to the jury instructions numbered from one to seventeen, inclusive," the order will be sustained if any one of the instructions so designated is correct. *Ohio, etc., R. Co. v. McCartney*, 121 Ind. 385.

Newly Discovered Evidence. — Where a motion for a new trial was based upon newly discovered evidence and other causes, and the record does not show upon what ground the new trial was granted, the Supreme Court will not assume that it was granted for newly discovered evidence. *Waddle v. Megee*, 81 Ind. 247.

Insufficiency of Evidence. — It will be presumed that a new trial was granted for insufficiency of the evidence where the grounds do not appear of record. *Craig v. Allen*, (Cal. 1886) 9 Pac. Rep. 429; *Renton v. Cannon*, (Cal. 1886) 9 Pac. Rep. 423; *Kircher v. Conrad*, 9 Mont. 191; *Young v. Stone*, 77 Hun (N. Y.) 395.

2. Presumption that Motion Was Not Filed in Time. — It will be presumed that a motion for a new trial was overruled because the motion was not made and filed in time, unless the contrary is disclosed by the record. *Lucas v. Sturr*, 21 Kan. 480; *Dyal v. Topeka*, 35 Kan. 62; *Hover v. Tenney*, 27 Kan. 133; *Douglass v. Insley*, 34 Kan. 604; *Burtiss v. La Belle Wagon Co.*, 45 Kan. 413; *Giles v. Austin*, 54 Kan. 616; *Wanamaker v. Manufacturers' Nat. Bank*, 2 Kan. App. 649; *Eskridge v. Lewis*, 51 Kan. 376; *State v. Carondelet Sav. Bank*, 6 Mo. App. 582; *Taylor v. Genail*, 10 Mo. App. 250.

Where a motion is not filed within three days it will be presumed that the applicant was unavoidably prevented from filing his motion in time and that the court treated the motion as suffi-

a new trial.¹

8. Discretion of Lower Court — a. IN GENERAL. — The rule that the trial court has considerable latitude of discretion in granting or refusing new trials has been stated elsewhere and the reasons of the rule explained. The question on review of the order of the lower court is not whether the appellate court would have granted the new trial had the application been made to it under the circumstances shown, but whether the lower court abused the discretion reposed in it, by depriving a party of a substantial right or by failing to exercise a sound practical judgment under the circumstances of the case.²

b. AS TO VARIOUS GROUNDS. — In the treatment of the various grounds for a new trial the latitude of discretion has been noted. The general rule is that the decision of the trial court on a motion for a new trial will not be disturbed on appeal unless there has been an abuse of discretion.³

cient and passed upon the merits of the case and refused to grant the motion on the ground stated therein. *Fordyce v. Hardin*, 54 Ark. 554.

Where a new trial was granted it will be presumed that the motion was filed within three days from the final decision of the case although the record does not show when such decision was rendered. *Wichita, etc., R. Co. v. Johnson*, 47 Kan. 351.

Where the record shows that the court entertained the motion and denied it on the merits, it will be presumed that the motion was filed in time. *Parrish v. Pensacola, etc., R. Co.*, 28 Fla. 251.

A recital in the bill of exceptions that the motion for a new trial was filed in due time is sufficient evidence that it was filed in time. *Mesker v. Cutler*, 51 Mo. App. 341.

1. Presumption of Decision on Merits. — Where the motion is not in the record, but the decree recites that it was made and overruled, it will be presumed that the motion was in writing and filed in time, and that the court overruled it on the merits. *Scott v. Rowland*, 82 Va. 498.

Where no objection was made that a motion was not filed in time, it will be presumed on appeal that a good cause was shown for making it more than two days after the conviction and that it was overruled on the merits. *Hart v. State*, 21 Tex. App. 163.

Where a new trial has been denied the presumption is that the court overruled the ground stated in the motion, and was not influenced by matters of

practice, such as the time of filing the brief of evidence, the motion, etc. *Augusta R. Co. v. Andrews*, 89 Ga. 653.

It is presumed that the trial court acted solely on the grounds specifically stated in the motion, and the order setting aside the verdict will be reversed where such grounds are insufficient. *Probst v. Braeunlich*, 24 W. Va. 356.

It will not be presumed that a new trial was granted on the merits when a motion to refuse a new trial on the ground that no bill of exceptions had been filed by the applicant has been sustained. *Emery v. Emery*, 54 Iowa 106.

2. See supra, XV. Decision of Motion — General Principles Governing.

Excessive Damages. — On review of an order granting a new trial for excessive damages the question presented to the appellate court is not whether the damages awarded are so excessive as to shock the sense of the court or evince partiality or prejudice. The only question presented is whether the trial court abused its discretion, or failed to exercise a sound practical judgment upon all the relevant facts before it. *Pratt v. Pioneer-Press Co.*, 32 Minn. 217.

3. Decision Sustained Unless an Abuse of Discretion Clearly Appears — Misconduct of Attorney. — *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; *Sunberg v. Babcock*, 66 Iowa 515; *Watson v. St. Paul City R. Co.*, 42 Minn. 46; *Olson v. Gjertsen*, 42 Minn. 407; *Lane v. Madison*, 86 Wis. 453.

Misconduct in Argument. — *McNabb v. Lockhart*, 18 Ga. 495; *Ferguson v.*

c. ORDER GRANTING NEW TRIAL — **Reversed for Manifest Abuse of Discretion.** — The general rule is that an order granting a new trial will not be reversed unless there has been a manifest abuse of discretion.¹ This rule requiring a showing of an abuse of discretion

State, 49 Ind. 33; St. Louis, etc., R. Co. v. Mathias, 50 Ind. 65; Combs v. State, 75 Ind. 215; Dowdell v. Wilcox, 64 Iowa 721; Scripps v. Reilly, 35 Mich. 371; Barden v. Briscoe, 36 Mich. 254; State v. Hamilton, 55 Mo. 520; State v. Waltham, 48 Mo. 55; Huckshold v. St. Louis, etc., R. Co., 90 Mo. 548; Overcash v. Kitchie, 89 N. Car. 384; Thompson v. Barkley, 27 Pa. St. 263; Kaime v. Omro, 49 Wis. 371.

Misconduct of Jury.—Dixon v. Pluns, 101 Cal. 511; Smith v. Lovejoy, 62 Ga. 372; Sawyer v. Stephenson, 1 Ill. 24; Alexander v. Thomas, 25 Ind. 268; Myers v. Conway, 62 Ind. 474; Whistler v. Teague, 66 Ind. 565; Hodges v. Bales, 102 Ind. 494; Dill v. Lawrence, 109 Ind. 564; De Hart v. Etnire, 121 Ind. 242; Stevens v. Stevens, 127 Ind. 560; Stewart v. Burlington, etc., R. Co., 11 Iowa 62; Fairchild v. Snyder, 43 Iowa 23; Perry v. Cottingham, 63 Iowa 41; Copper v. Dolvin, 68 Iowa 757; Light v. Chicago, etc., R. Co., 93 Iowa 83; Thompson v. Anderson, 94 Iowa 554; Peterman v. Jones, 94 Iowa 591; Hewitt v. Pioneer-Press Co., 23 Minn. 178; Jones v. Parker, 97 N. Car. 33; Downer v. Baxter, 30 Vt. 467.

Mistake or Perjury of Witness.— Unless it appears that there was an abuse of discretion in granting or refusing a new trial for perjury or mistake of a witness, the appellate court will not interfere. Hewey v. Nourse, 54 Me. 256; Jaccard v. Davis, 43 Mo. 535; Martin v. Block, 24 Mo. App. 60; Sly v. Union Depot R. Co., 134 Mo. 651.

1. **California.**—Drake v. Palmer, 2 Cal. 177; Palmer v. Stewart, 2 Cal. 348; Watson v. McClay, 4 Cal. 288; Duell v. Bear River, etc., Min. Co., 5 Cal. 84; Hanson v. Barnhisel, 11 Cal. 340; Peters v. Foss, 16 Cal. 357; Savage v. Sweeney, 63 Cal. 340; Blum v. Sunol, 63 Cal. 341; Hynes v. Nelson, (Cal. 1884) 2 Pac. Rep. 36; Lewis v. Adams, (Cal. 1885) 7 Pac. Rep. 779; Minturn v. Bliss, 77 Cal. 90.

District of Columbia.—Woods v. Richmond, etc., R. Co., 1 App. Cas. (D. C.) 165.

Georgia.—Spears v. Smith, 7 Ga. 436; Lane v. Cunningham, 51 Ga. 334;

Robbe v. Hewitt, 54 Ga. 260; Smith v. Ehlen, 57 Ga. 610; Delane v. Central R., etc., Co., 59 Ga. 633; Brown v. State, 60 Ga. 594; Vanzant v. State, 63 Ga. 158; Cochran v. Knowles, 63 Ga. 163; Story v. Collins, 66 Ga. 256; Steele v. Payne, 67 Ga. 766; Smith v. Sapp, 69 Ga. 756; Grice v. Grice, 69 Ga. 760; Dean v. Georgia Pac. R. Co., 79 Ga. 211; Smith v. Savannah, etc., R. Co., 86 Ga. 195; Georgia Midland, etc., R. Co. v. Curry, 90 Ga. 250; McCrary v. Glover, 92 Ga. 447; Johnson v. Harris, 93 Ga. 560; Mondon v. Western Union Tel. Co., 94 Ga. 716; Edwards v. Worley, 66 Ga. 755; Starling v. Western Union Tel. Co., 94 Ga. 224; Aldine Mfg. Co. v. Warner, 95 Ga. 566; Pelligrini v. Cunningham, 92 Ga. 572; Story v. Central R., etc., Co., 92 Ga. 574; Henderson v. East Tennessee, etc., R. Co., 94 Ga. 716; Tillman v. Fontaine, 94 Ga. 717; Williams v. Greenwich Ins. Co., 94 Ga. 717; Wood v. Southern Express Co., 95 Ga. 451; Pearce v. Pullen, 96 Ga. 783; Mann v. Van Dyke, 97 Ga. 339; Appling v. Lowry Banking Co., 97 Ga. 379; White v. Singer Mfg. Co., 97 Ga. 411; Axson v. Belt, 97 Ga. 427; Flournoy v. Stevens, 94 Ga. 718; Denson v. Denson, 97 Ga. 359; Hill v. Rome St. R. Co., 99 Ga. 103; Stuckey v. Etna Furnace Co., 99 Ga. 116; Etna Furnace Co. v. Sparks, 99 Ga. 117.

Idaho.—Jacksha v. Gilbert, (Idaho 1896) 44 Pac. Rep. 555.

Illinois.—Millikin v. Taylor, 53 Ill. 509.

Indiana.—Nagle v. Hornberger, 6 Ind. 69; Powell v. Grimes, 8 Ind. 252; Leppar v. Enderton, 9 Ind. 353; Cronk v. Cole, 10 Ind. 485; Hust v. Conn, 12 Ind. 257; Shaw v. Merchants' Nat. Bank, 60 Ind. 83; Rooker v. Parsley, 72 Ind. 497; Fitzpatrick v. Papa, 80 Ind. 17; Barner v. Bayless, 134 Ind. 600; Cleveland, etc., R. Co. v. Davis, 10 Ind. App. 342.

Iowa.—Stewart v. Ewbank, 3 Iowa 191; Finley v. David, 7 Iowa 3; Ruble v. McDonald, 7 Iowa 396; Newell v. Sanford, 10 Iowa 396; Caffrey v. Groome, 10 Iowa 548; Hill v. Denslinger, 61 Iowa 240; Peebles v. Peebles, 77 Iowa 11.

before an appellate court will reverse an order of the trial court granting a new trial has been applied to new trials granted for newly discovered evidence,¹ for insufficiency of the evidence,² for accident and surprise,³ for absence of an attorney or party,⁴ and

- Kansas.* — *Sedan v. Church*, 29 Kan. 190.
Minnesota. — *Marsh v. Webber*, 13 Minn. 109; *Adams v. Hastings, etc.*, R. Co., 18 Minn. 260.
Mississippi. — *Frizzell v. White*, 27 Miss. 198.
Nebraska. — *Sang v. Beers*, 20 Neb. 365.
New York. — *Talcott v. Cowdrey*, (City Ct.) 13 N. Y. St. Rep. 716.
Ohio. — *Beatty v. Hatcher*, 13 Ohio St. 115.
South Dakota. — *Thompson v. Ulrikson*, 8 S. Dak. 567.
Texas. — *Bass v. Hays*, 38 Tex. 128.
Wisconsin. — *Duffy v. Chicago, etc.*, R. Co., 34 Wis. 188; *Semaan v. Burnham*, 57 Wis. 568; *Evans v. Rugee*, 63 Wis. 31; *H. S. Benjamin Wagon, etc.*, Co. v. Merchants' Exch. Bank, 63 Wis. 470; *Mullen v. Reinig*, 68 Wis. 408.
If the Verdict Was in Fact Sustained by sufficient evidence, an order granting a new trial will be reversed as an abuse of discretion. *Wendel v. North*, 26 Wis. 379.
1. Newly Discovered Evidence. — *California.* — *Mowry v. Raabe*, 89 Cal. 606; *Gruss v. Robertson*, (Cal. 1894) 37 Pac. Rep. 772.
Georgia. — *Sterling v. Arnold*, 54 Ga. 690.
Idaho. — *Heilner v. Brown*, 2 Idaho 242.
Indiana. — *House v. Wright*, 22 Ind. 383.
Iowa. — *Powers v. Bridges*, 1 Greene (Iowa) 235; *Shepherd v. Brenton*, 15 Iowa 84; *Able v. Frazier*, 43 Iowa 175; *Lundon v. Waddick*, 98 Iowa 478.
Kentucky. — *Ewing v. Price*, 3 J. J. Marsh. (Ky.) 520.
Missouri. — *Cook v. St. Louis, etc.*, R. Co., 56 Mo. 380; *Howland v. Reeves*, 25 Mo. App. 458.
New York. — *Glassford v. Lewis*, 82 Hun (N. Y.) 46; *Clark v. New York Cent., etc.*, R. Co., 4 N. Y. App. Div. 331.
North Carolina. — *Holmes v. Godwin*, 69 N. Car. 467.
North Dakota. — *Patch v. Northern Pac. R. Co.*, 5 N. Dak. 55.
South Dakota. — *Grant v. Grant*, 6 S. Dak. 147.
Texas. — *Sweeney v. Jarvis*, 6 Tex. 36.
Wisconsin. — *Jones v. Evans*, 28 Wis. 168; *Bigelow v. Sickles*, 75 Wis. 427.
2. See infra, XXI. 9. b. Sufficiency of Evidence.
3. Accident and Surprise. — *Arkansas.* — *Coker v. State*, 20 Ark. 53; *Shepherd v. State*, 34 Ark. 659; *Merrick v. Britton*, 26 Ark. 498; *Anderson v. State*, 41 Ark. 229.
California. — *Nooney v. Mahoney*, 30 Cal. 226; *Moore v. Los Angeles Infirmary*, 49 Cal. 669.
Indiana. — *Hill v. Goode*, 18 Ind. 207; *Todd v. State*, 25 Ind. 212.
Iowa. — *Schumaker v. Gelpcke*, 11 Iowa 84; *Sanders v. Clark*, 22 Iowa 275; *Pickering v. Kirkpatrick*, 32 Iowa 163; *Hill v. Denslinger*, 61 Iowa 240.
Kansas. — *Board of Regents v. Linscott*, 30 Kan. 240.
Kentucky. — *King v. Walker*, 1 A. K. Marsh. (Ky.) 313.
Mississippi. — *Dorr v. Watson*, 28 Miss. 383.
Nebraska. — *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224.
Nevada. — *Sultan v. Sherwood*, 18 Nev. 454.
New York. — *Mulford v. Yager*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 371; *Lawrence v. Ely*, 38 N. Y. 42; *Williams v. Montgomery*, 60 N. Y. 648; *Platt v. Munroe*, 34 Barb. (N. Y.) 291; *Tyler v. Hornbeck*, 48 Barb. (N. Y.) 197; *Shuttleworth v. Winter*, 55 N. Y. 624.
Ohio. — *Ferguson v. Gilbert*, 16 Ohio St. 88.
Texas. — *Bolls v. Galloway*, 1 Tex. App. Civ. Cas., § 724.
Wisconsin. — *Lewellen v. Williams*, 14 Wis. 687; *Evans v. Rugee*, 63 Wis. 31.
Surprise from Mistake of Law. — *Johnson v. Watson*, 157 Pa. St. 454.
Surprise in Evidence. — *Nelson v. Waters*, 18 Ark. 570; *Ruger v. Bungan*, 10 Ind. 451.
4. Absence of Attorney. — Whether a new trial should have been granted for absence of counsel rests in the sound discretion of the court, and its order will rarely be disturbed. *Haight v. Green*, 19 Cal. 113; *Jacob v. McLean*, 24 Mo. 40; *Power v. Gillespie*, 27 Tex. 370; *Western Union Tel. Co. v. Brooks*, 78 Tex. 331; *Brock v. South,*

for excessive or inadequate damages.¹

Order Granting Rarely Reversed — Stronger Case Required. — Where the order granting a new trial is held to be reviewable the courts rarely reverse such order when a question of fact or of discretion is involved.² A much stronger showing is required to secure a reversal of an order granting than of one refusing a new trial.³

etc., Alabama R. Co., 65 Ala. 79; Gottheil v. Fisk, 3 Rob. (La.) 434; Hooe v. Lockwood, 3 Pin. (Wis.) 42.

Absence of Parties. — Brock v. South, etc., Alabama R. Co., 65 Ala. 79; Powell v. Westmoreland, 49 Ga. 341; Pioneer Mfg. Co. v. Callaway, 76 Ga. 105; Yates v. Mullen, 24 Ind. 277; Simonton v. Buchanan, 2 Baxt. (Tenn.) 279; Zweig v. Horicon Iron, etc., Co., 14 Wis. 356.

1. Excessive or Inadequate Damages — California. — Lee v. Southern Pac. R. Co., 101 Cal. 118; Clark v. Huber, 20 Cal. 196; Domico v. Casassa, 101 Cal. 411.

Georgia. — Murray v. Central R., etc., Co., 90 Ga. 83.

Iowa. — Blazelon v. Jenkins, 1 Mor. (Iowa) 15; Johnson v. Chicago, etc., R. Co., 94 Iowa 745; Rogers v. Winch, 65 Iowa 168.

Minnesota. — Pratt v. Pioneer-Press Co., 32 Minn. 217, 35 Minn. 251; Breen v. Watson, 34 Minn. 479; Craig v. Cook, 28 Minn. 232; Schaffer v. St. Paul, 41 Minn. 310.

New York. — Herbst v. Vacuum Oil Co., 61 Hun (N. Y.) 623, 15 N. Y. Supp. 938; Lefrois v. Monroe County, 88 Hun (N. Y.) 109; Lough v. Romaine, 36 N. Y. Super. Ct. 332.

Washington. — Rigney v. Tacoma Light, etc., Co., 9 Wash. 245.

2. An order granting a new trial on the ground that the verdict is contrary to and not sustained by the evidence will not be disturbed if there was any evidence tending in any degree to support the verdict. Engs v. Priest, 65 Iowa 232.

Where there has been a full and fair second trial, resulting in a correct verdict, such verdict will not be set aside and the first verdict reinstated unless there was a flagrant error in granting a new trial. Bell v. Fry, 5 Dana (Ky.) 341.

Finding of Referee. — An order setting aside the findings of the referee because against the weight of evidence cannot be reviewed on appeal, as such order rests within the discretion of the court. Caruth-Byrnes Hardware Co.

v. Wolter, 91 Mo. 484. Such order will not be reversed unless there has been a manifest abuse of discretion or it was based on an erroneous view of the law. Fairbanks v. Holliday, 59 Wis. 77.

3. California. — Moore v. Los Angeles Infirmary, 49 Cal. 669.

Georgia. — Oliver v. Pace, 6 Ga. 185; McGregor v. Christie, 37 Ga. 557; Murphy v. Harris, 49 Ga. 292; Robbe v. Hewitt, 54 Ga. 260.

Indiana. — Nagle v. Hornberger, 6 Ind. 69; Leppar v. Enderton, 9 Ind. 353; Hill v. Goode, 18 Ind. 207; House v. Wright, 22 Ind. 383; Hines v. Driver, 89 Ind. 344.

Iowa. — Ruble v. McDonald, 7 Iowa 90; Newell v. Sanford, 10 Iowa 396; Shepherd v. Brenton, 15 Iowa 84; Whitney v. Blunt, 15 Iowa 283; Chapman v. Wilkinson, 22 Iowa 541; White v. Poorman, 24 Iowa 108; Robinson v. Bacon, 24 Iowa 409; Roberts v. Jones, 30 Iowa 525; Tegeler v. Jones, 33 Iowa 234; Jenkins v. Chicago, etc., R. Co., 32 Iowa 97; New York Piano Forte Co. v. Mueller, 38 Iowa 552; Westphal v. Clark, 46 Iowa 262.

Kansas. — Field v. Kinnear, 5 Kan. 233; Ottawa v. Washabaugh, 11 Kan. 124; Howell v. Pugh, 25 Kan. 96; Sedan v. Church, 29 Kan. 190; Murphy v. Hindman, 37 Kan. 267.

Kentucky. — Caldwell v. Wright, 8 B. Mon. (Ky.) 526; Ford v. Gregory, 10 B. Mon. (Ky.) 182; Ewing v. Price, 3 J. J. Marsh. (Ky.) 523; Ford v. Gregory, 10 B. Mon. (Ky.) 175.

Michigan. — Stork v. Judge, 41 Mich. 5.

Mississippi. — Smith v. Walsh, 63 Miss. 584.

Missouri. — Howland v. Reeves, 25 Mo. App. 458; Helm v. Bassett, 9 Mo. 54.

Nebraska. — Bigler v. Baker, 40 Neb. 325; Weber v. Kirkendall, 44 Neb. 766; School Dist. No. 1 v. Bishop, 46 Neb. 850.

South Dakota. — Hodges v. Bierlein, 4 S. Dak. 258; Alt v. Chicago, etc., R. Co., 5 S. Dak. 20; Esshom v. Watertown Hotel Co., 7 S. Dak. 77.

But this distinction is not made where the court has committed an error of law in granting a new trial.¹

d. ORDER REFUSING NEW TRIAL — In General. — An order refusing a new trial is examined more carefully by the reviewing court, as the applicant may have been deprived of substantial rights and is without other remedy. Such orders are rarely reversed for abuse of discretion, although it is conceded that as strong a case need not be shown as where it is claimed that there was an abuse of discretion in granting a new trial. An order refusing a new trial will not be reversed unless a manifest abuse of discretion is shown.²

Newly Discovered Evidence. — The refusal of a new trial on the ground of newly discovered evidence will be reversed only for manifest error or abuse of discretion.³

Texas. — Parrott *v.* Underwood, 10 Tex. 48.

West Virginia. — Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116; Reynolds *v.* Tompkins, 23 W. Va. 229.

The Supreme Court undoubtedly possesses the power to reverse an order of an inferior tribunal, granting a new trial, for insufficiency of evidence; but it would require a strong case to justify its exercise. "Although by the terms of the statute the party supposing himself aggrieved would seem entitled to his writ of error, as well where a motion for a new trial is sustained as where it is refused, no case has occurred in practice where this court has seen fit to reverse the proceedings of a subordinate tribunal for the sole reason that it has, on motion, set aside a verdict as against evidence, and ordered a new trial." Spafford *v.* Bradley, 20 Ohio 74, quoted in Beatty *v.* Hatcher, 13 Ohio St. 115. Compare Dean *v.* King, 22 Ohio St. 134.

Insufficiency of Evidence. — A much stronger showing of abuse of discretion must be made to justify the reversal of an order granting a new trial for insufficiency of the evidence than an order refusing a new trial. House *v.* Wright, 22 Ind. 383; Ruble *v.* McDonald, 7 Iowa 90; Robinson *v.* Bacon, 24 Iowa 409; Roberts *v.* Jones, 30 Iowa 525; Jenkins *v.* Chicago, etc., R. Co., 32 Iowa 97; New York Piano Forte Co. *v.* Mueller, 38 Iowa 552; Ottawa *v.* Washabaugh, 11 Kan. 124; Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Hodges *v.* Bierlein, 4 S. Dak. 258; Alt *v.* Chicago, etc., R. Co., 5 S. Dak. 20; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116; Reynolds *v.* Tompkins, 23 W. Va. 229.

1. Error of Law. — An order granting a new trial will be reversed as readily as an order refusing it, when it was granted solely through a misapprehension of law. Schramm *v.* Southern Pac. Co., 87 Cal. 425.

Ground Not Discretionary — Error of Law. — Where a new trial is erroneously granted on a ground not discretionary, the action of the court will be corrected on appeal as readily as though the new trial had been refused. Manson *v.* Ware, 63 Iowa 345.

2. Refusal Sustained Unless Manifest Abuse of Discretion — California. — Speck *v.* Hoyt, 3 Cal. 413; Burnett *v.* Whitesides, 15 Cal. 35.

Georgia. — Green *v.* Cock, 39 Ga. 339; Van Zant *v.* State, 63 Ga. 158.

Indiana. — Edsall *v.* Ayres, 15 Ind. 286.

Iowa. — Hendricks *v.* Wallis, 7 Iowa 224; Jewett *v.* Miller, 12 Iowa 85.

Louisiana. — Sanchez *v.* Gonzales, 11 Martin (La.) 207.

Missouri. — Bobb *v.* Lambdin, 7 Mo. 601; Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177; McCullough *v.* Phoenix Ins. Co., 113 Mo. 606.

New York. — Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47.

Pennsylvania. — De Grote *v.* De Grote, 175 Pa. St. 50.

Tennessee. — Williams *v.* Elkins, 1 Heisk. (Tenn.) 88.

Wisconsin. — Rogers *v.* Bradford, 1 Pin. (Wis.) 418; Barnes *v.* Merrick, 6 Wis. 57.

3. Arkansas. — Armstrong *v.* State, 54 Ark. 364.

California. — Baker *v.* Joseph, 16 Cal. 173; Spottiswood *v.* Weir, 80 Cal. 448; O'Connor *v.* Clarke, (Cal. 1896) 44 Pac. Rep. 482.

Weight and Sufficiency of Evidence. — As the weight and sufficiency of evidence can be determined more accurately by the trial court, an order refusing a new trial on the ground of insufficiency of the evidence will not be disturbed except for a clear abuse of discretion.¹

9. Weight and Sufficiency of Evidence — a. PREPONDERANCE OF CONFLICTING EVIDENCE — Grant of New Trial. — The general rule is that an order granting a new trial on the ground that the verdict is contrary to the evidence is discretionary and will not be reversed on appeal unless it appears that there was a manifest abuse of discretion.²

Georgia. — *Wooten v. Wilkins*, 39 Ga. 223; *Harmon v. Charleston, etc.*, R. Co., 88 Ga. 261.

Illinois. — *Schaefer v. Wunderle*, 154 Ill. 577.

Indiana. — *Hodges v. Springer*, 5 Blackf. (Ind.) 103.

Iowa. — *Tanning v. M'Craney*, 1 Morr. (Iowa) 398.

Louisiana. — *Toulman v. Elliott*, 15 La. 226; *Davis v. Singleton*, 7 Rob. (La.) 56; *Devot v. Marx*, 19 La. Ann. 491.

Minnesota. — *Lampsen v. Brander*, 28 Minn. 526; *Peterson v. Faust*, 30 Minn. 22; *Eldridge v. Minneapolis, etc.*, R. Co., 32 Minn. 253.

Missouri. — *Stephens v. Macon*, 83 Mo. 345.

Ohio. — *Smith v. Bailey*, 26 Ohio St. 1; *Stuckey v. Bloomer*, 2 Ohio Cir. Ct. Rep. 541; *Weber v. Wiggins*, 11 Ohio Cir. Ct. Rep. 18.

South Carolina. — *Seegers v. McCreery*, 41 S. Car. 548.

South Dakota. — *Longley v. Daly*, 1 S. Dak. 257.

Texas. — *Ables v. Donley*, 8 Tex. 331; *Wright v. Bennett*, 1 Tex. App. Civ. Cas., § 1078; *Alexander v. Solomon*, (Tex. 1891) 15 S. W. Rep. 906; *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350.

United States. — *McLeod v. New Albany*, 66 Fed. Rep. 378.

1. *California.* — *Walton v. Maguire*, 17 Cal. 92; *Gerold v. Brunswick*, 67 Cal. 124.

Georgia. — *Hopkins v. Tilman*, 25 Ga. 212; *Hadley v. Ellis*, 31 Ga. 492; *Broughton v. Godwin*, 39 Ga. 359; *Monroe v. Carter*, 48 Ga. 174; *Burnett v. Ross*, 50 Ga. 124.

Indiana. — *Bronson v. Hickman*, 10 Ind. 3; *Colton v. Lewis*, 8 Ind. App. 40.

Iowa. — *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Jourdan v. Reed*, 1 Iowa

135; *Freeman v. Rich*, 1 Iowa 504; *Byington v. Woodward*, 9 Iowa 360; *Russ v. The Steamboat War Eagle*, 14 Iowa 363; *McKay v. Thorington*, 15 Iowa 25.

Tennessee. — *White v. Hembree*, 1 Overt. (Tenn.) 529.

Virginia. — *Bennett v. Hardaway*, 6 Munf. (Va.) 125.

Washington. — *Gove v. Moses*, 1 Wash. Ter. 7.

West Virginia. — *Jones v. Singer Mfg. Co.*, 38 W. Va. 147.

Wisconsin. — *Cook v. Helms*, 5 Wis. 107.

2. *California.* — *Watson v. McClay*, 4 Cal. 288; *O'Brien v. Brady*, 23 Cal. 243; *Phelps v. Union Copper Min. Co.*, 39 Cal. 407; *Lorenzana v. Camarillo*, 41 Cal. 467; *Simpson v. Pacific Mut. L. Ins. Co.*, 44 Cal. 139; *Bronner v. Wetzlar*, 55 Cal. 419; *Gutierrez v. Brinkerhoff*, (Cal. 1883) 1 Pac. Rep. 482; *Pico v. Cohn*, 67 Cal. 258; *Renton v. Cannon*, (Cal. 1886) 9 Pac. Rep. 423; *Breckenridge v. Crocker*, 68 Cal. 403; *Craig v. Allen*, (Cal. 1886) 9 Pac. Rep. 429; *Doty v. Whittle*, (Cal. 1886) 11 Pac. Rep. 761; *Bennett v. Hobro*, 72 Cal. 178; *Kerr v. Kerr*, (Cal. 1887) 13 Pac. Rep. 654; *Haas v. Whittier*, (Cal. 1889) 21 Pac. Rep. 547; *Pacific Rolling Mill Co. v. Telegraph Hill Co.*, 79 Cal. 340; *Grigsby v. Shwarz*, 82 Cal. 278; *Crooks v. Miller*, 89 Cal. 35; *Blum v. McHugh*, 92 Cal. 497; *Bjorman v. Fort Bragg Redwood Co.*, 92 Cal. 500; *Austin v. Gagan*, (Cal. 1892) 30 Pac. Rep. 790; *Gollin v. Lyle*, (Cal. 1892) 31 Pac. Rep. 456; *Kellenberger v. Market St. Cable R. Co.*, (Cal. 1893) 33 Pac. Rep. 90; *Cole v. Wilcox*, 99 Cal. 549; *Warner v. F. Thomas Parisian Dyeing, etc.*, Works, 105 Cal. 409; *Brooks v. San Francisco, etc.*, R. Co., 110 Cal. 173; *Scrivani v. Dondero*, (Cal. 1896) 44 Pac. Rep. 1066.

An Order Refusing a New Trial will not be reversed where the evidence is conflicting and the verdict is not clearly against the weight of evidence.¹

Georgia. — *Jacobs v. Pou*, 27 Ga. 33; *Cook v. Jones*, 28 Ga. 589; *Sims v. Southern Express Co.*, 40 Ga. 91; *Salter v. Glenn*, 42 Ga. 64; *Hart v. Granville*, 57 Ga. 559; *Wilson v. Atlanta*, 60 Ga. 473.

Iowa. — *McNair v. McComber*, 15 Iowa 368; *Phelps v. Hart*, 15 Iowa 596; *Conklin v. Dubuque*, 54 Iowa 571; *Stewart v. Dunlap*, 61 Iowa 248; *Halpin v. Nelson*, 76 Iowa 427; *Kern v. May*, 92 Iowa 674; *Arctic King Refrigerator Co. v. Kelly*, 95 Iowa 189.

Kentucky. — *Louisville, etc., R. Co. v. Conif*, (Ky. 1894) 27 S. W. Rep. 865.

Minnesota. — *Sheehan v. Dowling*, 55 Minn. 289.

Missouri. — *Whitsett v. Ransom*, 79 Mo. 258; *Wight v. Missouri Pac. R. Co.*, 20 Mo. App. 481; *Hurlbut v. Jenkins*, 22 Mo. App. 572; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Parker v. Cassingham*, 130 Mo. 348; *Hull v. Missouri Pac. R. Co.*, 60 Mo. App. 593.

Montana. — *Haggin v. Salle*, 14 Mont. 79.

Nevada. — *Margaroli v. Milligan*, 11 Nev. 96.

New York. — *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Slater v. Drescher*, 72 Hun (N. Y.) 425; *Ferguson v. Gill*, 74 Hun (N. Y.) 566; *Young v. Stone*, 77 Hun (N. Y.) 395; *Grening v. Malcom*, 83 Hun (N. Y.) 9; *Chesley v. Hughes*, 83 Hun (N. Y.) 357; *Horan v. Central Park, etc., R. Co.*, 9 Misc. Rep. (N. Y. C. Pl.) 68.

South Dakota. — *Hodges v. Bierlein*, 4 S. Dak. 258; *Alt v. Chicago, etc., R. Co.*, 5 S. Dak. 20.

Utah. — *Tousey v. Etzel*, 9 Utah 329.

West Virginia. — *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415.

Wisconsin. — *Van Valkenburgh v. Hoskins*, 7 Wis. 496; *Smith v. Lander*, 48 Wis. 587.

A Verdict Against the Testimony of a Majority of Witnesses will not be disturbed unless palpably wrong.

Alabama. — *Holloway v. Harper*, 108 Ala. 647.

California. — *Gibson v. Sterling Furniture Co.*, 113 Cal. 1.

Illinois. — *Bishop v. Busse*, 69 Ill. 403.

Kentucky. — *Gayheart v. Patton*,

(Ky. 1893) 20 S. W. Rep. 912, 14 Ky. L. Rep. 570.

Nebraska. — *Omaha, etc., R. Co. v. Brown*, 29 Neb. 492; *Omaha, etc., R. Co. v. Standen*, 29 Neb. 622; *Rector v. Canfield*, 40 Neb. 595; *Fremont, etc., R. Co. v. French*, 48 Neb. 638.

New York. — *Volk v. Livingston*, 56 Hun (N. Y.) 648, 10 N. Y. Supp. 211; *Francis v. Rome, etc., R. Co.*, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 939; *Latham v. Delaney*, 59 N. Y. Super. Ct. 590, 39 N. Y. St. Rep. 369, *affirmed* 133 N. Y. 601; *Millott v. New York, etc., R. Co.*, 64 Hun (N. Y.) 634, 19 N. Y. Supp. 122; *Foulke v. Thalmsinger*, 8 Misc. Rep. (N. Y. Super. Ct.) 445; *Kitchell v. Brooklyn Heights R. Co.*, 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 277; *Manning v. Atlantic Ave. R. Co.*, 91 Hun (N. Y.) 279.

North Dakota. — *Taylor v. Jones*, 3 N. Dak. 235.

1. *Arkansas.* — *Ford v. Ward*, 26 Ark. 360.

California. — *Taylor v. McKinley*, 4 Cal. 104; *Visher v. Webster*, 13 Cal. 58; *Preston v. Keys*, 23 Cal. 193; *Lubeck v. Bullock*, 24 Cal. 338; *Peterie v. Bugbey*, 24 Cal. 419; *Aldrich v. Palmer*, 24 Cal. 513; *Matthai v. Matthai*, 49 Cal. 90; *Sperry v. Spaulding*, 49 Cal. 252; *Reynolds v. Lincoln*, 73 Cal. 191; *Goodwin v. Burney*, (Cal. 1887) 14 Pac. Rep. 676; *Hogan v. Sanders*, (Cal. 1887) 14 Pac. Rep. 677; *Crawford v. Independent Stove Pipe Works*, 83 Cal. 629; *Long v. Sauley*, 89 Cal. 437; *Steinhart v. Coleman*, (Cal. 1895) 41 Pac. Rep. 1008.

Florida. — *Bridier v. Yulee*, 9 Fla. 481.

Georgia. — *Rozar v. Burns*, 13 Ga. 34; *Rutherford v. Newsom*, 36 Ga. 246; *Martin v. Tidwell*, 36 Ga. 332; *Rutland v. Hathorn*, 36 Ga. 380; *Field v. Boynton*, 37 Ga. 188; *McAfee v. Mulkey*, 40 Ga. 115; *Bussey v. Moses*, 48 Ga. 120; *Wilson v. Wilkins*, 51 Ga. 448; *Haddock v. Bivings*, 54 Ga. 199; *Freeman v. Thompson*, 54 Ga. 495; *Roberson v. Pope*, 57 Ga. 565; *Wilkinson v. Lane*, 62 Ga. 173; *Thurber v. Holmes*, 62 Ga. 590; *Ludden v. Morrow*, 65 Ga. 232; *Phillips v. White*, 66 Ga. 753; *Terry v. Americus Bank*, 74 Ga. 400; *Cockburn v. Walker*, 74 Ga. 841; *Partridge v. Brown*, 74 Ga. 841;

An Appellate Court Will Not Undertake to Weigh the Evidence where it is conflicting,¹ but in some jurisdictions the rule is that an order

- Wixon v. Williams, 75 Ga. 888; Byne v. Smith, 76 Ga. 101; Atlanta, etc., Air-Line R. Co. v. Holcombe, 76 Ga. 590; Georgia R. Co. v. Sigman, 77 Ga. 71; Anderson v. Barksdale, 77 Ga. 86; Harrison v. Dykes, 77 Ga. 494; Central R., etc., Co. v. Gamble, 77 Ga. 584; Waxelbaum v. Limberger, 78 Ga. 43; Moulton v. Baer, 78 Ga. 215; Atlanta, etc., R. Co. v. Smith, 81 Ga. 620; Richmond, etc., R. Co. v. Davis, 86 Ga. 76; Seymore v. Rice, 89 Ga. 372; Richmond, etc., R. Co. v. Merritt, 92 Ga. 486; Savannah, etc., R. Co. v. Falvey, 93 Ga. 244; Savannah, etc., R. Co. v. Du Bose, 95 Ga. 247; Rape v. Gunn, 96 Ga. 791; Atlanta, etc., R. Co. v. Thornton, 97 Ga. 301; East Tennessee, etc., R. Co. v. Butler, 97 Ga. 302; Georgia R., etc., Co. v. Brooks, 97 Ga. 314; Commercial Bank v. Postell, 97 Ga. 331; Phillips v. Dowdell, 97 Ga. 333; Mullaly v. Culver, 97 Ga. 333; Wright v. Bowser, 97 Ga. 335; Barnhart v. Hall, 97 Ga. 335; Central R., etc., Co. v. East Tennessee, etc., R. Co., 97 Ga. 336; Western, etc., R. Co. v. Willingham, 97 Ga. 338; Levkowitz v. Elias, 97 Ga. 427; Chandler v. Orr, 99 Ga. 61; Electric R. Co. v. O'Connor, 99 Ga. 62; Charplot v. Findlay, 99 Ga. 75; Carithers v. Matthews, 99 Ga. 89; Moss v. Bussey, 99 Ga. 89; Rodgers v. Black, 99 Ga. 141; McNeal v. Taylor, 99 Ga. 159.
- Illinois*. — Evans v. Fisher, 10 Ill. 569; Chapman v. Stewart, 63 Ill. 332.
- Indiana*. — Harris v. Rupel, 14 Ind. 209; Roose v. Roose, 145 Ind. 162.
- Iowa*. — Reeves v. Reeves, 20 Iowa 597; Pierce v. Walker, 23 Iowa 424; Stark v. Noble, 24 Iowa 71; Smith v. McLean, 24 Iowa 322; Callahan v. Shaw, 24 Iowa 441; Schrimper v. Heilman, 24 Iowa 505; Sherman v. Western Stage Co., 24 Iowa 515; Todd v. Branner, 30 Iowa 439; Snyder v. Eldridge, 31 Iowa 129; Wesley v. Jacobs, 38 Iowa 573; Aikin v. Kirkland, 66 Iowa 425; Donnelly v. Burkett, 75 Iowa 613; State v. Severson, 78 Iowa 653.
- Kansas*. — Mitchell v. Tolley, 4 Kan. 177.
- Minnesota*. — Crowley v. Underleak, 33 Minn. 197.
- Missouri*. — Oldham v. Henderson, 4 Mo. 295.
- Montana*. — Beck v. Beck, 6 Mont. 285; Mattock v. Goughnour, 13 Mont. 300; Ray v. Cowan, 18 Mont. 259.
- Nebraska*. — Kent v. Green, 43 Neb. 673.
- Nevada*. — Smith v. Mayberry, 13 Nev. 427; Tognini v. Kyle, 15 Nev. 464.
- New York*. — Murphy v. Boker, 3 Robt. (N. Y.) 1; Payne v. Tracey, 42 How. Pr. (N. Y. C. Pl.) 95; Belcher v. Manhattan R. Co., 48 Hun (N. Y.) 621, 1 N. Y. Supp. 349; Tuthill v. Hussey, 54 Hun (N. Y.) 637, 7 N. Y. Supp. 547.
- Pennsylvania*. — Wilkinson v. Becker, 155 Pa. St. 194.
- Texas*. — Chevallier v. Denson, 8 Tex. 439; Bradley v. Bradley, 13 Tex. 263; Young v. Read, 25 Tex. Supp. 113; Adams v. George, 25 Tex. Supp. 374; Fowler v. Lewis, 25 Tex. Supp. 380; Crawford v. French, 25 Tex. Supp. 436.
- Utah*. — Lehi Irrigation Co. v. Moyle, 4 Utah 327.
- Virginia*. — Patteson v. Ford, 2 Gratt. (Va.) 18; Proctor v. Spratley, 78 Va. 254.
- Washington*. — Noyes v. Pugin, 2 Wash. 653.
- Wisconsin*. — Welch v. Abbot, 72 Wis. 512; McGrath v. Bloomer, 73 Wis. 29; Kaufer v. Walsh, 88 Wis. 63.
1. *Conflicting Evidence Not Weighed on Appeal* — *California*. — Taylor v. McKinley, 4 Cal. 104; Weddle v. Stark, 10 Cal. 301; Visher v. Webster, 13 Cal. 58; Cappe v. Brizzolara, 19 Cal. 607; Rice v. Cunningham, 29 Cal. 492; Preston v. Keys, 23 Cal. 193; Thompson v. Thornton, 47 Cal. 76; Simpson v. Pacific Mut. L. Ins. Co., 44 Cal. 139; Marble v. Fay, 49 Cal. 585; Sperry v. Spaulding, 49 Cal. 252; Downey v. Hellman, 58 Cal. 62; Low v. McCallam, 64 Cal. 2; Doolittle v. Woodcock, 65 Cal. 258; Nelson v. Floyd, (Cal. 1884) 4 Pac. Rep. 105; Reynolds v. Scott, (Cal. 1884) 4 Pac. Rep. 346; Herzog v. Julien, (Cal. 1884) 4 Pac. Rep. 501; Mullins v. Wieland, 68 Cal. 231; Shumway v. Leakey, (Cal. 1886) 11 Pac. Rep. 839; Tide Land Reclamation Co. v. Cunningham, 71 Cal. 221; Harnett v. Central Pac. R. Co., 78 Cal. 31; White v. Merrill, 82 Cal. 14; Kellogg v. Colgan, (Cal. 1890) 23 Pac. Rep. 526; Curtiss v. Starr, 85 Cal. 376; Kloppe v. Levy, 98 Cal. 525.
- Georgia*. — Parker v. Walden, 16 Ga.

granting a new trial will be reversed when the appellate court is satisfied that the preponderance of evidence is manifestly and palpably in favor of the verdict.¹ This is almost equivalent to determining that there was an abuse of discretion.

27; *Foster v. Thomas*, 26 Ga. 290; *Whidby v. Lewis*, 32 Ga. 472; *Foute v. Massey*, 37 Ga. 258; *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; *Wadford v. Rhodes*, 49 Ga. 561; *Pritchett v. Patterson*, 51 Ga. 133; *Ludden v. Morrow*, 65 Ga. 232; *Galliher v. Smith*, 74 Ga. 402; *Worthington v. Western, etc., R. Co.*, 74 Ga. 408; *Cruse v. Foster*, 76 Ga. 723; *Wicher v. Walter*, 77 Ga. 490; *Irwin v. McKnight*, 76 Ga. 669; *Watts v. Pearce*, 79 Ga. 660; *Smith v. Dobbins*, 80 Ga. 344; *Meinhard v. Mullin*, 80 Ga. 593; *McCullough v. East Tennessee, etc., R. Co.*, 97 Ga. 373.

Illinois. — *Whisler v. Roberts*, 19 Ill. 274.

Indiana. — *Henline v. Jacoby*, 62 Ind. 298; *Trinler v. Cornelius*, 24 Ind. 97; *Nave v. Hadley*, 24 Ind. 224; *Hollingsworth v. Pickering*, 24 Ind. 435; *Harris v. Rupel*, 14 Ind. 209; *O'Herrin v. State*, 14 Ind. 420; *Roberts v. Nodwift*, 8 Ind. 339; *Sibbitt v. Stryker*, 62 Ind. 41; *Bridgewater v. Bridgewater*, 62 Ind. 82; *Leary v. Ebert*, 72 Ind. 418.

Iowa. — *Conklin v. Dubuque*, 54 Iowa 571; *Morgan v. Wagner*, 79 Iowa 174.

Kansas. — *Atyeo v. Kelsey*, 13 Kan. 212; *McCrum v. Corby*, 15 Kan. 112; *McCreary v. Hart*, 39 Kan. 216; *Orchard Place Land Co. v. Lewis*, 53 Kan. 750; *Mortgage Trust Co. v. Fleming*, 2 Kan. App. 744.

Missouri. — *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533.

Montana. — *Chauvin v. Valiton*, 7 Mont. 581; *Kilby v. Baker*, 9 Mont. 398; *Murray v. Heinze*, 17 Mont. 353.

New York. — *Suhrada v. Third Ave. R. Co.*, 14 N. Y. App. Div. 361.

Nevada. — *McLeod v. Lee*, 14 Nev. 398; *Phillpotts v. Blasdel*, 8 Nev. 61; *Worthing v. Cutts*, 8 Nev. 118.

Utah. — *Davis v. Utah Southern R. Co.*, 3 Utah 218; *Roach v. Gilmer*, 3 Utah 389; *White v. Union Pac. R. Co.*, 8 Utah 56.

Washington. — *Rotting v. Cleman*, 12 Wash. 615.

Wisconsin. — *Bearrs v. Sherman*, 56 Wis. 55; *McLimans v. Lancaster*, 57 Wis. 297; *Seaman v. Burnham*, 57 Wis. 569.

In *Ackley v. Berkey*, 22 Iowa 226, the court said: "Now, although the

evidence reported, taken as a whole, would have equally, if not better, justified a different conclusion, as we see it, looking simply at the written testimony, nevertheless we cannot conceal from ourselves the fact that there is so much to be inferred, especially in this class of cases, from surrounding circumstances, from the appearance of witnesses, their conduct upon the stand, etc., that it is possible we might have reached the same conclusion had we been placed in like circumstances. Hence the propriety of not interfering unless the conflict in the testimony is slight, and the weight of evidence clearly against the verdict, or there are other circumstances strongly indicating that injustice has been done."

1. **Evidence Manifestly in Favor of Verdict** — *Alabama*. — *White v. Blair*, 95 Ala. 147; *Dillard v. Savage*, 98 Ala. 598; *Lee v. De Bardeleben Coal, etc., Co.*, 102 Ala. 628.

California. — *Mills v. Oregon R., etc., Co.*, 102 Cal. 357.

Georgia. — *Cross v. Cross*, 40 Ga. 667; *Hazzard v. Savannah*, 72 Ga. 205; *Spurlock v. West*, 80 Ga. 302.

Iowa. — *Whitney v. Blunt*, 15 Iowa 283; *Burlington Gaslight Co. v. Green*, 21 Iowa 335; *Worthington v. Olden*, 31 Iowa 419; *Moran v. Harris*, 63 Iowa 390.

Minnesota. — *Hicks v. Stone*, 13 Minn. 434; *Siebert v. Mainzer*, 26 Minn. 104; *Campbell v. Landberg*, 27 Minn. 454; *Rheiner v. Stillwater St. R., etc., Co.*, 29 Minn. 147; *Fox v. Burke*, 29 Minn. 171; *Pratt v. Pioneer Press Co.*, 30 Minn. 41; *Wilcox v. Landberg*, 30 Minn. 96; *Young v. Davis*, 30 Minn. 293; *Carlson v. Small*, 32 Minn. 439; *Clapp v. Minneapolis, etc., R. Co.*, 33 Minn. 22; *Jacobson v. Williams*, 34 Minn. 22; *Clark v. C. N. Nelson Lumber Co.*, 34 Minn. 289; *Crosby v. St. Paul City R. Co.*, 34 Minn. 413; *Taylor v. Spaulding*, 36 Minn. 550; *Hensel v. Chicago, etc., R. Co.*, 37 Minn. 87; *Werner v. Schroeder*, 38 Minn. 321; *Cable v. Byrne*, 38 Minn. 534; *Congdon v. Bailey*, 39 Minn. 22; *Wachlin v. Glencoe*, 41 Minn. 499; *Ayers v. Minneapolis, etc., R. Co.*, 46 Minn. 134; *Farmers', etc., State Bank v. Haug*, 49 Minn. 553; *Dupee v.*

b. SUFFICIENCY OF EVIDENCE — Review of Evidence. — As the lower court possesses better facilities for determining the weight and sufficiency of the evidence, appellate courts generally refuse to reverse an order granting a new trial on the ground that the verdict is not sustained by sufficient evidence.¹ A verdict sus-

Northern Pac. R. Co., 50 Minn. 556; Thompson v. Northwestern Guaranty Loan Co., 56 Minn. 11; Hoffman v. Meyer, 57 Minn. 25; Maxfield v. Auerbach, 60 Minn. 272; Murphy v. St. Paul City R. Co., 63 Minn. 301; Simon v. Christian, 63 Minn. 262; Smith v. St. Paul, etc., R. Co., 44 Minn. 17; Shanahan v. Chicago, etc., R. Co., 64 Minn. 300.

Nevada. — Treadway v. Wilder, 9 Nev. 67.

West Virginia. — Ruffner v. Hill, 31 W. Va. 428.

On appeal from an order granting a new trial, the appellate court will not weigh the evidence, but only review it to ascertain whether the trial court acted arbitrarily in granting a new trial. Taylor v. Scherpe, etc., Architectural Co., 47 Mo. App. 257.

Minnesota. — The rule on appeal from an order granting a new trial on the ground that the verdict was contrary to the evidence was stated as follows: "We should not be warranted in reversing an order of this kind simply because if the judge below had refused to grant a new trial we should have felt bound to sustain him; nor because there was evidence reasonably tending to support the verdict; nor because, if the motion for a new trial had been made before us in the first instance, we should, upon a consideration of the evidence and its preponderance, have denied the motion. But if, upon a careful perusal of the testimony, and upon mature reflection, we feel satisfied that the preponderance of the evidence is manifestly and palpably in favor of the verdict, we should then deem it our duty to reverse an order granting a new trial." Hicks v. Stone, 13 Minn. 434, quoted in Rheiner v. Stillwater St. R., etc., Co., 29 Minn. 147. See also Cleland v. Minneapolis, etc., R. Co., 29 Minn. 170.

This rule applies also to cases tried by the court without a jury. Knappen v. Swensen, 40 Minn. 171.

1. Collingwood v. Indianapolis, etc., R. Co., 54 Ind. 15; La Salle v. Tift, 52 Iowa 164; Stewart v. Stewart, 2 T. B. Mon. (Ky.) 85; Moulton v. Jose, 25 Me.

76; Stetson v. Medford, 109 Mass. 242; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Hand v. Dorchester, 43 Hun (N. Y.) 33; Jenkins v. North Carolina Ore Dressing Co., 65 N. Car. 563; Brink v. Black, 74 N. Car. 329; Agnew v. Adams, 26 S. Car. 101.

An order granting a new trial will not be disturbed where the verdict is manifestly against the weight of evidence. King v. King, 45 Ga. 644; Sams v. Tracey, 49 Ga. 588; Steadman v. Lee, 50 Ga. 45; Albion Consol. Min. Co. v. Richmond Min. Co., 19 Nev. 225; Bate v. American Fork City, 7 Utah 189; Farley v. Chicago, etc., R. Co., 89 Wis. 206.

Appellate courts will grant a new trial when the verdict is so opposed to the evidence and to the probabilities arising from all the circumstances that it can be accounted for only on the supposition that the jurors were prejudiced or wholly disregarded the instructions of the court. Friesz v. Fallon, 24 Mo. App. 439; Spohn v. Missouri Pac. R. Co., 87 Mo. 74.

"The decision of the trial court, refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust." Cobb v. Malone, 92 Ala. 630, quoted in Tennessee Coal, etc., Co. v. Stevens, 115 Ala. 461.

When a verdict is wholly without evidence to support it, still more when it is directly against the entire evidence, and when the preponderance of evidence is manifestly in opposition to it, and especially when in any of these cases the impression made upon the mind of the presiding judge concurs with the view of the court above, a new trial will be granted. Plate v. Carolina Mut. Ins. Co., 15 Rich. L. (S. Car.) 213; Davidson v. Manlove, 2 Coldw. (Tenn.) 346.

Mississippi. — "The doctrine is well established by a series of adjudications

tained by evidence of all the essential facts will not be disturbed.¹ Where there is sufficient evidence to support the verdict, an order refusing a new trial will, of course, be sustained.² But if it can be ascertained from the record that there is no evidence to support

that on a motion for a new trial, brought to this court by writ of error, the verdict of the jury will not be disturbed unless where it is without evidence, or the evidence greatly preponderates against it, or where the verdict appears to be manifestly wrong, from the record before us." *Drake v. Surget*, 36 Miss. 487. See also *Dickson v. Parker*, 3 How. (Miss.) 219; *Harris v. Halliday*, 4 How. (Miss.) 338; *Leflore v. Justice*, 1 Smed. & M. (Miss.) 381.

Rule in Criminal Cases.—It is the rule, even in criminal cases, that a verdict will not be set aside as not sustained by the evidence unless there is either a total failure of evidence or the evidence is such as to create the necessary inference that the verdict is the result of passion, prejudice, or partiality. *State v. Glahn*, 97 Mo. 679.

1. *California*.—*Campbell v. Coburn*, 77 Cal. 36.

Colorado.—*Pueblo v. Pinckney*, 3 Colo. App. 384.

Georgia.—*Gunn v. Slaughter*, 83 Ga. 124.

Indiana.—*Tate v. Means*, 82 Ind. 355; *Indianapolis v. Murphy*, 91 Ind. 382; *Beck v. Bundy*, 92 Ind. 145; *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446; *Noblesville v. Vestal*, 118 Ind. 80; *Huntington v. Hawley*, 120 Ind. 502; *Lafayette v. Ashby*, 8 Ind. App. 214.

Kansas.—*Service v. Watson*, 37 Kan. 750; *Stevens v. Clemmons*, 52 Kan. 369; *Kansas City, etc., R. Co. v. Berry*, 53 Kan. 112.

Minnesota.—*Ostrander v. Everest*, 44 Minn. 419.

Missouri.—*Snider v. Current River R. Co.*, 53 Mo. App. 638.

New York.—*Savage v. Faulhaber*, 90 Hun (N. Y.) 609.

2. **Evidence Sufficient to Support the Verdict.**—*Arkansas*.—*Spratt v. Vaughn*, 10 Ark. 474; *Memphis, etc., Plank Road Co. v. Rives*, 21 Ark. 306.

Georgia.—*Wilcox v. Strong*, 40 Ga. 147; *Howser v. Evans*, 40 Ga. 157; *McBurney v. Hollingsworth*, 40 Ga. 197; *Burke v. Steel*, 40 Ga. 217; *Picquet v. Gibbs*, 40 Ga. 455; *Perry v. Houseley*, 40 Ga. 657; *Bruce v. Turner*, 42

Ga. 146; *Raden v. Thompkins*, 42 Ga. 163; *Powell v. Atlanta*, 51 Ga. 478; *Compton v. Temples*, 54 Ga. 171; *Fry v. Shehee*, 55 Ga. 208; *Powell v. Westmoreland*, 60 Ga. 572; *Gabbett v. Sparks*, 60 Ga. 582; *Brown v. State*, 60 Ga. 594; *Richmond, etc., R. Co. v. Green*, 73 Ga. 814; *Gay v. Parker*, 74 Ga. 407; *Wilcox v. Aaron*, 74 Ga. 407; *Wilkins v. Georgia Iron Works*, 74 Ga. 532; *Georgia, etc., Inland Steamboat Co. v. Mercier*, 77 Ga. 99; *Turner v. Scott*, 77 Ga. 270; *Longstreet v. Hobbs*, 78 Ga. 337; *Christian v. Wahl*, 83 Ga. 395; *Harvey v. Edwards*, 84 Ga. 558; *Penitentiary Co. No. 2 v. Gordon*, 85 Ga. 159; *Holliday v. McLendon*, 87 Ga. 90; *Bradshaw v. Thornton*, 89 Ga. 68; *Wright v. Baldwin*, 89 Ga. 369; *Cedartown v. Freeman*, 89 Ga. 451; *East Tennessee, etc., R. Co. v. Smith*, 90 Ga. 558; *Savannah St. R. Co. v. Jackson*, 95 Ga. 366; *Price v. Robinson*, 95 Ga. 561; *Blackmon v. Burt*, 99 Ga. 118.

Illinois.—*Whisler v. Roberts*, 19 Ill. 274.

Indiana.—*Nunemacher v. Ingle*, 20 Ind. 135; *Hunt v. Price*, 39 Ind. 408; *Sibbitt v. Stryker*, 62 Ind. 41; *Bridge-water v. Bridgewater*, 62 Ind. 82; *Henline v. Jacoby*, 62 Ind. 298; *Hudson v. Bunch*, 116 Ind. 63.

Kansas.—*Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Cooper v. Davis Sewing Mach. Co.*, 37 Kan. 231; *Bell v. Fisher*, 1 Kan. App. 284.

Kentucky.—*Dorsey v. Doherty*, 3 Litt. (Ky.) 448.

Minnesota.—*Ohlson v. Manderfeld*, 28 Minn. 390; *Cleland v. Minneapolis, etc., R. Co.*, 29 Minn. 170.

Missouri.—*Gibson v. St. Louis, etc., R. Co.*, 8 Mo. App. 488.

Montana.—*Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395.

North Carolina.—*Owens v. Phelps*, 95 N. Car. 286.

Washington.—*Page v. Rodney*, 2 Wash. Ter. 461.

Wisconsin.—*Lockwood v. Stewart*, 12 Wis. 628; *Smith v. Wallace*, 25 Wis. 55; *Cremer v. Portland*, 36 Wis. 92; *Chappell v. Oregon*, 36 Wis. 145; *Warren v. Cummings*, 37 Wis. 81; *Kidd v. Fleek*, 47 Wis. 443.

the verdict, an order refusing a new trial must be reversed.¹

c. APPROVAL OF VERDICT BY TRIAL COURT — Effect of Approval.

— A verdict based on conflicting but sufficient evidence will not be disturbed on appeal as being contrary to the evidence where it has been approved by the trial judge on motion for a new trial.²

1. *No Evidence — Error to Refuse a New Trial.* — *Bowen v. Cook*, 14 Ark. 202; *Gay v. Parker*, 74 Ga. 407; *Goldsby v. Robertson*, 1 Blackf. (Ind.) 21; *Baughan v. Brown*, 122 Ind. 115; *Lodge v. Reznor*, 13 Iowa 600; *Lester v. Sallack*, 31 Iowa 477; *Sadler v. Bean*, 38 Iowa 684; *McCarty v. James*, 62 Iowa 257; *Clemens v. Laveille*, 4 Mo. 80; *Quinton v. Cutlip*, 1 Okla. 302; *McKinney v. Craig*, 4 Sneed (Tenn.) 577; *Tate v. Gray*, 4 Sneed (Tenn.) 591; *Davidson v. Manlove*, 2 Coldw. (Tenn.) 346.

2. *Alabama.* — *Willis v. Willis*, 9 Ala. 330.

California. — *Pfeiffer v. Riehn*, 13 Cal. 643.

Georgia. — *Pearce v. Vaughn*, 25 Ga. 27; *Macon, etc., R. Co. v. Davis*, 27 Ga. 113; *Scott v. Newsom*, 27 Ga. 125; *Lockett v. Nims*, 27 Ga. 207; *Morris v. Stokes*, 27 Ga. 239; *Phillips v. Stewart*, 27 Ga. 402; *Orr v. Huff*, 27 Ga. 422; *Rawson v. McJunkins*, 27 Ga. 432; *Doe v. Roe*, 28 Ga. 484; *Diomatari v. Choate*, 28 Ga. 320; *Dupree v. Price*, 37 Ga. 235; *Skinner v. Allen*, 49 Ga. 557; *Leitner v. Goodwin*, 60 Ga. 148; *Watson v. Brightwell*, 60 Ga. 212; *Mixon v. Pollok*, 55 Ga. 321; *Maddox v. Stephenson*, 60 Ga. 125; *Eubanks v. Brunson*, 77 Ga. 498; *Day v. Case*, 78 Ga. 58; *Clapp v. Walton*, 78 Ga. 354; *Moore v. Dutson*, 79 Ga. 456; *Jones v. Cooper*, 80 Ga. 364; *Western, etc., R. Co. v. Denmead*, 83 Ga. 351; *Brown v. Meador*, 83 Ga. 406; *Carlisle v. Callahan*, 78 Ga. 320; *Augusta Southern R. Co. v. Hill*, 99 Ga. 76; *Webster v. Brazelton*, 31 Ga. 284; *Wood v. Ross*, 43 Ga. 596; *Georgia R. Co. v. Williams*, 74 Ga. 723; *Cureton v. Ketcherside*, 75 Ga. 890; *Peek v. Boone*, 90 Ga. 767; *Matthews v. Willoughby*, 96 Ga. 783; *Seymour v. Daniel*, 97 Ga. 328; *Southern Express Co. v. Branch*, 94 Ga. 328; *Richmond, etc., R. Co. v. Herrington*, 94 Ga. 706.

Illinois. — *Illinois Cent. R. Co. v. Hays*, 19 Ill. 166; *Stumps v. Kelley*, 22 Ill. 140; *Nokomis Creamery Co. v. Grennan*, 46 Ill. App. 250.

Indiana. — *Austin v. Swank*, 9 Ind. 109; *Johnson v. Hedrick*, 16 Ind. 214;

Lake Erie, etc., R. Co. v. Everett, 86 Ind. 229; *Piersol v. Hudson*, 94 Ind. 318; *Steele v. Hinshaw*, 14 Ind. App. 384.

Iowa. — *Gordon v. Pitt*, 3 Iowa 385; *Bergert v. Davenport City R. Co.*, 34 Iowa 571; *Mahaney v. Bell*, 42 Iowa 383; *Stutsman v. Burlington, etc., R. Co.*, 53 Iowa 760; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728; *Stone v. Moore*, 83 Iowa 186; *Dewey v. Chicago, etc., R. Co.*, 31 Iowa 373.

Kansas. — *Armstrong v. Layton*, 29 Kan. 576; *Beal v. Coddling*, 32 Kan. 107; *Union Pac. R. Co. v. Diehl*, 33 Kan. 422; *Wood v. Dickinson*, 34 Kan. 137; *Elerick v. Braden*, 38 Kan. 83; *Martin v. Hopkins*, 40 Kan. 63; *Peacock v. Boyle*, 41 Kan. 492; *Hodgden v. Larkin*, 46 Kan. 454; *Kansas City, etc., R. Co. v. Grimes*, 50 Kan. 655; *St. Louis, etc., R. Co. v. Brown*, 3 Kan. App. 260.

Kentucky. — *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528.

Louisiana. — *Riddle v. Kreinbiehl*, 12 La. Ann. 297; *Denegre v. Bayly*, McGloin (La.) 51; *Dreyfus v. Lincoln*, McGloin (La.) 313; *Fox v. Jones*, 39 La. Ann. 929.

Minnesota. — *Egan v. Faendel*, 19 Minn. 231.

Missouri. — *Hill v. Sutton*, 8 Mo. App. 353; *Watson v. Stromberg*, 46 Mo. App. 630; *Oakes v. Mound City Mut. L. Ins. Co.*, 52 Mo. 237.

Montana. — *O'Donnell v. Bennett*, 12 Mont. 242; *Bradshaw v. Degenhart*, 15 Mont. 267.

Nebraska. — *Davis v. Hilbourn*, 41 Neb. 35; *Sonnenschein v. Bartels*, 37 Neb. 592.

New Jersey. — *Den v. Johnson*, 5 N. J. L. 522.

New York. — *Halpin v. Finch*, 53 Hun (N. Y.) 631, 24 N. Y. St. Rep. 884.

Ohio. — *Dolittle v. McCullough*, 7 Ohio St. 299.

Tennessee. — *Lea v. Netherton*, 9 Verg. (Tenn.) 315; *England v. Burt*, 4 Humph. (Tenn.) 399; *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139; *Sweany v. Bledsoe*, 8 Humph. (Tenn.) 612; *Louisville, etc., R. Co. v. Connor*, 9 Heisk. (Tenn.) 19.

10. Findings as to Grounds for New Trial. — As a trial court may have knowledge of facts not incorporated into the record, and may determine the credibility of the parties and witnesses largely upon such facts, its findings as to the grounds for a new trial are almost conclusive.¹

11. Harmless Error. — The general rule that an order or ruling of a lower court will not be reversed where the error is harmless or has not prejudiced the rights of the parties has been stated elsewhere.² This rule is applicable to orders granting or refusing a new trial and to orders relating to proceedings for a new trial. The rule is well understood, but its application to particular cases is not governed by any well-defined rules of review. The rule is amply illustrated by the notes.³

Texas.—*Meuley v. Meuley*, 9 Tex. 60.
West Virginia.—*Miller v. Franklin Ins. Co.*, 8 W. Va. 515.

Wisconsin.—*Lockwood v. Stewart*, 12 Wis. 628; *Laville v. Lucas*, 13 Wis. 617; *Janssen v. Lammers*, 29 Wis. 88; *Meusel v. Semple*, 48 Wis. 86; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5; *Smith v. Coleman*, 77 Wis. 343; *Bank of Commerce v. Ross*, 91 Wis. 320; *Griffiths v. Kellogg*, 39 Wis. 290.

Effect of Approval by Trial Court. — Where the evidence is conflicting or of doubtful credibility the approval of the trial court is entitled to great weight. In such a case it was said: "To this finding the trial judge, by overruling a motion for new trial, set his seal of approval. His opportunities for considering the sufficiency of the evidence were better than ours. Had he seen fit to set aside the verdict, it is probable that we would not disturb his ruling; but there being competent evidence to support the verdict, and the trial judge having considered the evidence sufficient, it is not for us to disturb his finding thereon. There is a marked distinction between the discretion which may be exercised by the trial judge, who sees the witnesses and is an eye and ear witness to the proceedings upon the trial, and that of this court, which is limited in its review of the evidence to a consideration of a written record, in which many of the tests for determining the credibility of witnesses are absent. It is for this reason that this court always refuses to weigh conflicting evidence or to set aside a verdict which has for its support any substantial, competent testimony." *Irvine, C.*, in *Davis v. Hilbourn*, 41 Neb. 35.

The appellate court refuses to dis-

turb a verdict approved by a trial judge because, "first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions." *Dewey v. Chicago, etc., R. Co.*, 31 Iowa 373 [*approved* in *Central City Bank v. Rice*, 44 Neb. 594; *Davis v. Hilbourn*, 41 Neb. 35].

1. *Indiana.*—*Alexander v. Thomas*, 25 Ind. 268; *Myers v. Conway*, 62 Ind. 474; *Hodges v. Bales*, 102 Ind. 494; *Dill v. Lawrence*, 109 Ind. 564; *De Hart v. Etnire*, 121 Ind. 242; *Stevens v. Stevens*, 127 Ind. 560.

Iowa.—*Light v. Chicago, etc., R. Co.*, 93 Iowa 83; *Thompson v. Anderson*, 94 Iowa 554.

Minnesota.—*Tierney v. Minneapolis, etc., R. Co.*, 33 Minn. 311; *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

Missouri.—*Morgan v. Ross*, 74 Mo. 318.

2. See article APPEALS, vol. 2, p. 1.

3. That a trial court should not grant a new trial for harmless error, see *supra*, XV. 4. *Technical and Harmless Errors.*

Excessive Damages — Remittitur. — Where the court has required a remittitur of excessive damages, its refusal to grant a new trial for newly discovered evidence which only tended to impeach the testimony as to the excessive damages is harmless error.

XXII. THE NEW TRIAL — 1. Procedure and Burden of Proof. — The new trial is conducted in the same manner as if it were the first trial,¹ the burden of proof remaining the same.²

2. Parties and Pleadings. — New parties may be substituted³ and the pleadings amended,⁴ but the parties are restricted to the same issues.⁵

3. Whether Trial by Same Judge and Jury. — On the new trial all

Koenigsberger v. Richmond Silver Min. Co., 158 U. S. 41.

Weight of Evidence. — Where a court refused a motion to set aside a verdict as against the weight of evidence, it cannot be said that the error was harmless because the court had refused to instruct the jury to return a verdict in favor of the defendant upon the plaintiff's evidence, as the questions were not identical. *Metropolitan R. Co. v. Moore*, 121 U. S. 558.

Error in Prematurely Overruling Motion. — Where a motion for a new trial was denied pending an application to the Supreme Court for leave to prove an exception, error in prematurely overruling the motion is not prejudicial where the application to the Supreme Court was subsequently denied. *McLean v. Crow*, 88 Cal. 644.

Right to Have Court in Banc Pass on Motion. — The objection of a defeated party that he was entitled to have his motion for a new trial passed upon by all the judges of the Superior Court in banc is not a ground for reversal where the Supreme Court can see that there was no ground in the record for granting a new trial, as it will be presumed that the court in banc would have denied the motion. *Coursen v. Ely*, 37 Ill. 338.

Defense of Set-off. — Where the only defense to the action is set-off, and this has been voluntarily withdrawn before trial by the defendant, it is harmless to deny him a new trial on the ground of his inability to attend the trial, since he can still recover on his set-off. *Bruce v. Clark*, 151 Ill. 495.

Consideration of Affidavit. — Error of the court in refusing to consider an affidavit in support of a motion for a new trial is not a ground for a reversal where it appears that a consideration of the affidavit would not have caused a different result. *Taylor v. First Cong. Church*, 7 Ind. App. 388; *Hall v. Robinson*, 25 Iowa 91.

Error as to Date of Judgment. — An error in an order granting a new trial

as to the date of the judgment is an immaterial and harmless error. *Germand v. Littleton*, 22 Kan. 730.

Granting New Trial for Harmless Error — Order Reversed. — Where it appears from admissions in the pleadings and from findings not excepted to that the new trial was granted for a harmless and immaterial error, and the ruling could not be based upon any other ground, the order granting a new trial will be reversed. *Hayes v. Fine*, 91 Cal. 391.

1. *Gott v. Judge*, 42 Mich. 625; *Brenner v. Coerber*, 42 Ill. 497; *Walton v. Bostick*, 1 Brev. (S. Car.) 162; *Hudson v. Strickland*, 49 Miss. 591; *Dows v. Swett*, 127 Mass. 364; *Paul v. Luttrell*, 1 Colo. 491; *O'Neill v. Brown*, 61 Tex. 34.

Where the adverse party has actual notice, no copy of the order granting the new trial need be served before the second trial. *Kayser v. Hartnett*, 67 Wis. 250.

The new trial should be conducted as far as possible as if no prior trial had taken place. *Mahoney v. Ashton*, 4 Har. & M. (Md.) 295.

2. Burden of Proof. — On a second trial in ejectment the burden of proof is not changed although since the first trial the plaintiff has obtained restitution of the property under a judgment rendered on the verdict at the first trial. *Donahue v. Klassner*, 22 Mich. 252.

3. *Brown v. Cody*, 115 Ind. 484.

4. *Gordon v. Downey*, 1 Gill (Md.) 41; *Shippy v. Au Sable*, 85 Mich. 280; *McCorkle v. Everett*, (Tex. Civ. App. 1897) 41 S. W. Rep. 136. See *contra*, *Taylor v. Keeler*, 51 Conn. 397.

5. The parties are restricted to the same theory of the case. *Lake Shore, etc., R. Co. v. Peterson*, 144 Ind. 214.

After a trial on the merits a defendant will not be permitted on a new trial to raise for the first time, and upon an amended answer, the objection that there is a defect of parties plaintiff. *Jones v. Foster*, 67 Wis. 296.

jurors of the former panel are ineligible,¹ but the new trial may be had before the same judge.²

4. Effect of Proceedings at Former Trial. — Generally the rulings of the court or the waivers of the parties are not binding on the second trial,³ and no references to the verdict or the rulings at the first trial should be made.⁴

5. New Trial in Criminal Cases. — The effect of granting a new trial in a criminal case is to put the case in the same position in which it was before any trial had taken place.⁵ Neither a second arraignment⁶ nor a second indictment⁷ is necessary. No presumption of guilt arises from the former conviction, and it must not be alluded to in the argument.⁸

6. New Trial on Mandate from Appellate Court. — See article MANDATE AND PROCEEDINGS THEREON, vol. 13, p. 853 *et seq.*

XXIII. SUBSEQUENT NEW TRIALS — 1. Number of New Trials —
a. GENERALLY. — In the absence of statutory prohibition it seems that there is no limit to the number of new trials which may be granted in a cause upon proper grounds.⁹ A new trial should

1. *Argent v. Darrell*, 2 Salk. 648; *Rex v. Mawbey*, 6 T. R. 619.

On disagreement of the jury the case cannot be tried by another jury drawn from the same panel. *Wilson v. Barnum*, 1 Wall. Jr. (C. C.) 347.

2. A judge is not at liberty to refuse to rehear a cause in which he has granted a new trial. *Fry v. Bennett*, 3 Bosw. (N. Y.) 200.

Where a criminal case is reversed a new trial must be had before the same trial court although no special order for that purpose is entered by the Supreme Court. *Matter of Kazer*, 5 Ohio 544.

3. *Gott v. Judge*, 42 Mich. 625; *Dows v. Swett*, 127 Mass. 364; *Mitchell v. Bannon*, 10 Ill. App. 340; *Crim v. Starkweather*, 32 Hun (N. Y.) 350; *Hays v. Hynds*, 28 Ind. 531.

4. *Crawford v. Morris*, 5 Gratt. (Va.) 90.

Retraction of Admission. — Where an order for a new trial before a referee directs that the evidence taken on the former trial shall stand as evidence on the new trial, a party cannot retract an absolute and unqualified admission made at the first trial, unless by leave of court. *Owen v. Cawley*, 36 N. Y. 600, *affirming* 42 Barb. (N. Y.) 105.

5. Where a new trial is granted on appeal the case stands in the same condition as if a new trial had been granted in the trial court. *Cox v. State*, 7 Tex. App. 495; *Hatch v. State*,

10 Tex. App. 515; *Moore v. State*, 21 Tex. App. 666.

New Trial at the Same Term. — Where a new trial is granted the case may be tried again at the same term, but the defendant should be allowed sufficient time to prepare for trial. *Lott v. State*, 41 Tex. 121.

6. A Second Arraignment is not necessary on a second trial. See article ARRAIGNMENT AND PLEA, vol. 2, p. 763.

7. A Second Indictment is not required on a second trial where the original indictment has not been adjudged insufficient. *State v. Hughes*, 2 Ala. 102.

Change of Venue. — Where a new trial is granted for error in refusing a change of venue, in order to secure a change for the second trial new affidavits must be filed, showing that the cause for a change of venue still exists. *State v. Nash*, 7 Iowa 347.

8. Although the court should not allude in the instructions to the former conviction, it may inform a jury that the defendant has been acquitted of a higher grade of the offense and is on trial for a lower grade only. *West v. State*, 7 Tex. App. 150; *Pharr v. State*, 10 Tex. App. 485.

9. *Florida*. — *Pensacola*, etc., R. Co. v. *Nash*, 12 Fla. 497.

Georgia. — *Chambers v. Collier*, 4 Ga. 193; *Monroe Female University v. Broadfield*, 30 Ga. 1; *Morgan v. Morgan*, 15 Ga. 288.

Massachusetts. — *Clark v. Jenkins*, 162 Mass. 397.

be granted as often as prejudicial errors are committed and excepted to.¹

b. FOR ERRORS OF LAW. — This is the rule where errors of law have occurred at each trial, it being the duty of the court to grant a new trial as often as the verdict is erroneous.²

c. FOR INSUFFICIENCY OF THE EVIDENCE — CONCURRENT VERDICTS. — But a distinction is made where the judge disagrees with the jury on questions of fact.³ If several juries have agreed as to questions of fact, a second or third concurrent verdict will not be set aside merely because contrary to the views of the judge.⁴

Missouri. — *State v. Horner*, 86 Mo. 71; *Wright v. Adams*, 12 Mo. App. 376; *State v. Edwards*, 35 Mo. App. 680; *State v. Edwards*, 36 Mo. App. 425; *Lovell v. Davis*, 52 Mo. App. 347; *Nicol v. Hyre*, 58 Mo. App. 134; *O'Neil v. Young, etc. Seed, etc., Co.*, 58 Mo. App. 628.

New York. — *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 206.

Texas. — *Wilson v. Gordon*, 20 Tex. 568.

England. — *Parker v. Ansel*, 2 W. Bl. 963; *Goodwin v. Gibbons*, 4 Burr. 2108; *Tindal v. Brown*, 1 T. R. 167.

1. *Berks County v. Ross*, 3 Binn. (Pa.) 520; *Keble v. Arthurs*, 3 Binn. (Pa.) 26; *Burkart v. Bucher*, 2 Binn. (Pa.) 467; *Van Blarcom v. Kip*, 26 N. J. L. 351; *Ross v. Ross*, 5 B. Mon. (Ky.) 20; *Moore v. Cherry*, 1 Bay (S. Car.) 269; *Munn v. Perkins*, 1 Smed. & M. (Miss.) 412; *Cumming v. Fryer*, Dudley (Ga.) 182; *Hill v. Deaver*, 7 Mo. 57; *Humbert v. Eckert*, 7 Mo. 259; *Jackson v. McMurray*, 4 Colo. 76.

The Rule in Equity is that where one verdict goes one way and the second verdict the other way, the court will usually order a third trial, and the third verdict will be regarded as conclusive. *Dan. Ch. Pr.* (5th ed.) 1125, citing *Wyatt's Pr.* 263.

The Scope of Inquiry on Appeal is limited to the order granting the second new trial. The appellate court will not review the action of the lower court in granting the first new trial. *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

2. *Coffin v. Phenix Ins. Co.*, 15 Pick. (Mass.) 291; *Van Doren v. Wright*, 65 Minn. 80.

A Third New Trial should be granted where the jury has followed erroneous instructions of the court on a material point. *Wright v. Adams*, 12 Mo. App. 376.

3. *Silsbee v. Lucas*, 53 Ill. 479; *Coffin v. Phenix Ins. Co.*, 15 Pick. (Mass.) 291; *Wilson v. Gordon*, 20 Tex. 569; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 206.

In *Van Doren v. Wright*, 65 Minn. 80, a new trial was granted for error in the instructions although the plaintiff had recovered the fourth successive verdict against the defendant. The court said: "It would certainly be error, after four trials, and four successive verdicts in favor of a party, to set aside the verdict as being against the evidence, provided there is sufficient evidence to fairly justify it. Of course this rule would not apply if prejudicial errors of law occurred during the trial, which were duly excepted to and urged as a ground for a new trial. Unfortunately, this is the condition of this case."

4. *Wolbrecht v. Baumgarten*, 26 Ill. 291; *Fowler v. Aetna F. Ins. Co.*, 7 Wend. (N. Y.) 270.

Two Concurrent Verdicts. — If there are no errors of law, two concurrent verdicts on conflicting evidence should be conclusive although in the opinion of the judge the verdicts are against the weight of evidence. *Joyce v. Charleston Ice Mfg. Co.*, 50 Fed. Rep. 371; *Griffith v. Willing*, 3 Binn. (Pa.) 317; *Frost v. Brown*, 2 Bay (S. Car.) 139.

But a new trial may be awarded where in the opinion of the trial court the juries have returned two concurrent verdicts which were against the preponderance of the evidence, as to both negligence and the amount of damages. *Gilligan v. New York, etc., R. Co.*, 1 E. D. Smith (N. Y.) 453.

Where Three New Trials Were Granted, each resulting in a verdict for the plaintiff, in an action for personal injuries chargeable to negligence, it is reversible error for the trial court to order

2. Number Restricted by Statute. — In many states the number of new trials which may be granted to one party is limited by statutes.¹ The object of such statutes is to make concurrent verdicts of different juries conclusive on questions of fact, although not approved by the judge,² and such statutes do not apply where there has been a mistrial on account of errors of law.³

another trial. *Hazzard v. Savannah*, 77 Ga. 54.

Where the evidence was conflicting on all material issues, it is not an abuse of discretion for the lower court to refuse a new trial after there have been three concurrent verdicts in favor of the same party. *Keans v. Jones*, 77 Ga. 90; *Central R., etc., Co. v. Kent*, 91 Ga. 687.

If there have been three concurrent verdicts, the supervisory power of the judge should then cease, and the facts thus determined should be conclusive. *Silsbee v. Lucas*, 53 Ill. 479; *Parmly v. Farrar*, 67 Ill. App. 624.

The refusal of the trial court to grant a third new trial on the ground of insufficiency of the evidence will not be interfered with by the appellate court although it would have approved a new trial on that ground. *Hollenbeck v. Marshalltown*, 62 Iowa 21.

Third Concurrent Verdict — Insufficient Evidence. — In *Massachusetts* there is no rule of law limiting the number of times a judge may set aside a verdict as against the evidence. The fact that three successive verdicts for the plaintiff have been returned does not, of itself, make it the legal duty of the court to allow the last verdict to stand if not supported by sufficient evidence. *Clark v. Jenkins*, 162 Mass. 397.

Disagreement of Juries — Fourth Verdict. — Where there have been three disagreements of juries, and the fourth verdict is, in the opinion of the trial judge, against the weight of the evidence, and does not meet with his approval, a new trial should be granted because the verdict is contrary to the evidence. *Richolson v. Freeman*, 56 Kan. 463.

1. *Stanberry v. Moore*, 56 Ill. 472; *Judah v. Vincennes University*, 23 Ind. 273; *Shirts v. Irons*, 47 Ind. 445; *Charles v. Malott*, 65 Ind. 184; *Humbert v. Eckert*, 7 Mo. 259; *Garnett v. Kirkman*, 33 Miss. 389; *Ray v. McCary*, 26 Miss. 404; *Wildy v. Bonney*, 35 Miss. 77.

2. *Judah v. Vincennes University*, 23

Ind. 273; *State v. Adams*, 12 Mo. App. 436.

3. *Turner v. Ross*, 1 Humph. (Tenn.) 16; *Wilson v. Greer*, 7 Humph. (Tenn.) 513; *Trott v. West*, 10 Yerg. (Tenn.) 500; *East Tennessee, etc., R. Co. v. Hackney*, 1 Head (Tenn.) 169.

But see *contra*, *Watterson v. Moore*, 23 W. Va. 404; *Williams v. Ewart*, 29 W. Va. 659.

Illinois — Sufficiency of Evidence — Third Verdict Conclusive. — Section 27 of the Illinois Practice Act, providing that "no more than two new trials upon the same grounds shall be granted to the same party in the same cause," does not prohibit the granting of new trials for errors of law, but only restricts the courts from reviewing the action of the jury on the facts after two concurrent verdicts have been returned. *Parmly v. Farrar*, 67 Ill. App. 624.

Tennessee. — Section 3122 of the Tennessee Code, providing that "not more than two new trials shall be granted to the same party," does not prevent new trials for errors in the charge of the court, error in the admission or rejection of evidence, misconduct of the jury, or other errors of law. The act was intended to prevent trial courts from setting aside two concurrent verdicts upon the merits of the case, on the ground that the verdict is contrary to the evidence or not sustained by sufficient evidence. *Knoxville Iron Co. v. Dobson*, 15 Lea (Tenn.) 409.

Such provision is not in conflict with the Fourteenth Amendment to the Federal Constitution. *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614.

If the court has set aside, upon the motion of some party, the verdicts of two juries, upon the ground that the evidence is not sufficient to sustain them, the power of the court is at an end to grant another new trial to the same party upon the facts or merits. *Knoxville Iron Co. v. Dobson*, 15 Lea (Tenn.) 409; *Trott v. West*, 10 Yerg. (Tenn.) 499; *East Tennessee, etc., R. Co. v. Hackney*, 1 Head (Tenn.) 170; *Burton v. Gray*, 10 Lea (Tenn.) 580.

3. Number After Reversal—No Restriction as to Reversals.—The power of appellate courts to reverse and remand a case for a new trial is not restricted by such statutes.¹ A new trial granted by the appellate court is not to be counted as a new trial within the number restricted.²

Unless it appears of record that a party has obtained two new trials on the ground of errors of law, it is error for a trial court to set aside a third verdict and grant a new trial. *Turner v. Ross*, 1 *Humph. (Tenn.)* 16; *Ferrell v. Alder*, 2 *Swan (Tenn.)* 78.

Missouri.—Rev. Stat. Mo. 1889, § 2241, provides that "only one new trial shall be allowed to either party, except, first, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior; and every order allowing a new trial shall specify of record the ground or grounds on which said new trial is granted." This is construed to permit any number of new trials where there is an error of law, or erroneous instruction, or misbehavior of the jury. *Hill v. Deaver*, 7 Mo. 57; *Pratte v. Judge*, 12 Mo. 194; *Boyce v. Smith*, 16 Mo. 317; *State v. Adams*, 76 Mo. 605; *State v. Edwards*, 36 Mo. App. 425; *State v. Horner*, 86 Mo. 71; *State v. Edwards*, 35 Mo. App. 680; *Harrison v. Cachelin*, 23 Mo. 117.

In *McShane v. Sanderson*, 108 Mo. 316, and *O'Neil v. Young*, etc., *Seed*, etc., Co., 58 Mo. App. 628, it was held that if for any cause a new trial had been granted, a second new trial could not be granted except for the two causes excepted in the section quoted *supra*. But in *Kreis v. Missouri Pac. R. Co.*, 131 Mo. 533, it was held that the court has power to grant either party a new trial where the evidence is insufficient to support the verdict although the same party has already been granted a new trial for errors of law or misbehavior of the jury.

Under this statute the same party cannot have a second new trial on the ground of the insufficiency of the evidence where he has secured the first new trial on that ground. *McFarland v. U. S. Mutual Accident Assoc.*, 124 Mo. 204.

Texas.—Where the statute provides that "not more than two new trials shall be granted to either party in the same cause, except the jury have been guilty of some misconduct, or erred in matter of law," a third new trial will not be granted for improper admission or exclusion of testimony. *Rains v. Hood*, 23 *Tex.* 555.

A third new trial will be set aside for error in matter of law where the verdict is based on insufficient evidence, *Randall v. Collins*, 58 *Tex.* 231; *Gibson v. Hill*, 23 *Tex.* 77; or where erroneous instructions were given, and followed by the jury, *Austin v. Talk*, 26 *Tex.* 127.

Concurring Verdicts.—Where the first verdict was set aside because the damages awarded were excessive, a second verdict for a larger sum is not a concurring verdict, and may be set aside on the same ground. *U. S. v. Taffe*, 78 *Fed. Rep.* 524.

1. *Stanberry v. Moore*, 56 *Ill.* 472; *Silsbe v. Lucas*, 53 *Ill.* 479; *Illinois Cent. R. Co. v. Patterson*, 93 *Ill.* 290; *De Soto v. Buckles*, 40 *Ill.* App. 85; *Atchison, etc., R. Co. v. Alsdurf*, 68 *Ill.* App. 149; *Shirts v. Irons*, 47 *Ind.* 445; *Roberts v. Robeson*, 22 *Ind.* 456; *Headrick v. Wisehart*, 57 *Ind.* 129; *Charles v. Malott*, 65 *Ind.* 184; *Boyce v. Smith*, 16 Mo. 317; *Harrison v. Cachelin*, 23 Mo. 117; *Dennison v. Genesee Circuit Judge*, 37 *Mich.* 285; *Louisville, etc., R. Co. v. Woodson*, 134 *U. S.* 614. But see *contra*, *Carmichael v. Geary*, 27 *Ind.* 362.

Questions of Fact.—A statutory prohibition against granting more than two new trials to the same party will prevent the appellate court from granting a new trial upon questions of fact. *Knoxville Iron Co. v. Dobson*, 15 *Lea (Tenn.)* 409.

2. *Burton v. Brashear*, 3 *A. K. Marsh. (Ky.)* 276; *Beckman v. Richardson*, 28 *Kan.* 648.

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By WILLIAM B. HALE.

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CROSS-REFERENCES.

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I. DEFINITION AND NATURE OF OFFICE — 1. In General — Definition. — A next friend is one who, though not regularly appointed guardian, represents in a suit a party thereto who is not *sui juris*, as an infant or married woman. The term is synonymous with *prochein ami*, which is the Norman-French term.¹ He is but a species of attorney.²

Distinguished from Guardian. — There is but little substantial difference between the office of next friend and that of a guardian *ad litem*. The chief distinction is that the former term is usually applied to one who appears on behalf of a plaintiff, while the corresponding representative of a defendant is usually denominated a guardian *ad litem*.³ But this distinction is not universal, and

1. A *prochein ami* is one admitted by the court to prosecute for an infant because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

2. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Anonymous*, 2 Hill (N. Y.) 417.

A next friend differs from an attorney in that he has control over the suit and is liable for the costs. *Sinclair v. Sinclair*, 13 M. & W. 640, *per Parke*, B.

3. See article *INFANTS*, vol. 10, p. 581.

A guardian *ad litem* and a *prochein ami* are different in that though an

by the practice and statutes of some states, a plaintiff under disability must be represented by a guardian *ad litem*.¹ There is substantially no difference between such a guardian *ad litem* and a next friend.

2. Character as a Party and as an Officer of Court. — A Next Friend, or Prochein Ami, Is Not a Party to the suit, but simply a person appointed by the court to look after the interests of one who by reason of some legal disability is unable to look after his own interests, and to manage the suit for him. The person for whose benefit the suit is prosecuted is the real party.² It follows from

infant may prosecute by the latter, he must always defend by the former. *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425.

A guardian *ad litem* is never appointed except for an infant defendant. *Priest v. Hamilton*, 2 Tyler (Vt.) 49; *Clark v. Platt*, 30 Conn. 282.

But married women and insane persons are sometimes permitted to prosecute by next friend. See *infra*, II. 1. *Necessity and Propriety of Suing by Next Friend*.

"Such a next friend is in the nature of a guardian *ad litem*, the chief difference being that the former is the curator of an infant plaintiff and the latter of an infant defendant." *Turner v. Patridge*, 3 P. & W. (Pa.) 172, citing 1 Tidd's Pr. 69.

"The relation of a *prochein ami* to the infant is similar to that of a guardian *ad litem* to his ward. * * * Both are mere agents, appointed either theoretically or in fact by the court, to conduct the business of the suit for the real parties whom they represent." *Leavitt v. Bangor*, 41 Me. 458.

1. See *infra*, II. 1. *Necessity and Propriety of Suing by Next Friend*.

2. *Georgia*. — *Bartlett v. Batts*, 14 Ga. 539.

Indiana. — *Whitem v. State*, 36 Ind. 196.

Maine. — *Soule v. Winslow*, 64 Me. 518; *Leavitt v. Bangor*, 41 Me. 458; *Sanborn v. Merrill*, 41 Me. 467.

Maryland. — *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619.

Massachusetts. — *Tripp v. Gifford*, 155 Mass. 109.

North Carolina. — *Mason v. McCormick*, 75 N. Car. 263; *George v. High*, 85 N. Car. 113; *Morris v. Gentry*, 89 N. Car. 249. See also *Branch v. Goddin*, 2 Winst. L. (N. Car.) 105; *Falls v. Gamble*, 66 N. Car. 455; *Wilson v. Houston*, 76 N. Car. 375; *Walker*

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Texas. — *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421. And see *Wygall v. Myers*, 76 Tex. 598.

Vermont. — *Brown v. Hull*, 16 Vt. 673; *Duffy v. Pinard*, 41 Vt. 297.

United States. — *Williams v. Ritchey*, 3 Dill. (U. S.) 406.

England. — *Sinclair v. Sinclair*, 13 M. & W. 640; *In re Corsellis*, 48 L. T. N. S. 425; *Melluish v. Collier*, 14 Jur. 621, 19 L. J. Q. B. 493.

The suit "although attended by a next friend, is the suit of the infant." *Bartlett v. Batts*, 14 Ga. 539, quoted in *Beliveau v. Amoskeag Mfg. Co.*, (N. H. 1895) 40 Atl. Rep. 734.

Nature of Office. — A *prochein ami*, or guardian by whom a suit in behalf of an infant is prosecuted, is merely a manager or conductor of the suit and is not a party for any purpose, the infant being the real party. *Brown v. Hull*, 16 Vt. 673, holding, for this reason, that a petition to vacate the judgment in such case need not be served on the next friend or guardian, nor need he be named in it. See also *Duffy v. Pinard*, 41 Vt. 297, holding that under the statute requiring a recognizance for costs "by some person other than the plaintiff," the *prochein ami* may be recognized.

The guardian or next friend is not in any legal sense a party to the action, although his name appears upon the record. *Tate v. Mott*, 96 N. Car. 19.

A next friend is not a party, but rather an attorney, and hence may be surety in replevin. *Anonymous*, 2 Hill (N. Y.) 417. In *Sinclair v. Sinclair*, 13 M. & W. 640, Pollock, C. B., inquired during the argument: "Why is the *prochein ami* more a party to the suit than the attorney?" Counsel re-

the fact that a next friend is not a party to the suit, that he is not disqualified as a witness in cases where a party would be incompetent to testify;¹ that his admissions or declarations out of court are not admissible in evidence as admissions of a party;² that the citizenship of the next friend is not a test of the jurisdiction of the federal courts;³ that the admission of a next friend

plied that the only difference there could be in this respect was that the one is appointed by the party himself, and the other by the court. In the same case, Parke, B., said: "I think the parties to a suit are the plaintiff and defendant, and that a *prochein ami* is not a party to the suit, but simply a person appointed by the court to look after the interests of the infant and manage the suit for him. He is different, no doubt, from the attorney, because he has a control over the suit and is liable to the costs. In *Slaughter v. Talbott*, Willes 190, it is said that the reason why they do not appoint officers of the court, or attorneys, to manage a suit in the character of a *prochein ami* is that they appoint some person who is to be liable for the costs."

When it appears with certainty that the action is based on the right of the minor, that the relief sought is such as he alone would be entitled to on the facts pleaded, and that this is sought for the use and benefit of the minor, the minor is the real plaintiff. *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421.

An infant female who by her next friend institutes an action for her own seduction is the plaintiff in the cause, and may or may not, as seems best to her, attend court and prosecute the suit. *Whittem v. State*, 36 Ind. 197.

1. **Disqualification as a Witness.**—*Leavitt v. Bangor*, 41 Me. 458; *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614.

A *prochein ami* is not a party to the suit, but simply a person appointed by the court to look after the interests of the infant and manage the suit for him, and therefore he is not within the exception to the general enactment in the statute 6 & 7 Vict., c. 85, § 1, as a party individually named in the record; and though he be liable to the costs, yet as that statute takes away all objection on the ground of interest, he is a competent witness for the plaintiff. *Sinclair v. Sinclair*, 13 M. & W. 640.

So the wife of the next friend or guardian may be a witness for the infant plaintiff. *Bonett v. Stowell*, 37 Vt. 258.

One who is made *prochein ami* to an infant, without his knowledge or consent, is not disqualified from being a witness. *Burwell v. Corbin*, 1 Rand. (Va.) 131.

Contra.—A complainant prosecuting a suit in chancery as the next friend of an infant is incompetent as a witness to sustain the allegations of the bill in behalf of the infant. *Pryor v. Ryburn*, 16 Ark. 671. See also *Hahn v. Van Doren*, 1 E. D. Smith (N. Y.) 411, where a next friend was held incompetent as a witness as being a party to the record.

In *Mason v. McCormick*, 75 N. Car. 263, 80 N. Car. 244, it was held that one who is next friend and also surety for the prosecution, has a certain "legal interest which might be affected by the event of the action," and is therefore not competent to testify as to any transactions with a party deceased.

Generally, as to the disqualifying interest of a next friend, see *Head v. Head*, 3 Atk. 511; *Sproule v. Botts*, 5 J. J. Marsh. (Ky.) 162; *Peebles v. Stanley*, 77 N. Car. 243; *McLeary v. Norment*, 84 N. Car. 235.

2. **Declarations as Evidence.**—*Buck v. Maddock*, 167 Ill. 219, *affirmed* 67 Ill. App. 466, holding that such admissions can only be received for the purpose of impeaching the credit of the next friend as a witness, and that a proper foundation must be laid.

3. **Jurisdiction of Federal Courts—Diverse Citizenship.**—*Blumenthal v. Craig*, 81 Fed. Rep. 320. *Compare Pennington v. Smith*, 45 U. S. App. 409, 78 Fed. Rep. 399, wherein the court said: "Whether complainant be regarded as a testamentary trustee under the will, or as a special guardian under the New Jersey statute for the sale of infants' real estate, he is certainly not a mere guardian *ad litem* or next friend, as in the cases cited by appellees; and it is on his citizenship, not on that of those he represents, that the jurisdiction of the federal courts must stand." *Citing* *Susquehanna, etc., R., etc., Co. v. Blatchford*, 11 Wall. (U. S.) 172.

by way of amendment does not amount to a change of parties;¹ and that the next friend is not individually bound by the judgment.²

A Next Friend Is Regarded as a Party, however, within the meaning of certain statutes relating to the conduct of suits.³

As Officer of Court.—A next friend is properly considered as an officer of the court specially appointed to look after the interests of defendants in whose behalf he acts.⁴

3. Majority of Infant Pendente Lite.—The authority of the next friend of an infant terminates upon the latter's arrival at

1. Admission by Amendment.—*Burns v. Wilson*, 1 Mo. App. 179.

Where the next friend is dead at the institution of the suit, the infant may amend and substitute a new name. *Bond v. Dillard*, 50 Tex. 302.

2. Effect of Judgment.—*Darvin v. Hatfield*, 4 Sandf. (N. Y.) 468; *Darrin v. Hatfield*, Seld. Notes (N. Y.) 38; *Bernard v. Merrill*, 91 Me. 358.

The Chancery Court has no jurisdiction to render a decree against one not a party to the suit, connected with it merely as *prochein ami*, for the amount bid by the complainant for lands sold under order of the court, and reported as paid by the register, who, under agreement of parties, had accepted the draft of the *prochein ami* in satisfaction of the bid. Execution issued on such a decree is void. *Moore v. Randolph*, 52 Ala. 530.

Compare *Baker v. Flint*, etc., R. Co., 91 Mich. 298, wherein it was held that a judgment in favor of a minor in an action brought by his father as next friend, which includes damages for loss of earning capacity from the time the injuries occurred, is a bar to an action by the father personally to recover for loss of services of the son during minority. This decision proceeded upon the ground that the father was estopped to claim such earnings, rather than that he was bound by the judgment as a party to the record. See also, to the same effect, *Goodin v. Rayl*, 85 Iowa 592.

Where a father prosecutes as next friend an action for a personal injury to his child, a judgment for the defendant is no bar to a subsequent *per quod* action by the father in his own right to recover for loss of services resulting from the same injury. *Bernard v. Merrill*, 91 Me. 358.

3. "We do not mean to say that a *prochein ami* may not be regarded as a party for certain purposes, such as re-

ceiving notices to take depositions, and the like." *Leavitt v. Bangor*, 41 Me. 458.

In an action by an infant brought by his next friend, the latter is the plaintiff within the meaning of the Statutes of 1784, c. 28, § 11, requiring original writs to be indorsed by the plaintiff or one of them. *Crossen v. Dryer*, 17 Mass. 222.

The *prochein ami*, or next friend, though technically not a party to the cause, is a party within the meaning and contemplation of the Constitution and the Acts of Assembly, to regulate and give force to the constitutional provision, and is therefore capable of making the suggestion and affidavit for removal of a cause to another court on the ground of prejudice. *Deford v. State*, 30 Md. 179.

4. *Alabama.*—*Isaacs v. Boyd*, 5 Port. (Ala.) 388.

Connecticut.—*McCarrick v. Kealy*, 70 Conn. 642.

Georgia.—*Bartlett v. Batts*, 14 Ga. 539.

Kansas.—*Sutton v. Nichols*, 20 Kan. 43.

Maryland.—*Baltimore*, etc., R. Co. v. *Fitzpatrick*, 36 Md. 619.

Massachusetts.—*Tripp v. Gifford*, 155 Mass. 109.

Mississippi.—*Klaus v. State*, 54 Miss. 644.

United States.—*The Etna*, 1 Ware (U. S.) 462.

England.—*Morgan v. Thorne*, 7 M. & W. 400.

Where an infant sues by *prochein ami*, the *prochein ami* is in theory, as originally he was in fact, an appointee or officer of the court. *Cludleigh v. Chicago*, etc., R. Co., 51 Ill. App. 491, *per Waterman*, J.

In *Sinclair v. Sinclair*, 13 M. & W. 640, Pollock, C. B., said: "It appears to me that the view taken by this court in the case of *Morgan v. Thorne*, 7 M.

majority,¹ for there is no longer any reason for continuing the office; but the action does not therefore abate.² The infant may be admitted to prosecute in his own name,³ and the name of the next friend may be stricken out by amendment.⁴ But it seems that even an amendment is not necessary, and that a mere suggestion upon the record that the infant has attained to full age is sufficient, and the cause may thereafter proceed in his name alone.⁵ Where the infant has sued in his own name without objection, upon reaching majority he may proceed without amendment,⁶ and the objection of infancy is not thereafter available,⁷ but the judgment will be binding on both parties to the action.⁸

The Infant May Elect whether or not to proceed with the suit.⁹

& W. 400, is perfectly correct; that he is not a party, but is merely to be considered as an officer of the court, specially appointed by them to look after the interests of the infant. My brother Parke there says: 'It appears perfectly clear that every *prochein ami* is to be considered as an officer of the court, specially appointed by them to look after the interests of the infant.' And my brother Alderson says: 'It is in fact almost the same thing as appointing an attorney.' It appears to me, therefore, that the *prochein ami* cannot be considered a party to the suit."

Agent of Court Not of Infant.—The next friend is in reality but the agent of the court, through whom it acts to protect the interests of the minor. The court is itself the guardian. *Seaton v. Tohill*, (Colo. App. 1898) 53 Pac. Rep. 170, citing *Cole v. Superior Court*, 63 Cal. 89.

A next friend of an infant is not his agent or attorney, but an officer of the court who derives his authority, not from the infant, but from the court. *Beliveau v. Amoskeag Mfg. Co.*, (N. H. 1895) 40 Atl. Rep. 734. Citing *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Tripp v. Gifford*, 155 Mass. 108; *Morgan v. Thorne*, 7 M. & W. 400.

1. *Lang v. Belloff*, 53 N. J. Eq. 298.

2. **Action Does Not Abate.**—*Tucker v. Wilson*, 68 Miss. 693; *Campbell v. Bowne*, 5 Paige (N. Y.) 34.

In *Lake Shore, etc., R. Co. v. Hutchins*, 37 Ohio St. 282, the action was begun by the guardian of infants who became of age before judgment; no amendment of the pleadings or parties was made. It was held that the suit would not be dismissed upon a motion based on the ground that the plaintiff,

i. e., the guardian, was not entitled to receive the money if recovered.

3. *Patton v. Furthmier*, 16 Kan. 29; *Sibley v. Ratliffe*, 50 Ark. 477.

4. *Lasseter v. Simpson*, 78 Ga. 61.

Where a husband sues as next friend of his minor wife, and pending suit she becomes of age, the declaration can be amended so as to strike out the representative character of the husband and leave the suit to proceed in the names of the husband and wife. *Bryant v. Helton*, 66 Ga. 477.

5. *Holmes v. Adkins*, 2 Ind. 398; *Clark v. Watson*, 2 Ind. 399; *Clements v. Ramsey*, 9 Ky. L. Rep. 172; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *Shuttlesworth v. Hughey*, 6 Rich. L. (S. Car.) 329, 60 Am. Dec. 130.

6. *Woodman v. Rowe*, 59 N. H. 453.

7. *Hicks v. Beam*, 112 N. Car. 642; *Sibley v. Ratliffe*, 50 Ark. 477.

Where an Action Is Commenced by an Infant Without a Guardian, he may, on coming of age during its pendency, ratify what has been done, and thereafter it will proceed the same as if properly commenced. Such ratification may be presumed from any conduct evincing his recognition of its being carried on for his benefit. *Germain v. Sheehan*, 25 Minn. 338.

Infancy cannot be pleaded in abatement after the plaintiff is of full age, although the suit was commenced while the plaintiff was an infant. *Hamlin v. Stevenson*, 4 Dana (Ky.) 597.

8. *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521.

9. *Shuttlesworth v. Hughey*, 6 Rich. L. (S. Car.) 329, 60 Am. Dec. 130; *Kleffel v. Bullock*, 8 Neb. 336.

Where the suit is brought by a next friend of an infant, the latter, after attaining his majority, may have a

4. Death of Next Friend. — An action does not abate upon the death of a next friend by whom it is prosecuted,¹ because, as has been seen, the next friend is not a party.² Another next friend may be appointed and the action will proceed.³ A bill of revivor is not necessary.⁴

II. APPOINTMENT — 1. Necessity and Propriety of Suing by Next Friend — a. INFANTS — (1) General Statement of Rule — Right of Infant to Sue. — As a general rule, an infant is entitled to sue on any cause of action accruing in his favor, without waiting until he arrives at majority.⁵

reference to ascertain whether or not it was properly brought, and if it was not, he may abandon it and the costs will be charged upon the next friend. *Waring v. Crane*, 2 Paige (N. Y.) 79. See generally *infra*, VI. 1. *Costs*.

1. *Tucker v. Wilson*, 68 Miss. 693.

2. See *supra*, I. 2. *Character as a Party and as an Officer of Court*.

3. *Richards v. Swan*, 7 Gill (Md.) 366.

Where the next friend dies pending the suit, the infant's attorney should at once move for the appointment of a new one. *Bracey v. Sandiford*, 3 Madd. 468. And where the party named as next friend is dead at the institution of the suit, the infant may amend and substitute a new name. *Bond v. Dillard*, 50 Tex. 302.

Where a guardian who had not obtained an appointment at the time of commencing an action prosecuted the action on behalf of infants and died before judgment, it was held that a guardian duly appointed and qualified should be admitted to prosecute the action, and that the declaration should be amended so as to make it appear that the infants sued by their guardian and next friend, in order to disembarass the pleading from the technical point that the suit had been begun by the deceased guardian before his appointment, but that the new guardian should pay the costs up to the day of his application for admission. *Bull v. Dagenhard*, 55 Miss. 602.

English Practice. — When the next friend of an infant plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend; and their nominee may obtain orders of course in the suit changing the solicitors on the record and appointing himself next friend. In such a case the order appointing the new next friend need not be supported by any affidavit as to his fitness. *Talbot v. Talbot*, L.

R. 17 Eq. 347, 43 L. J. Ch. 352, 22 W. R. 619.

4. *Tucker v. Wilson*, 68 Miss. 693, holding that infants who reached their majority after the death of their next friend may continue the suit merely by appearing as adults and prosecuting it, and that, although a bill of revivor was unnecessary, still it was a proper mode of giving notice to the court and to adverse parties.

5. *Alabama*. — *Benziger v. Miller*, 50 Ala. 206.

Connecticut. — *Smith v. Richards*, 29 Conn. 239.

Georgia. — *Alsbaugh v. Adams*, 80 Ga. 346.

Indiana. — *Edwards v. Beall*, 75 Ind. 401; *Britton v. State*, 115 Ind. 55; *Winer v. Mast*, 146 Ind. 177.

Iowa. — *Gooden v. Rayl*, 85 Iowa 592.

Maine. — *Boynton v. Clay*, 58 Me. 236.

Michigan. — *Bloomington v. Chittenden*, 74 Mich. 698.

Mississippi. — *Carmichael v. Hunter*, 4 How. (Miss.) 308, 35 Am. Dec. 401.

Montana. — *Clark v. Tate*, 7 Mont. 171.

New York. — *Carr v. Huff*, 57 Hun (N. Y.) 18; *Segelken v. Meyer*, 22 Hun (N. Y.) 6.

England. — *Howard v. Shrewsbury*, L. R. 17 Eq. 378, 43 L. J. Ch. 495, 22 W. R. 290, 29 L. T. N. S. 862.

A minor may make the necessary contracts for the commencement and prosecution of a civil suit where, under the peculiar circumstances of the case, it is the only means by which he can procure the absolute necessities which he requires. *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

Partition. — Infants may be plaintiffs in statutory proceedings for partition. *Thornton v. Thornton*, 27 Mo. 302; *Wagh v. Blumenthal*, 28 Mo. 462; *Larned v. Renshaw*, 37 Mo. 458.

Cannot Sue Without Representative. — But an infant is not considered as having sufficient discretion to conduct a suit in person, and therefore the law provides a competent representative for him.¹ It is a universal rule that an infant cannot sue in person or by attorney, but must sue by his guardian or next friend.²

Under Rev. Stat. Wis., § 1166, providing that the lands of minors sold for taxes may be redeemed at any time before coming of age and during one year afterwards, a minor may sue for partition and to quiet title to lands sold for taxes, where he asks for relief, on condition of paying into court the amount necessary to redeem, and pays such amount into the office of the county clerk. *Tucker v. Whittlesey*, 74 Wis. 74. See also *Britton v. State*, 115 Ind. 55; *Scott v. Scott*, 29 S. Car. 414; *Andrews v. Townshend*, 56 N. Y. Super. Ct. 140.

An action to correct a mistake in a decree, set aside a deed, quiet title, and for partition, may be commenced by an infant. *Edwards v. Beall*, 75 Ind. 401.

Accounting for Rents and Profits. — An infant may obtain in chancery an accounting of rents and profits from a disseizor who has entered on lands of which the infant holds the legal title. *Carmichael v. Hunter*, 4 How. (Miss.) 308, 35 Am. Dec. 401.

Recovery of Realty in Equity. — When an infant is entitled both at law and in equity to real estate, as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as coplaintiffs. *Howard v. Shrewsbury*, L. R. 17 Eq. 378, 43 L. J. Ch. 495, 22 W. R. 290, 29 L. T. N. S. 862.

See generally article INFANTS, vol. 10, p. 581.

1. See article INFANTS, vol. 10, p. 594 *et seq.*

It Is the Theory of the Law that a minor is not competent to maintain and protect his own interests in court. *Parkins v. Alexander*, (Iowa 1898) 74 N. W. Rep. 769. *Citing Cavender v. Smith*, 5 Iowa 193.

Who May Object. — The rule requiring a minor to be represented by a next friend or guardian *ad litem* is primarily for the benefit of the minor, but interested persons may in proper cases insist upon the observance of the rule for their own protection. *Parkins v.*

Alexander, (Iowa 1898) 74 N. W. Rep. 769.

2. **Cannot Sue in Person or by Attorney** — *Alabama*. — *Hooks v. Smith*, 18 Ala. 340; *Strode v. Clark*, 12 Ala. 621; *Bowie v. Minter*, 2 Ala. 406.

Arkansas. — *Roberts v. Maddox*, 5 Ark. 51.

California. — *Fox v. Minor*, 32 Cal. 111.

Connecticut. — *Apthorp v. Backus*, *Kirby* (Conn.) 407; *Judson v. Blanchard*, 3 Conn. 584; *Clark v. Turner*, 1 Root (Conn.) 200.

Georgia. — *Jack v. Davis*, 29 Ga. 219; *Oliver v. McDuffie*, 28 Ga. 522; *Nicholson v. Wilborn*, 13 Ga. 467.

Illinois. — *Hoare v. Harris*, 11 Ill. 24; *Peak v. Shasted*, 21 Ill. 137.

Indiana. — *Keeran v. Clowser*, 5 Blackf. (Ind.) 604; *Bouche v. Ryan*, 3 Blackf. (Ind.) 472; *Timmons v. Timmons*, 6 Ind. 8.

Iowa. — *Byers v. Des Moines Valley R. Co.*, 21 Iowa 54.

Kansas. — *Sutton v. Nichols*, 20 Kan. 43; *Burdette v. Corgan*, 26 Kan. 102.

Kentucky. — *Philpot v. Bengé*, 5 Ky. L. Rep. 690; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562; *Chalfant v. Monroe*, 3 Dana (Ky.) 35; *McChord v. Fisher*, 13 B. Mon. (Ky.) 193; *Cook v. Totton*, 6 Dana (Ky.) 108.

Maine. — *Raymond v. Sawyer*, 37 Me. 406.

Maryland. — *Wainwright v. Wilkinson*, 62 Md. 146; *Deford v. State*, 30 Md. 179; *Baltimore v. Norman*, 4 Md. 352.

Massachusetts. — *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Knapp v. Crosby*, 1 Mass. 479; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Swan v. Horton*, 14 Gray (Mass.) 179; *Jennings v. Collins*, 99 Mass. 29.

Minnesota. — *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497.

Mississippi. — *Hurt v. Southern R. Co.*, 40 Miss. 394; *Lee v. Jenkins*, 30 Miss. 592.

Missouri. — *Jeffrie v. Robideaux*, 3 Mo. 33; *Fulbright v. Cannefox*, 30 Mo. 425.

New Jersey. — *McGiffin v. Stout*, 1 N. J. L. 108; *Lang v. Belloff*, 53 N. J. Eq. 298.

General Guardian as Representative. — In the absence of a controlling statute, the general guardian of an infant must sue as technical plaintiff on behalf of his ward, and in the latter's name, for the

New York. — *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Wilkinson v. Schmale*, 1 Hilt. (N. Y.) 263; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417; *Comstock v. Carr*, 6 Wend. (N. Y.) 526; *Maynard v. Downer*, 13 Wend. (N. Y.) 575; *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373.

North Carolina. — *Ward v. Lowndes*, 96 N. Car. 367.

South Carolina. — *M'Daniel v. Nicholson*, 2 Mill (S. Car.) 344.

Texas. — *Wright v. McNatt*, 49 Tex. 425.

Vermont. — *Somers v. Rogers*, 26 Vt. 585; *Thomas v. Dike*, 11 Vt. 273.

An Infant Cannot Appear by an Attorney, either at law or in equity. 1 Tidd's Pr. 99; Story's Eq. Pl., § 57; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123; *Bernard v. Merrill*, 91 Me. 358; *Wainwright v. Wilkinson*, 62 Md. 146.

"Minors can only litigate by their guardians, general or special; or even if they can still appear by a next friend they certainly cannot litigate in their own names, appearing by attorney." *Wright v. McNatt*, 49 Tex. 425.

Illustrations. — Infants cannot, by their solicitor or counsel, present a petition — *e. g.*, to be realized from giving security on appeal — but must, as in all other cases, appear by guardian or next friend. *Bradwell v. Weeks*, 1 Johns. Ch. (N. Y.) 325.

If the plaintiff is an infant the form of the writ may be the same as in other cases; but the declaration must be by guardian or next friend. *Bouche v. Ryan*, 3 Blackf. (Ind.) 472.

"The Old Equity Rule is stated by Story as follows: 'An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion as of his inability to bind himself and to make himself liable to the costs of the suit. When, therefore, an infant claims a right or suffers an injury, on account of which it is necessary to apply to a court of equity, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs;

and the person who institutes a suit on behalf of an infant is therefore termed his next friend (*prochein ami*).' Story's Eq. Pl., § 57. If the appointment was not made, the defendant could demur or put in a plea in abatement. Story's Eq. Pl., §§ 494, 725." *Matter of Cahill*, 74 Cal. 52.

"The Common-law Rule is stated by Tidd as follows: 'An infant, or person under the age of twenty-one years, not being capable of appointing an attorney, must sue by his *prochein ami* or guardian. * * * An infant defendant must in all cases appear and defend by guardian. * * * If it appear by attorney, it is error; though if an infant plaintiff appear by attorney, it is cured by the statute of jeofails.' Tidd's Pr. (9th ed.) 99." *Matter of Cahill*, 74 Cal. 52.

Infants May Sue by Next Friend —

Arkansas. — *Reed v. Ryburn*, 23 Ark. 47; *Sibley v. Ratliffe*, 50 Ark. 477.

Florida. — *Pace v. Pace*, 19 Fla. 438.

Georgia. — *Daniel v. Powell*, 29 Ga. 730; *Lasseter v. Simpson*, 78 Ga. 61.

Illinois. — *Ames v. Ames*, 148 Ill. 321; *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

Indiana. — *Funk v. Davis*, 103 Ind. 281; *Dodd v. Moore*, 91 Ind. 522, 92 Ind. 397; *Budd v. Rutherford*, 4 Ind. App. 386.

Iowa. — *Ball v. Miller*, 59 Iowa 634; *Vance v. Fall*, 48 Iowa 364; *Byers v. Des Moines Valley R. Co.*, 21 Iowa 54; *Thurston v. Cavenor*, 8 Iowa 155.

Kansas. — *Strong v. Marcy*, 33 Kan. 109.

Kentucky. — *Longnecker v. Greenwade*, 5 Dana (Ky.) 516; *Andrews v. Hurt*, 14 Ky. L. Rep. 765; *Richardson v. Hunt*, 5 Ky. L. Rep. 931; *C. & C. Bridge Co. v. Brennan*, 16 Ky. L. Rep. 126; *Bramel v. Cunningham*, 3 Ky. L. Rep. 512; *Clements v. Ramsey*, 9 Ky. L. Rep. 172; *Wilson v. M'Gee*, 2 A. K. Marsh. (Ky.) 601.

Maryland. — *Bush v. Linthicum*, 59 Md. 344.

Michigan. — *Bloomington v. Chittenden*, 74 Mich. 698.

Minnesota. — *Meyenberg v. Eldred*, 37 Minn. 508.

New York. — *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178.

enforcement of his rights.¹ In such a suit the guardian is substantially a next friend, although not so designated.² But there are numerous classes of cases in which a general guardian may maintain an action in his own name, although for the benefit of his ward.³

Texas. — *Cannon v. Hemphill*, 7 Tex. 184; *Texas, etc., R. Co. v. Malone*, 15 Tex. Civ. App. 56.

United States. — *Kingsbury v. Buckner*, 134 U. S. 650; *Kansas City, etc., R. Co. v. Morgan*, 76 Fed. Rep. 429.

See also *infra*, II. 1. a. (2) *Guardian ad Litem or Next Friend*.

Infants May Sue by Guardian — Alabama. — *Hooks v. Smith*, 18 Ala. 338.

Arkansas. — *Turner v. Alexander*, 41 Ark. 254; *Roberts v. Maddox*, 5 Ark. 51.

Indiana. — *Rucker v. M'Neely*, 4 Blackf. (Ind.) 179.

Kentucky. — *Marshall v. Marshall*, 4 Bush (Ky.) 248, wherein the court said: "In the absence of a statutory guardian, the public guardian could take control of suits which he might find pending and not being prosecuted for the want of a statutory guardian."

1. See article GUARDIANS, vol. 9, p. 929.

2. *Guardian Substantially a Next Friend.* — In *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619, the court said: "Although the practice of allowing an infant to sue by his guardian, describing him as such, has prevailed in this state, still he is in all respects the next friend of the infant. He is charged with all the duties and liabilities, subject to the same restraints, and bears the same relation to the infant and the suit as though he had been described as the next friend of the infant. * * * He is, in the conduct of the suit, subject to the control of the court; and if he fail to do his duty, or if any other sufficient ground be brought to the knowledge of the court, as, if he have an interest in the subject-matter of the litigation antagonistic to the interests of the infant, the court not only has the power, but it is its duty, to remove him and appoint another, who may be more faithful or not subjected to a similar temptation." See *Dan. Ch. Pr.* 68.

A guardian of a minor plaintiff, improperly appointed, will be treated by the court as a next friend to enable the minor to maintain an action to recover rents to which she is entitled. *Johnson v. Blair*, 126 Pa. St. 426.

3. *Alabama.* — *Hutton v. Williams*,

35 Ala. 503; *Longmire v. Pilkington*, 37 Ala. 296; *Sutherland v. Goff*, 5 Port. (Ala.) 508; *Fuqua v. Hunt*, 1 Ala. 197.

Nevada. — *Ricord v. Central Pac. R. Co.*, 15 Nev. 167.

New York. — *Thomas v. Bennett*, 56 Barb. (N. Y.) 197; *Carr v. Huff*, 57 Hun (N. Y.) 18; *Andrews v. Townshend*, 56 N. Y. Super. Ct. 140; *Bunce v. Bunce*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 61.

Texas. — *March v. Walker*, 48 Tex. 372.

See article GUARDIANS, vol. 9, p. 932.

Reason for Rule. — The general guardian of an infant is a trustee of an express trust, and may bring an action in reference to the personal estate as well as in reference to the rents and profits of the real estate of the ward. *Thomas v. Bennett*, 56 Barb. (N. Y.) 197, wherein the court said: "It would certainly be a very useless ceremony, where the personal property was legally owned by the ward, and a suit became necessary to recover for it, there being a general guardian, that the action should be brought in the name of the infant, under the appointment of a guardian *ad litem*, and who, if, when he had received the money, should refuse to pay it over to the general guardian, would have to be sued therefor in the same way."

A Guardian Is Not Authorized to file a bill in equity in his own name as guardian to recover the distributive share of his wards in the personal estate of their ancestor. Such suit should be brought in the name of the infants by their next friend, who may be their guardian. *Burdett v. Cain*, 8 W. Va. 282.

A writ of entry in behalf of infants cannot be maintained in the name of their guardian, but should be brought in their name by their next friend. *Jennings v. Collins*, 99 Mass. 29.

An action for damages for the diminution of the rental value of real estate, the title to which is in infants, is properly brought in the name of the infants by their next friend or guardian, and not by the guardian in his own name. *Baltimore, etc., R. Co. v. Taylor*, 6 App. Cas. (D. C.) 259.

Guardian or Next Friend. — At common law infants were required to sue and defend by guardian, but by the statute of Westminster infants were authorized to sue by next friend.¹ Under this or similar statutes,² suit may be brought either by a guardian or a next friend.³ In a few cases it has been distinctly held that an

In Indiana the statutes providing that an infant may bring suit by next friend were intended as an additional protection to infants and their estates, and were not meant to deprive them of other means of obtaining such protection. It was accordingly held that a guardian of an infant might maintain suit in her own name to enjoin the ward's real estate in the guardian's possession. *Kinsley v. Kinsley*, (Ind. 1898) 49 N. E. Rep. 819.

1. *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Roy v. Louisville, etc., R. Co.*, 34 Fed. Rep. 276.

Origin of Office. — "At the common law, infants were required to sue and to defend by guardian. Co. Litt. 135*b*, note 220. The law has not been altered as to the manner in which they are to defend. But by the statute of Westm. 1, c. 48, infants were authorized to sue by *prochein ami* in an assize, and by Westm. 2, c. 15, in all other actions. 'In omni casu quo minores infra aetatem implacitare possunt, concessum est, etc., quod propinquiore amici admittantur ad sequendum pro eis.' It was a cumulative remedy, leaving it optional for them to sue either by guardian or by next friend." *Miles v. Boyden*, 3 Pick. (Mass.) 213.

"It seems that a *prochein ami* for an infant was not known before the statute of Westminster, passed in the reign of Edward the First; and though this statute was not introduced by the adoption of the common law, yet upon the introduction of that system, the rule, under the statute, seems immediately to have been carried out in practice; and this has continued for such period of time, and been sanctioned by such general usage, that it would seriously endanger the multiplied rights growing up and settled under such rule were it now declared to be unauthorized by law. The case before the court furnishes evidence that the rule is deeply rooted in practice. One of the plaintiffs, who is an infant, sues by her next friend; and the infant heir of an adult plaintiff, who died during the pendency of the suit, continues its prosecution by

the agency of a next friend, on grounds which involve his want of authority." *Cannon v. Hemphill*, 7 Tex. 201.

"Since the 2d Statute of Westminster, c. 15, it has been usual for infants to sue by *prochein ami* and defend by guardian. The Court of Chancery, when exercising its protective jurisdiction over infants, has always appointed a guardian to defend their rights, and in this way has made them wards of the court. A *prochein ami* might make suggestions to the court, but before any determination was made respecting an infant's interests, they were placed under the care of a guardian, who was bound to see that all facts affecting them were brought to the knowledge of the court." *Roche v. Waters*, (Md. 1889) 18 Atl. Rep. 867.

2. See *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491; *Hooks v. Smith*, 18 Ala. 338.

Since the Statute of 13 Edward I. there has never been any question as to the right of a minor to sue either by guardian or by next friend, as the case may be, in any matter whatever in which suit might be maintained by an adult, in the absence of any statute by which that right has been denied to the infant and his guardian substituted in his place. *Baltimore, etc., R. Co. v. Taylor*, 6 App. Cas. (D. C.) 259.

In *Massachusetts*, under Pub. Stat., c. 139, § 29, a suit may be brought in the name of an infant either by guardian or by next friend. *Burke v. Burke*, (Mass. 1898) 49 N. E. Rep. 753.

3. *Alabama*. — *Strange v. Gunn*, 56 Ala. 611; *Hooks v. Smith*, 18 Ala. 338; *Barwick v. Rackley*, 45 Ala. 215; *Cook v. Adams*, 27 Ala. 294.

California. — *Fox v. Minor*, 32 Cal.

111.

Connecticut. — *Judson v. Blanchard*, 3 Conn. 579.

Illinois. — *Holmes v. Field*, 12 Ill. 424.

Indiana. — *Perkins v. Wright*, 37 Ind. 27.

Kansas. — *Sutton v. Nichols*, 20 Kan. 43.

Mississippi. — *Hurt v. Southern R. Co.*, 40 Miss. 391.

infant must sue by a next friend and cannot sue by his guardian,¹ while in many cases the rule has been stated broadly and without

Missouri. — *Robinson v. Hood*, 67 Mo. 660.

Nebraska. — *Kleffel v. Bullock*, 8 Neb. 336.

Tennessee. — *Evans v. Mason*, 1 Lea (Tenn.) 26.

Vermont. — *Brown v. Hull*, 16 Vt. 673.

United States. — *Kingsbury v. Buckner*, 134 U. S. 650.

In *Deford v. State*, 30 Md. 179, the court decided that infants were properly represented by a next friend, although they had a guardian appointed by the Orphans' Court.

"It does not seem to us that it is of much consequence which way it is brought, as the court will have power to direct a change from the one to the other, as occasion may require, both being officers of the court for the purpose of such suits." *Baltimore, etc., R. Co. v. Taylor*, 6 App. Cas. (D. C.) 259. *Citing French v. Marshall*, 136 Mass. 564; *Riggs v. Zaleski*, 44 Conn. 121; *Thomas v. Dike*, 11 Vt. 273; *Bradley v. Amidon*, 10 Paige (N. Y.) 239; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Hoare v. Harris*, 11 Ill. 24; *Fox v. Minor*, 32 Cal. 112; *Deford v. Keyser*, 30 Md. 179; *Baltimore v. Norman*, 4 Md. 352.

A Minor Can Sue Only by Guardian, appointed according to the law of the forum. *Verrier v. Verrier*, 7 Phila. (Pa.) 618.

Infant May Sue by Next Friend Although There Is a Guardian — *Alabama*. — *Hooks v. Smith*, 18 Ala. 338.

Illinois. — *Holmes v. Field*, 12 Ill. 424; *Patterson v. Pullman*, 104 Ill. 80.

Maryland. — *Baltimore v. Norman*, 4 Md. 352; *Deford v. State*, 30 Md. 179.

Mississippi. — *Hurt v. Southern R. Co.*, 40 Miss. 391.

Texas. — *Robson v. Osborn*, 13 Tex. 298; *Martin v. Weyman*, 26 Tex. 460.

Vermont. — *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

An infant may sue by a next friend though he has a natural guardian residing in another state. *St. Louis, etc., R. Co. v. Jackson*, 3 Tex. App. Civ. Cas., § 327; *Hays v. Hays*, 66 Tex. 606; *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421.

Discretion of Court. — The guardian is the proper representative of the ward

in all legal proceedings, and should be regarded as such unless some good reason appears to the contrary. As to the reason, the court in which the proceeding is instituted or is proposed to be brought is the judge; that provision of the statute which says that the court may "appoint or allow any person as next friend" to sue or defend, clearly shows that the court is clothed with discretion. *Patterson v. Pullman*, 104 Ill. 80. See also *Peak v. Shasted*, 21 Ill. 137; *Kesler v. Penninger*, 59 Ill. 134.

An infant is not always bound to appear in a court of chancery by a guardian, though there may be one in existence, but he may file his bill by a next friend, and if an objection that there is a guardian by whom the bill should have been filed is taken in proper time, the court may, in the exercise of a sound discretion, determine whether the suit shall proceed as it was commenced or in the name of the guardian. *Holmes v. Field*, 12 Ill. 424.

Infants May Sue by Guardian *ad Litem* Although There Is a General Guardian, in states where a guardian *ad litem* performs the functions of a next friend. *Segelken v. Meyer*, 94 N. Y. 473.

An action on a life insurance policy made payable to the assured's "children for their use, or to their guardian if under age," may be maintained by a guardian *ad litem*, and need not be in the name of the general guardian. *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497.

The guardian in socage or general guardian must sue to recover lands and damages for withholding them from an infant. The infant cannot maintain such an action by guardian *ad litem*. This case is not within section 115 of the code, which applies only to actions which may be brought by an infant in his own name. Objection, however, is waived unless taken by demurrer or answer. *Seaton v. Davis*, 1 Thomp. & C. (N. Y.) 91.

1. *Sanderson v. Sanderson*, 17 Fla. 820; *Rawlins v. Rawlins*, 18 Fla. 345; *Paul v. Frierson*, 21 Fla. 529; *Hoyt v. Hilton*, 2 Edw. Ch. (N. Y.) 202.

Where, by statute, an infant is required to bring an action by his next friend, he cannot sue by a guardian. *Maxedon v. State*, 24 Ind. 370.

qualification that an infant must sue by a next friend or guardian *ad litem*.¹ On the other hand, cases may be found intimating that infants may proceed by next friend only in cases where their regular guardian refuses to act.² However this may be, an

1. *Alabama*. — *Smith v. Redus*, 9 Ala. 99; *Barwick v. Rackley*, 45 Ala. 215.
- Florida*. — *Sanderson v. Sanderson*, 17 Fla. 820; *Rawlins v. Rawlins*, 18 Fla. 345; *Paul v. Frierson*, 21 Fla. 529.
- Georgia*. — *Bartlett v. Batts*, 14 Ga. 539; *Van Pelt v. Chattanooga, etc.*, R. Co., 89 Ga. 706.
- Illinois*. — *St. Louis, etc., R. Co. v. Reagan*, 52 Ill. App. 488.
- Indiana*. — *Clark v. Watson*, 2 Ind. 399; *Shirley v. Hagar*, 3 Blackf. (Ind.) 225; *Britton v. State*, 115 Ind. 55.
- Iowa*. — *Gooden v. Rayl*, 85 Iowa 592.
- Kentucky*. — *Bustard v. Gates*, 4 Dana (Ky.) 437; *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 69; *Yeizer v. Stone*, 7 T. B. Mon. (Ky.) 189.
- Maine*. — *Soule v. Winslow*, 64 Me. 518.
- Maryland*. — *Wainwright v. Wilkin-*
son, 62 Md. 147.
- Massachusetts*. — *Crossen v. Dryer*, 17 Mass. 222.
- Michigan*. — *Sick v. Michigan Ald*
Assoc., 49 Mich. 50; *Ash v. Mathes*, 52 Mich. 615; *Haines v. Oatman*, 2 Dougl. (Mich.) 430.
- Missouri*. — *Porter v. Hannibal, etc.*,
R. Co., 60 Mo. 160.
- New Jersey*. — *Lang v. Belloff*, 53 N.
J. Eq. 298.
- New York*. — *Colden v. Haskins*, 3
Edw. Ch. (N. Y.) 311; *Fulton v. Rose-*
velt, 1 Paige (N. Y.) 178, 19 Am. Dec.
409.
- North Carolina*. — *Howett v. Alexan-*
der, 1 Dev. L. (N. Car.) 431.
- Ohio*. — *Hanly v. Levin*, 5 Ohio 227.
- South Carolina*. — *Shuttlesworth v.*
Hughey, 6 Rich. L. (S. Car.) 329; *Drago*
v. Moso, 1 Spears L. (S. Car.) 212, 40
Am. Dec. 592.
- Tennessee*. — *Miles v. Kaigler*, 10
Yerg. (Tenn.) 15; *Benton v. Pope*, 5
Humph. (Tenn.) 392; *Barbee v. Wil-*
liams, 4 Heisk. (Tenn.) 522.
- Vermont*. — *Brown v. Hull*, 16 Vt.
673.
- United States*. — *U. S. Bank v. Ritchie*,
8 Pet. (U. S.) 128; *Prince v. Towns*, 33
Fed. Rep. 161.
- England*. — *Dow v. Clark*, 1 Cromp.
& M. 860, 2 Dowl. P. C. 302; *Briant v.*
Wagner, 3 Jur. 460.

Under the Colorado Code, where an in-

fant is a party to a suit, he must appear by next friend or guardian to be appointed by the court or judge. *Seaton v. Tohill*, (Colo. App. 1898) 53 Pac. Rep. 170, citing Code, §§ 7, 8.

In New York. — "On the whole, while we agree that the better practice is at present to bring an action designed for the protection or the recovery of an infant's property in the name of the infant, represented by a guardian appointed for the purposes of the action in hand, yet an action brought by the general guardian where, by the title and the averments in the complaint, it is plain to see that the same is solely in behalf of the infant, and where the recovery is for his benefit, is, in the absence of fraud or collusion, binding upon the infant. By the statute, 2 Rev. Stat., p. 150, § 3, the guardian is required to take the custody and management of the personal estate of the minor, together with the profits of his real estate, and is authorized to bring such action in relation thereto as guardian in socage might by law. We perceive in the provisions of the code no language which works a repeal of this statute, and consequently the same must be deemed in force, although, as above stated, under the general scope and purpose of the Code of Civil Procedure, an infant should be represented by a person specially designated by the court or judge to take care of his interests in each particular action." *Carr v. Huff*, 57 Hun (N. Y.) 18. See also *Perkins v. Stimmel*, 114 N. Y. 359, 42 Hun (N. Y.) 520; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Segelken v. Meyer*, 14 Hun (N. Y.) 593.

2. Under a statute providing that "excepting married women, the action of a person under disability must be brought by his guardian, curator, or committee, or unless said guardian, curator, or committee refuse to sue, in which case he must be made a defendant," infants having a statutory guardian can only probate a will by that guardian unless he declines to assert their claim to have the paper probated; then, if they appear by their next friend, the guardian should be made a defendant. *Miller v. Cabell*,

infant's right to sue by next friend is undoubted in cases where he has no regularly qualified guardian,¹ or where such guardian is hostile or interested adversely to his ward.²

Infant Complainant.—It seems the better opinion that a next friend must be appointed for an infant complainant suing jointly with adults, as well as where he is a sole plaintiff;³ but a few cases

81 Ky. 178. See also *Apthorp v. Backus*, Kirby (Conn.) 407, 1 Am. Dec. 26.

"The trust of *prochein ami* was first created by statute, 10 Petersdorff 579, though by long practice it may now be considered as one of the rights of an infant, and was intended to provide alone for those cases where the lawful guardian omitted to protect the rights and interests of his ward, or was unable or unwilling to commence a suit in his behalf. The origin of the trust goes far to show the limited authority coupled with it." *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

If a guardian disagrees to his ward's suit, the writ will not be quashed, but a *prochein ami* may be substituted. *Hardy v. Scanlin*, 1 Miles (Pa.) 87.

1. *McDodrill v. Pardee*, etc., *Lumber Co.*, 40 W. Va. 564; *Wainwright v. Wilkinson*, 62 Md. 147.

An infant may sue by *prochein ami* when he has no guardian, or, having a guardian, he refuses to appear for his ward. *Apthorp v. Backus*, Kirby (Conn.) 407, 1 Am. Dec. 26.

2. *Hawkins v. Forrest*, 1 Tex. Unrep. Cas. 167; *Mealy v. Lipp*, (Tex. Civ. App. 1897) 40 S. W. Rep. 824.

Disqualifying Adverse Interest.—Illustrations.—An infant, in a proceeding where his guardian's interest is hostile to his, should either be made defendant and have a guardian *ad litem*, or may proceed himself by his next friend or guardian *ad litem*; and where his regular guardian is a cotenant of the infant, such guardian cannot maintain an action for partition as next friend of his ward, because their interests are adverse. *Roodhouse v. Roodhouse*, 132 Ill. 360.

Where a bill filed by a father and his children for specific performance shows on its face that the interest of the father is adverse to that of the children, the court, upon its appearing that such children are minors, should appoint a guardian *ad litem*, as the father's interest prevents his acting as next friend. *Linebaugh v. Atwater*, 173 Ill. 613.

Where an action is brought by a

guardian upon the bond of a former guardian, to which bond the plaintiff guardian is surety, it is necessary that the wards of the plaintiff should be made parties plaintiff and a *prochein ami* appointed to protect their interests, and on appeal the case will be remanded to that end. *Wilson v. Houston*, 76 N. Car. 375. See also *George v. High*, 85 N. Car. 113.

3. In a suit by and in the name of the state for the use of certain persons, the fact that one of the *cestuis que usent* is of full age does not dispense with the necessity of having a *prochein ami* to prosecute for the others who are infants. *Deford v. State*, 30 Md. 179. But compare *Welch v. Bunce*, 83 Ind. 382. And see *Linebaugh v. Atwater*, 173 Ill. 613.

"The second section of the title of the Revised Statutes, relative to proceedings by and against infants (2 Rev. Stat. 446), provides that before any process shall be issued in the name of an infant who is sole plaintiff in any suit, a competent and responsible person shall be appointed to appear as the next friend for such infant, in such suit, who shall be responsible for the costs thereof. The third section directs the manner in which such appointment shall be made. Notwithstanding these sections do not in terms apply to suits where an infant is joined with an adult plaintiff, the appointment of a next friend is as necessary to protect the rights of the infant in the one case as in the other; although in the latter case the defendant would have a remedy for his costs against the adult complainant." *Re Frits*, 2 Paige (N. Y.) 374. Compare *Hulburt v. Newell*, 4 How. Pr. (N. Y. Supreme Ct.) 93, wherein Johnson, J., construing the same statute, held that no next friend is necessary except where the infant is sole plaintiff. See also *Sick v. Michigan Aid Assoc.*, 49 Mich. 50. In this case suit was brought on a policy of insurance taken out for the benefit of a wife and minor children, and these beneficiaries sued as complainants. It was held that the fact that the mother

take the contrary view.¹

In a *Suit by Joint Executors*, however, some of whom are under age, as their authority is joint the adult represents all, and the next friend is not necessary for the infant coplaintiff.²

In *Indiana* it is well settled that where an infant is admitted to sue as a poor person no next friend is necessary.³

Giving Security for Costs will not obviate the necessity of suing by next friend.⁴

Jurisdiction. — Minors will bring themselves within the jurisdiction of the court by invoking its aid through their guardian or next friend.⁵

Representation by Attorney. — The rule that an infant cannot appear in person or by an attorney applies only to appearance upon the record, and is not intended to deprive the infant of the benefit of counsel. Accordingly, after the infant is properly in court by his next friend or guardian, an attorney may be employed to conduct the case.⁶

was not designated as next friend constituted no ground for abatement; that her appointment as next friend would have been a mere formality; that the failure to make it would be cured by a verdict; and that the court should have allowed an amendment instead of turning the minors out of court.

1. "The appellee moves to dismiss the appeal because it appears by the record that the two appellants, Mildred Chandler and Orion Chandler, are infants, not appearing here either by guardian or guardian *ad litem*. The Practice Act, § 11, requires that an infant who is a sole plaintiff shall appear by next friend; but it was always the rule that where an infant is coplaintiff with an adult, his appearance by the attorney of the adult is valid; 'if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error.' 2 Com. Dig., tit. Pleader, 2, C. 1; Foxwist v. Tremaine, 2 Saund. 213; Resor v. Resor, 9 Ind. 347. The motion to dismiss the appeal is overruled." Chandler v. Chandler, 78 Ind. 417. See also Hulburt v. Newell, 4 How. Pr. (N. Y. Supreme Ct.) 93.

2. Sick v. Michigan Aid Assoc., 49 Mich. 50.

In Deford v. State, 30 Md. 179, the court said: "In the case of a suit by two executors, one of whom is an infant, there the executor of full age may appoint an attorney for himself and the infant coexecutor, because they both together make but one representative." Citing Tidd's Pr. 99.

3. Britton v. State, 115 Ind. 55; Wright v. McLarinan, 92 Ind. 103; Budd v. Rutherford, 4 Ind. App. 386; Hood v. Pearson, 67 Ind. 368; Spencer v. Robbins, 106 Ind. 580; Kinsley v. Kinsley, (Ind. 1898) 49 N. E. Rep. 819.

In such a case there is no necessity for a next friend, as the statute provides for an attorney to represent the plaintiff, and the admission to sue as a poor person removes the necessity of having some one liable for costs. See Hood v. Pearson, 67 Ind. 368.

4. "The guardian or next friend is not merely responsible for the costs; he controls the action and directs the manner of its management. The law does not deem it wise to grant to a minor unlimited license to sue; it prefers that he should be guided and directed by the discretion of some adult person." Sutton v. Nichols, 20 Kan. 43.

5. Allman v. Taylor, 101 Ill. 185; Wallace v. Jones, 93 Ga. 419.

6. See article INFANTS, vol. 10, p. 598.

The next friend may appear by attorney. Judson v. Blanchard, 3 Conn. 584; Apthorp v. Backus, Kirby (Conn.) 409.

An attorney who, as attorney for the plaintiff in an action by an infant suing by *prochein ami*, has received the damages and costs recovered from the defendant in such action is liable to the infant in an action for money had and received. Collins v. Brook, 4 H. & N. 270.

In Apthorp v. Backus, Kirby (Conn.) 407, the court said: "It is further objected that appearance in this case for

(2) *Guardian ad Litem or Next Friend*.—In a few states it is provided by statute that infants shall sue as well as defend by a guardian *ad litem* appointed by the court,¹ and where this is true an action by an infant commenced by a next friend is irregularly brought.²

In the Absence of Such a Statute it has been held that an infant must sue by next friend and cannot sue by guardian *ad litem*.³

In Texas provision was made by statute for the appointment of a special guardian to prosecute suits for infants where the general guardian did not act,⁴ and such statute was held to exclude the

the plaintiff hath been by attorney. In the Court of Common Pleas, where the form of entering the appearance is not now material, if it has been regular in this court, it appears that pleadings were signed for the plaintiff by attorneys, though the judgment there was of a suit, as expressed in the declaration, by next friend and guardian. But if pleadings had been signed for the plaintiff by attorneys in this court, still the appearance, as well as the suit, might be considered as by *prochein ami*, or guardian; for there is no good reason why they should be obliged constantly to appear in person, and may not appoint an attorney to attend and conduct the suit for them; though an infant has not discretion for such an appointment, they have; and it would be detrimental to the infant, and inconvenient in practice, if they could not make use of it."

1. *Minnesota*.—Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497.

New York.—Grantman v. Thrall, 44 Barb. (N. Y.) 173; Sere v. Coit, 5 Abb. Pr. (N. Y. Supreme Ct.) 481; Carr v. Huff, 57 Hun (N. Y.) 18; Perkins v. Stimmel, 114 N. Y. 359; Segelken v. Meyer, 14 Hun (N. Y.) 593, 94 N. Y. 473; Buermann v. Buermann, 17 Abb. N. Cas. (N. Y. Super. Ct.) 391; Hoftailing v. Teal, 11 How. Pr. (N. Y. Supreme Ct.) 188; Freyberg v. Pelerin, 24 How. Pr. (N. Y. Supreme Ct.) 202.

Utah.—Chipman v. Union Pac. R. Co., 12 Utah 68.

In *New York*, prior to the Code of Procedure, an infant sued by his next friend and appeared and defended by guardian (see *Lansing v. Gulick*, 26 How. Pr. (N. Y. Supreme Ct.) 250), but since the code an infant is required to be represented by guardian in both instances. *Hoftailing v. Teal*, 11 How. Pr. (N. Y. Supreme Ct.) 188.

A special guardian, to whom a mortgage has been given for the benefit of

his ward, is the proper person to bring suit to redeem and to procure an assignment of a senior mortgage. *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534.

In *North Carolina* minors must sue by guardian *ad litem* or next friend. *James v. Withers*, 114 N. Car. 474.

2. *Hoftailing v. Teal*, 11 How. Pr. (N. Y. Supreme Ct.) 188; *Buermann v. Buermann*, 17 Abb. N. Cas. (N. Y. Super. Ct.) 391.

The *New York Code Civ. Pro.*, §§ 469, 471, requires that the infant party, whether plaintiff or defendant, shall appear by guardian. To commence an action in any other way, *e. g.*, by next friend, on behalf of an infant plaintiff, is an irregularity for which the summons and complaint must be set aside. *Hoftailing v. Teal*, 11 How. Pr. (N. Y. Supreme Ct.) 188; *Freyberg v. Pelerin*, 24 How. Pr. (N. Y. Supreme Ct.) 202.

See *infra*, II. 2. *Effect of Failure to Appoint or Irregular Appointment*.

3. *Spencer v. Robbins*, 106 Ind. 580; *Budd v. Rutherford*, 4 Ind. App. 386; *Priest v. Hamilton*, 2 Tyler (Vt.) 49, holding that the court never appoints a guardian to prosecute for an infant plaintiff, but only to defend, and citing 2 Cro. 641 in support of this practice. Compare *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118; and see generally cases cited in preceding section.

Can Sue Only by Next Friend.—Infants may defend by guardian *ad litem*, but they cannot, over objection, thus prosecute an action either upon a complaint or a cross-complaint. They can prosecute only by next friend, as provided by Rev. Stat. 1894, §§ 257-259. *Spencer v. Robbins*, 106 Ind. 580; *Budd v. Rutherford*, 4 Ind. App. 386.

4. Pasch. Dig., art. 6969 *et seq.*; Gen. Laws 1876, 187. See *March v. Walker*, 48 Tex. 372.

right of an infant to sue by next friend.¹ This statute was subsequently repealed,² and it is well settled that prior to its enactment, and subsequent to its repeal, minors could sue in Texas by next friend.³

b. MARRIED WOMEN.—In certain cases married women are authorized to sue by next friend,⁴ and it has been held that an

1. *Smith v. Redden*, 1 Tex. Unrep. Cas. 360; *March v. Walker*, 48 Tex. 372; *McDonna v. Wells*, 1 Tex. Unrep. Cas. 35; *Wright v. McNatt*, 49 Tex. 425; *Bond v. Dillard*, 50 Tex. 302.

The rule requiring the appointment of special guardians for minors applies both to minors who are plaintiffs and those who are defendants; the provision of the statute is intended for the protection of the minors, and should be enforced. *Bond v. Dillard*, 50 Tex. 302.

Minor plaintiffs must be represented by their legally qualified guardian, or if they have none, by a special guardian appointed by the court. *McDonna v. Wells*, 1 Tex. Unrep. Cas. 35.

In *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511, it was held that where an infant sues otherwise than by a regular guardian, on objection a special guardian must be appointed, and for failure so to appoint a judgment will be reversed. But in *Brooke v. Clark*, 57 Tex. 105, it was decided by the Supreme Court that where the statute requires the appointment of a guardian *ad litem* to represent a minor in a suit it should be strictly followed, but that nevertheless, when a judgment was rendered in the District Court in favor of a minor represented by next friend, no special guardian having been appointed, and the next friend being recognized by the court below throughout the cause as the proper representative of the minor's interest, without objection by the adversary, the failure to appoint a special guardian would be regarded as an irregularity only, and not to require a reversal of the judgment when urged for the first time on appeal. This case was cited with approval in *Wygall v. Myers*, 76 Tex. 598, wherein the court said that there was a much stronger reason for sustaining the judgment, because the question was there raised in a collateral attack upon the judgment.

The law in force in 1875 provided for the appointment of a special guardian to take care of the interests of a minor in a suit pending or about to be commenced. *Pasch. Dig.*, arts. 6969, 6970.

In *Ivey v. Harrell*, 1 Tex. Civ. App. 226, it was held that before that statute was passed, and since its repeal, minors could sue by next friend, and there is nothing in those provisions which would prevent a suit or an intervention being brought before the court in that manner. The brothers of the appellant brought him into court by the plea of intervention, and, if necessary, in the absence of record evidence to the contrary, it would be presumed that in doing so they acted in the capacity of next friend.

2. See *Ivey v. Harrell*, 1 Tex. Civ. App. 226; *Hays v. Hays*, 66 Tex. 606.

3. *Cannon v. Hemphill*, 7 Tex. 184; *Robson v. Osborn*, 13 Tex. 298; *Ivey v. Harrell*, 1 Tex. Civ. App. 226; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896; *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Hays v. Hays*, 66 Tex. 606; *Wygall v. Myers*, 76 Tex. 598.

In *Robson v. Osborn*, 13 Tex. 298, the court said that it was settled in *Cannon v. Hemphill*, 7 Tex. 184, that an infant could sue by his next friend.

It is well settled that since the adoption of the *Texas Revised Statutes* suit can be maintained in that state by a next friend for the benefit of a minor; and in this respect no distinction has been made between suits for land and other actions. *Hays v. Hays*, 66 Tex. 606; *Chambers v. Ker*, 6 Tex. Civ. App. 373.

4. See article HUSBAND AND WIFE, vol. 10, p. 197 *et seq.*, wherein the whole subject of actions by and against married women is fully discussed. See also the following cases:

Alabama.—*Lewis v. Elrod*, 38 Ala. 17; *Calhoun v. Cozens*, 3 Ala. 498; *Bridges v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187; *Crabb v. Thomas*, 25 Ala. 212; *Gould v. Hill*, 18 Ala. 84.

Florida.—*Smith v. Smith*, 18 Fla. 789.

Maryland.—*Heck v. Vollmer*, 29 Md. 507; *Bridges v. McKenna*, 14 Md. 259.

Minnesota.—*Wolf v. Banning*, 3 Minn. 202.

New York.—*Wood v. Wood*, 8 Wend. 1013.

infant wife may sue by next friend.¹

c. INSANE PERSONS, LUNATICS, ETC. — Persons of unsound mind are sometimes authorized to sue by next friend,² though where there is a committee or guardian it is usually proper to bring the suit by such representative.³

(N. Y.) 357; *Jones v. Jones*, 2 Barb. Ch. (N. Y.) 146.

Tennessee. — *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310; *Hawkins v. Hawkins*, 4 Sneed (Tenn.) 105; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *McCoy v. Broderick*, 3 Sneed (Tenn.) 203; *Winchester v. Winchester*, 1 Head (Tenn.) 460; *Farnsworth v. Lemons*, 11 Humph. (Tenn.) 140; *Stephens v. Porter*, 11 Heisk. (Tenn.) 341.

A wife may sue for divorce in her own name without the intervention of a *prochein ami*. *Wright v. Wright*, 3 Tex. 168.

Cases Where Wife Cannot Sue by Next Friend. — In an action by a wife to recover damages for an injury caused by the defendant's negligence it was necessary, before the Act of 1882, c. 265, that her husband should join as co-plaintiff, and a declaration in which she sued by her husband as next friend was bad on demurrer. *Treusch v. Kamke*, 63 Md. 278. See also *Adams v. Hannon*, 3 Mo. 222; *Clafin v. Van Wagoner*, 32 Mo. 252.

1. *Indiana*. — *Bush v. Groomes*, 125 Ind. 14; *Ex p. Post*, 47 Ind. 142.

Kentucky. — *Hopkins v. Virgin*, 11 Bush (Ky.) 678; *Anderson v. Anderson*, 11 Bush (Ky.) 327.

Missouri. — *Adams v. Hannon*, 3 Mo. 222.

Compare Dugas v. Gilbeau, 15 La. Ann. 581.

Infant Wife. — In *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233, it was held that a guardian *ad litem* for an infant wife who joins with her husband as plaintiff is unnecessary, unless the action is to recover her separate property. The court said that in a suit to recover lands of a married woman who is an infant, if they are not her separate property, "her husband should sue, and she should be joined, especially if she has a fee and was ousted before coverture; or if neither of them during coverture have had actual or constructive possession. *Bracebridge v. Cook*, Plowd. 418; 1 Chit. Pl. 63, note; 4 Vin. Abr. 77; 1 Bac. Abr., tit. Bar. and Feme, K.; *Wiscot's Case*, 2 Coke 61 b; *Boraston's Case*, 3 Coke 21 b; 2

Kent's Com. 131; 1 *Black. Com.* 443, note 44; *Bing. on Coverture* 248; *Reeve's Dom. Rel.* 27; *Morse v. Earl*, 13 Wend. (N. Y.) 271. * * * In case they sue together, no guardian (or *prochein ami*) is necessary, although she be an infant. The husband appoints an attorney for both. Code, § 114; *Foxwist v. Tremaine*, 2 Saund. 213; *Bing. on Inf.* 123. And see *Hulburt v. Newell*, 4 How. Pr. (N. Y. Supreme Ct.) 93. If the suit is for her separate property she must have a next friend, whether she claims a legal or equitable estate. Code, § 114; *Bowers v. Smith*, 10 Paige (N. Y.) 201; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Stuart v. Kissam*, 2 Barb. (N. Y.) 493; *Wade v. Parker*, 2 Keen 59; *England v. Downs*, 1 Beav. 96; *Coit v. Coit*, 6 How. Pr. (N. Y. Supreme Ct.) 53."

In *Indiana* it has been held, in *Welch v. Bunce*, 83 Ind. 382, that where the action concerns the separate property of a married woman, she may, under Civil Code 1852, § 8 (R. S. 1881, § 254), sue as sole plaintiff, or her husband may be joined with her as her co-plaintiff. If the married woman be an infant and sue as sole plaintiff, a competent and responsible person must consent in writing to appear as her next friend, under Civil Code 1852, § 11 (R. S. 1881, § 256), but where her adult husband is joined as co-plaintiff with her, no next friend is necessary or can be required.

2. See article INSANE PERSONS, vol. 10, p. 1224 *et seq.* See also *Prince v. Towns*, 33 Fed. Rep. 161; *Gillespie v. Hauenstein*, 72 Miss. 838.

A Feeble-minded Person of full age but not insane may sue without a guardian *ad litem*. *Menz v. Beebe*, 95 Wis. 383.

3. See article INSANE PERSONS, vol. 10, p. 1225. See also article GUARDIANS, vol. 9, p. 886, wherein suits by the committee or guardian of an insane person are exhaustively treated.

In *Row v. Row*, 53 Ohio St. 249, it was held that the guardian of an imbecile, and not his next friend, was the proper person to bring an action for the recovery of property belonging to the imbecile.

d. APPLICATION AND ILLUSTRATION OF PRINCIPLES —
 (1) *Proceedings Properly Brought by Next Friend.*— In accordance with the principles hereinbefore stated, it has been held that the following actions or proceedings may be maintained by an infant by next friend or guardian *ad litem*, as the case may be: Actions in ejectment,¹ for wages,² for seduction,³ for the construction of a will,⁴ for an accounting by his guardian,⁵ for the removal of his guardian,⁶ or upon a contract made with his guardian.⁷ So it has been held that an infant may prosecute a trial of right of property by next friend.⁸ But it has also been held that an infant claimant in trustee process is to be regarded rather as a defendant than as a plaintiff, and should therefore have a guardian, and not a next friend.⁹ A caveat to the probate of a will may be filed for infant heirs by a *prochein ami*.¹⁰

An Infant *En Ventre Sa Mere* may sue by next friend.¹¹

The Emancipation of a Minor by his parents does not render him capable of suing without a guardian.¹²

An Action for Partition may be maintained by an infant by his next friend or guardian *ad litem*.¹³

1. Heft v. McGill, 3 Pa. St. 256, holding that an infant may bring an action of ejectment in the name of his next friend without the appointment of a guardian.

2. Boynton v. Clay, 58 Me. 236.

3. Smith v. Richards, 29 Conn. 239.

4. An action to construe a will in respect to affecting an infant legatee should be brought, not by the general guardian or the guardian with the infant, but by the infant by a guardian *ad litem*. Wead v. Cantwell, 36 Hun (N. Y.) 528.

5. Thomas v. Williams, 9 Fla. 289.

6. Ruohs v. Backer, 6 Heisk. (Tenn.) 395; Stephenson v. Yandle, 3 Hayw. (Tenn.) 109.

7. Where a note had been given to a guardian for the hire of slaves of his ward, and the contract of hiring had been closed and executed, it was held that *indebitatus assumpsit* would lie by the infant, suing by her next friend for the amount of the debt, notwithstanding the written contract. Lanier v. Chappell, 2 Fla. 621. See also Hay v. Conner, 2 Har. & J. (Md.) 347.

8. Strode v. Clark, 12 Ala. 621.

9. Keeler v. Fassett, 21 Vt. 539, 52 Am. Dec. 71.

Interveners may occupy the positions of either plaintiffs or defendants. All the elements of a cause of action or ground of defense may be contained in their pleading, and parties may come into court as effectually by that method

as by original suit. Ivey v. Harrell, 1 Tex. Civ. App. 226.

10. Humes v. Shillington, 22 Md. 346.

In Middleditch v. Williams, 47 N. J. Eq. 585, certain relatives of an infant, who was the only one to be benefited by a refusal of probate, filed a caveat in their own names and conducted the suit as if the infant had been the caveator and they her next friends, until the cause reached the appellate court upon an appeal by the caveators from a decree of the Prerogative Court. It was held that the caveators and appellants had no standing in the court because of the want of interest in the result of the suit, and that the record should be remitted to the Prerogative Court that it might there be amended by the substitution of the name of the infant as caveator and appellant, by the admission of a next friend to prosecute the suit, and for further proceedings in the cause as amended.

11. Middleditch v. Williams, 47 N. J. Eq. 585, citing Wallis v. Hodson, 2 Atk. 117.

12. Hoskins v. White, 13 Mont. 70.

In Louisiana a minor may sue in his own name when he has been emancipated. Beauchamp v. Whittington, 10 La. Ann. 646.

13. Strange v. Gunn, 56 Ala. 611; Latta v. Vickers, 82 N. Car. 501.

New York—Next Friend and Not Guardian.—In Lansing v. Gulick, 26 How. Pr. (N. Y. Supreme Ct.) 250, it

Suit on Administrator's Bond. — An infant cannot sue by next friend upon an administrator's bond for nonpayment of money due by the probate decree.¹

(2) *Next Friend Unnecessary or Improper.* — There are a number of cases where under the circumstances a next friend or guardian *ad litem* is unnecessary or improper.²

Suit by Father for Injury to Child. — Thus, under a statute authorizing a father to sue for injury to his child, for the child's benefit, no next friend is necessary.³

was held, according to the reporter's headnote, that an action of partition cannot be prosecuted by an infant plaintiff without the appointment by the court of a next friend, pursuant to the Act of 1852, and that the appointment of a guardian to protect the interest of an infant plaintiff in partition under section 116 of the Code of Procedure was a nullity.

A general guardian is not competent to act for infants on petition for partition in *New York*. *Matter of Stratton*, 1 Johns. (N. Y.) 509. *Compare Strange v. Gunn*, 56 Ala. 611, wherein it was held that a petition for the partition of property, owned partly by an infant, may be filed in the name of the infant by his next friend or in the name of his guardian.

In Missouri an infant cannot sue for partition by next friend, but must sue by his regular guardian, or by a guardian *ad litem* appointed under the Partition Act. *Colvin v. Hauenstein*, 110 Mo. 583; *Mitchell v. Jones*, 50 Mo. 438; *Gochran v. Thomas*, 131 Mo. 258; *Fulbright v. Cannefox*, 30 Mo. 425.

Infants may join as parties plaintiff, by their curator, in an *ex parte* suit for partition. *Larned v. Renshaw*, 37 Mo. 458.

Where the infant has no guardian or curator, the court in which the suit is to be brought may, in term time, appoint a guardian *ad litem*, who shall have all the authority of a regular guardian in such case. *Mitchell v. Jones*, 50 Mo. 438; *Chrisman v. Divinia*, 141 Mo. 122.

Where an infant sues in partition by next friend, but no question as to the regularity of the proceeding is made in the trial court, the appellate court will give the plaintiff an opportunity to correct the error before dismissing the suit. *Colvin v. Hauenstein*, 110 Mo. 583.

1. *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 203. This is because no one

but a guardian properly constituted is entitled to receive moneys due an infant, and accordingly there is no breach of the condition of the bond.

2. *Next Friend Unnecessary — Illustrations.* — In *Bunce v. Bunce*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 61, a guardian appointed in a foreign state to whom ancillary letters had been granted in *New York* was permitted to sue in his own name, and the appointment of a guardian *ad litem* was said to be unnecessary.

When an infant is denied admission to the public schools his father may apply for mandamus, and a guardian *ad litem* is unnecessary. *People v. Board of Education*, 18 Mich. 400.

In *Texas* a person of African descent, under the republic, though not entitled to the rights of citizenship, was entitled to the protection of the laws; and such person might sue for damages for an injury without the intervention of a next friend. *Benton v. Williams*, Dall. (Tex.) 496.

In *Louisiana* it has been held that in an action to annul a marriage a tutor for either party is unnecessary, although both are minors. *Lacoste v. Guidroz*, 47 La. Ann. 295.

Infant Informer or Prosecutor. — In *State v. Dillon*, 1 Head (Tenn.) 389, it was held that an infant is not prohibited by statute nor by public policy from becoming a prosecutor, and may, therefore, be indorsed upon an indictment as such. *Compare Maggs v. Ellis*, Buller's N. P. 1966, holding that an infant cannot be a common informer, because he can only sue by guardian, and the statute of 18 Eliz., c. 5, § 1, requires an informer to sue either in person or by attorney.

3. *Action by Father under Statute.* — *Lathrop v. Schutte*, 61 Minn. 196, holding that the amount recovered in such an action belongs to the child; that the father simply holds it in trust for him; that in cases where the court has

Action in Name of State. — So where the action is in the name of the state to the use of an infant or a married woman, a next friend for the *cestui que use* is not necessary, although it may be proper.¹

In Bastardy Proceedings a guardian for an infant complainant is not necessary.²

Admiralty Suit. — Nor is a guardian necessary in a suit in admiralty by a minor to recover wages as a seaman.³

Probate Proceedings may sometimes be in the name of a minor.⁴

2. Effect of Failure to Appoint or Irregular Appointment — a. IN GENERAL — Judgment Voidable, but Not Void. — Where the proceedings are conducted without the intervention of a next friend or guardian *ad litem*, in a case where one is required, or where the appointment is irregular, the judgment is irregular and voidable.⁵

reason to believe that the trust will not be faithfully executed, it may, in the exercise of its equitable powers, require security from the father before any money is paid; and that the judgment in such action is a bar to any subsequent action for the same cause prosecuted by the minor, by his guardian, general or *ad litem*, or by himself when he reaches his majority.

1. Action by State Ex Rel. — *Albert v. State*, 66 Md. 325. In this case the court said: "The only object that could have been obtained by inserting the name of the next friend of the infant, was security for the costs to the defendant if the plaintiff failed in his suit. The next friend would have had no authority to receive the amount of the judgment, and his appearance in a case like this answers no good purpose except to be security for costs. But while that is undoubtedly so, we must not be understood to decide that it would be improper to insert the name of a *prochein ami* to the infant in a case like the present. In many instances it would be very desirable to do so, especially in those cases where the infant was too young to make an affidavit for removal." See also, in support of text, *Le Strange v. State*, 58 Md. 45; *Fridge v. State*, 3 Gill & J. (Md.) 103; *State v. Dorsey*, 3 Gill & J. (Md.) 75.

2. Low v. Mitchell, 18 Me. 372; *Miller v. State*, 110 Ala. 69.

The fact that the complainant in a bastardy proceeding pleads by guardian is insufficient to warrant an inference that she is a minor, since the guardianship may exist from some cause other than minority. *Com. v. Moore*, 3 Pick. (Mass.) 194.

3. Wicks v. Ellis, Abb. Adm. 444.

4. In New York there is no statutory provision requiring an infant to institute a special proceeding in a surrogate's court by a special guardian. An infant aged nineteen years, residing in Vermont, united with her husband in a petition to the surrogate's court, showing that her mother was dead, and that her father was living and a resident of New Hampshire; that the petitioner was a person interested in the estate of her maternal grandfather, who had died in Paris, France, in 1881, and whose alleged will had been admitted to probate by a decree of said court in 1882; that the paper writing so admitted to probate was not the will of said decedent; and praying that the court appoint a special guardian for her, to enable her to move to vacate the decree admitting the same, and to come in and contest the probate proof. It was held that the court was without power in the premises; that the proper practice was for the infant to petition in her own name for the relief ultimately sought by her, whereupon a citation would issue to the proper parties, upon the return of which citation, it appearing that petitioner was an infant, a special guardian would be appointed to protect her interests as a party to a pending proceeding. *Matter of Watson*, 2 Dem. (N. Y.) 642.

5. Judgment Voidable. — *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47, holding that under such circumstances a judgment against a minor may be set aside on his motion by a next friend at the next term of court.

The appearance of an adult by a next friend, except where such adult is a

But while a failure to appoint a next friend or guardian *ad litem*, or to sue by one, is irregular, it is merely that. The defect is not a jurisdictional one, and hence the judgment is not void.¹ *A fortiori*, where there has been an appointment, but it is irregular, the defect is not jurisdictional and the judgment is not void.²

married woman, is an irregularity for which the judgment will be set aside. *Jeffrie v. Robideaux*, 3 Mo. 33.

The failure of a guardian *ad litem* to acknowledge his consent to act is an irregularity, and the appointment will be set aside and the action dismissed. *Cole v. McGarvey*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 305, decided under N. Y. Code Civ. Pro., § 472.

1. *Failure to Appoint—California.*—*Foley v. California Horseshoe Co.*, 115 Cal. 184; *Childs v. Lanterman*, 103 Cal. 387; *Matter of Cahill*, 74 Cal. 52.

Georgia.—*King v. King*, 37 Ga. 205.

Maryland.—*Powles v. Jordan*, 62 Md. 499.

Missouri.—*Brandon v. Carter*, 119 Mo. 572.

New Jersey.—*Middleditch v. Williams*, 47 N. J. Eq. 585.

New York.—*Sims v. New York College of Dentistry*, 35 Hun (N. Y.) 344; *Fellows v. Niver*, 18 Wend. (N. Y.) 564; *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153; *Smart v. Haring*, 14 Hun (N. Y.) 276; *Parks v. Parks*, 19 Abb. Pr. (N. Y. Supreme Ct.) 161; *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.) 506; *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638; *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118; *Drishler v. Van Den Henden*, 49 N. Y. Super. Ct. 508.

North Carolina.—*Tate v. Mott*, 96 N. Car. 19.

The error is one of practice, and is technical rather than substantial. *Middleditch v. Williams*, 47 N. J. Eq. 585.

The proceedings will not be set aside in the absence of fraud or other ground for equitable relief. *Tate v. Mott*, 96 N. Car. 19.

A judgment in a suit in which minors are parties, and in which they are not represented by their guardian, curator, or next friend, as required by law, is not void if their father, who was their natural guardian, was also a party to such suit. *Brandon v. Carter*, 119 Mo. 572. See also *King v. King*, 37 Ga. 205.

2. *Irregular Appointment.*—*Matter of*

Cahill, 74 Cal. 52; *Reed v. Ring*, 93 Cal. 96; *Henning v. Barringer*, 10 Ky. L. Rep. 674; *Webber v. Ward*, 94 Wis. 605.

Illustrations of Irregularities Not Fatal.

—A suit brought by next friend without an order of appointment may proceed under the statute, upon the filing of a bond for costs at any time during the prosecution of the suit when the court shall so order; the filing of a bond is not a jurisdictional prerequisite. *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

If one acts in the capacity of a guardian without having been duly appointed, it is erroneous, but that fact will not render the proceedings in the action void. *Reed v. Ring*, 93 Cal. 96.

In *Fellows v. Niver*, 18 Wend. (N. Y.) 563, where a *prochein ami* was appointed after the commencement of the suit, a motion to set aside the proceedings was denied, the court saying: "The only difference between the former statutes and the present is this: formerly the *prochein ami* was appointed after the issuing of the process, but before a declaration; now it should be done before process; but now, as formerly, it is a question of regularity merely, not, as the defendant's counsel supposes, a question of jurisdiction. It is a question of practice, and the irregularity may be waived under the present statute as well as under the old statutes."

So in *Bartlett v. Batts*, 14 Ga. 539, where a next friend was appointed for an infant, but after the commencement of the action, the court refused to set aside the verdict, saying: "It seems very safe to say that a suit commenced and prosecuted by an infant alone, is not absolutely void; and although defective in wanting a next friend, the defect is one which before verdict is amendable and after verdict is cured."

The last two cases cited were quoted with approval in *Matter of Cahill*, 74 Cal. 52, and it was held that where proceedings to contest a will are commenced by a minor *in propria persona*, and a guardian *ad litem* is appointed at

It Is Error in Fact for an infant to appear in person or by attorney, and such error may be assigned in the court in which the judgment was rendered.¹

Collateral Attack.—Suit by next friend instead of by guardian *ad litem*,² or irregularities in appointment,³ will not render the judgment subject to collateral attack.

b. IRREGULARITY CURED OR WAIVED—**Waiver by Failure to Object.**—A failure to appoint a next friend or guardian *ad litem*, or an irregularity in appointment, may be cured or waived,⁴ and it is so waived or cured by a failure to object⁵ before going to trial upon the merits.⁶ Thus it has been held that a failure to sue by next friend is waived, if not taken by demurrer, answer, or

the trial, the proceedings are not void for want of jurisdiction.

The appearance by next friend instead of by guardian or guardian *ad litem*, as required by statute, is a mere irregularity which does not make the judgment void. *Wygat v. Myers*, 76 Tex. 598; *Cochran v. Thomas*, 131 Mo. 258.

1. *Peak v. Shasted*, 21 Ill. 137, 74 Am. Dec. 83; *Castledine v. Mundy*, 1 N. & M. 635, 4 B. & Ad. 90, 24 E. C. L. 30; *Maynard v. Downer*, 13 Wend. (N. Y.) 576.

If an infant assigns by attorney, for error *coram vobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error; still the court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 3 Dowl. P. C. 70.

2. *Wygat v. Myers*, 76 Tex. 598.

3. The appointment, though without proper notice to the natural guardian, cannot be questioned collaterally, and the denial of a motion to set it aside without appeal is conclusive upon the parties. *Drischler v. Van Den Henden*, 49 N. Y. Super. Ct. 508, citing *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638.

4. *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638; *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

The Appointment of an Infant as Guardian ad Litem for an infant plaintiff may be cured or waived. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

5. Failure to Object.—Where a person of unsound mind prosecutes a suit in his own name, the defendant may, by proper procedure, compel the presence of a guardian, but if a guardian or next friend is not asked by either party, the

cause may proceed to judgment. *Rankin v. Warner*, 2 Lea (Tenn.) 302.

A failure to file a written consent to act, as required by statute, will be waived by a failure of the defendant to require it. *Budd v. Rutherford*, 4 Ind. App. 386.

Ignorance of the plaintiff's infancy is no excuse for failure to object. *Ex p. Scott*, 1 Cow. (N. Y.) 33. Compare *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118, holding that the irregularity of appointing an infant guardian *ad litem* for another infant is not waived by answering to the merits where the defendant had no knowledge of the guardian's infancy.

6. *Worthington v. Mencer*, 96 Ala. 310; *Matter of Cahill*, 74 Cal. 52; *Apthorp v. Backus*, Kirby (Conn.) 407; *Bramel v. Cunningham*, 3 Ky. L. Rep. 512; *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; *Strong v. Jenkins*, 21 N. Y. Civ. Pro. Rep. (Buffalo Super. Ct.) 9; *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521; *Brooke v. Clark*, 57 Tex. 105.

The Objection Cannot Be Raised by Requests for Instructions after entering upon the trial upon the merits. *Worthington v. Mencer*, 96 Ala. 310.

Waived if Not Pleaded.—When an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, because the judgment, like the contract, may be repudiated or affirmed and enforced at the election of the infant, if rendered before his majority. But such objection must be interposed in apt time by plea in abatement or by answer before the trial on the merits, and if not so pleaded it will be considered as waived. *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521.

plea,¹ or other appropriate mode.²

After Pleading to the Merits the objection cannot be raised,³ for the defendant is deemed to have thereby admitted that the plaintiff is *rectus in curia*.⁴

After Verdict or Judgment in an infant's favor, his failure to sue by next friend is cured.⁵ The defect is one to which the statute of

1. Objection Must Be by Demurrer, Answer, or Plea — *Alabama*. — Levystein v. O'Brien, 106 Ala. 352, 54 Am. St. Rep. 56.

Missouri. — Jones v. Steele, 36 Mo. 324; Robinson v. Hood, 67 Mo. 660.

New York. — Rima v. Rossie Iron Works, 47 Hun (N. Y.) 153; Smart v. Haring, 14 Hun (N. Y.) 276; Sims v. New York College of Dentistry, 35 Hun (N. Y.) 344.

North Carolina. — Hicks v. Beam, 112 N. Car. 642, 34 Am. St. Rep. 521.

Ohio. — Woog v. Barnhart, 41 Ohio St. 177.

Wisconsin. — Webber v. Ward, 94 Wis. 605; Moir v. Dodson, 14 Wis. 279; Wood v. Union Gospel Church Bldg. Assoc., 63 Wis. 14.

Infancy of the plaintiff is a matter of form, and is waived by pleading the general issue. Drago v. Moso, 1 Spears L. (S. Car.) 212, 40 Am. Dec. 592. See also Hicks v. Beam, 112 N. Car. 644.

Objections to the plaintiff's capacity to sue must be taken by demurrer or answer. It is too late to make them to the judgment. Martin v. Webb, 5 Ark. 72.

Where it appears by the answer that the plaintiff is a married woman, but no advantage is sought to be taken of the fact that she did not sue by next friend, it is too late to raise the objection after going to trial. Woog v. Barnhart, 41 Ohio St. 177.

2. As to the mode of raising the objection, see the following section. See also cases cited in the preceding note.

3. *Indiana*. — Smith v. Allen, 16 Ind. 316.

Mississippi. — Gully v. Dunlap, 24 Miss. 410.

New York. — Parks v. Parks, 19 Abb. Pr. (N. Y. Supreme Ct.) 161; Fellows v. Niver, 18 Wend. (N. Y.) 563; Smart v. Haring, 14 Hun (N. Y.) 276; Rutter v. Puckhofer, 9 Bosw. (N. Y.) 638; Vere v. Coit, 5 Abb. Pr. (N. Y. Supreme Ct.) 481; Sims v. New York College of Dentistry, 35 Hun (N. Y.) 344; Schemerhorn v. Jenkins, 7 Johns.

(N. Y.) 373; *Ex p.* Scott, 1 Cow. (N. Y.) 33.

North Carolina. — Hicks v. Beam, 112 N. Car. 642.

South Carolina. — Drago v. Moso, 1 Spears L. (S. Car.) 212.

Texas. — Moke v. Fellman, 17 Tex. 367, 67 Am. Dec. 656.

After an Answer Is Served or Plea Entered, it is too late to move to set aside the plaintiff's proceedings on the ground that the action is prosecuted by the infant without a guardian. Parks v. Parks, 19 Abb. Pr. (N. Y. Supreme Ct.) 161, following Fellows v. Niver, 18 Wend. (N. Y.) 563. But delay in making the objection may be excusable. See *Ex p.* Scott, 1 Cow. (N. Y.) 33.

A failure to make the appointment before process is issued is waived by pleading to the merits. Fellows v. Niver, 18 Wend. (N. Y.) 563.

4. Fellows v. Niver, 18 Wend. (N. Y.) 564; Parks v. Parks, 19 Abb. Pr. (N. Y. Supreme Ct.) 161.

5. *California*. — Matter of Cahill, 74 Cal. 52.

Connecticut. — Apthorp v. Backus, Kirby (Conn.) 412.

Georgia. — Bartlett v. Batts, 14 Ga. 539; Evans v. Collier, 79 Ga. 319; King v. King, 37 Ga. 205.

Illinois. — Helmuth v. Bell, 150 Ill. 263, 49 Ill. App. 626.

Maryland. — Albert v. State, 66 Md. 325.

Massachusetts. — Smith v. Carney, 127 Mass. 179.

Michigan. — Sick v. Michigan Aid Assoc., 49 Mich. 50.

Missouri. — Jones v. Steele, 36 Mo. 324.

New York. — Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373.

South Carolina. — Hamilton v. Foster, 1 Brev. (S. Car.) 464; Kid v. Mitchell, 1 Nott & M. (S. Car.) 334.

Wisconsin. — Hafern v. Davis, 10 Wis. 501.

If an infant appears by attorney, no objection can be taken after verdict in his favor. Apthorp v. Backus, Kirby

jeofails is applicable.¹

Majority Pendente Lite. — Where an infant brings suit in his own name, but reaches majority *pendente lite* and before objection, his failure to prosecute by a next friend or guardian *ad litem* is no longer available and the defect is cured.²

First Raised on Motion for New Trial or on Appeal. — Infancy of the plaintiff cannot be objected to for the first time upon a motion for a new trial³ or on appeal,⁴ because under the rules just stated the objection must necessarily have been waived before that stage of the case was reached. Indeed, it has been held that a failure to appoint a next friend is not ground for reversal in any case.⁵

(Conn.) 407; *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373.

Reason for Rule. — The defendant cannot go on and take the chances of a verdict in his favor and keep the objection in reserve to be used in case the verdict goes against him. *Matter of Cahill*, 74 Cal. 52.

1. Statute of Jeofails. — *Matter of Cahill*, 74 Cal. 52; *Apthorp v. Backus*, Kirby (Conn.) 407; *Jones v. Steele*, 36 Mo. 324; *Robinson v. Hood*, 67 Mo. 660; *Cochran v. Thomas*, 131 Mo. 276; *Brandon v. Carter*, 119 Mo. 583.

"If, however, the appearance in this case has been merely by an attorney, and an attorney appointed by the infant, though if it had been objected to before, which it does not appear to have been in this court, it would have been ill; yet no advantage can be taken of it after verdict in the infant's favor. So is the English law declared by the statute of jeofails, of 21st Jac. I., and the statute of jeofails in this state extends as far; and the rule is founded in the reason of the case, and would hold without the aid of any statute. For the only reason why a minor is to sue by guardian, or *prochein ami*, is that his suit may not suffer through his want of discretion to appoint an attorney, or conduct it himself; but if it hath in fact been conducted to a successful issue, though by himself or his attorney, the design of the law is answered. And the minor ought not, because he hath obtained a verdict with less aid than the law would have given him, lose the benefit of what he hath obtained, and be put in a worse condition than if he was of full age. Which way soever, therefore, the appearance in this case hath been, it is good now." *Apthorp v. Backus*, Kirby (Conn.) 407.

An Irregularity in the Appointment of a guardian *ad litem* for an infant plain-

tiff is cured by a verdict in his favor. *Hafern v. Davis*, 10 Wis. 501.

2. Kentucky. — *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Philpot v. Bengé*, 5 Ky. L. Rep. 690.

New York. — *Sims v. New York College of Dentistry*, 35 Hun (N. Y.) 344; *Smart v. Haring*, 14 Hun (N. Y.) 276; *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 639; *Croghan v. Livingston*, 17 N. Y. 221; *Rogers v. McLean*, 31 How. Pr. (N. Y. Ct. App.) 283; *McMurray v. McMurray*, 66 N. Y. 177; *Parks v. Parks*, 19 Abb. Pr. (N. Y. Supreme Ct.) 161; *Graham v. Pinckney*, 7 Robt. (N. Y.) 149.

North Carolina. — *Hicks v. Beam*, 112 N. Car. 644.

3. Smith v. Allen, 16 Ind. 316.

4. Brooke v. Clark, 57 Tex. 105; *Wygal v. Myers*, 76 Tex. 598.

"It is too late for the exception that the bill is filed by * * * a minor without the interposition of a next friend. The objection may be more than a formal one, but it should have been taken in the court below. To perfect the record, the said plaintiff is at liberty to move for the appointment, *nunc pro tunc*, in the Circuit Court." *Seabrook v. Gregg*, 2 S. Car. 68.

5. As Ground for Reversal. — In *Hafern v. Davis*, 10 Wis. 502, the plaintiff had signed her complaint in her own name and had proceeded without the appointment of a next friend. The court, *per* Dixon, C. J., said: "All objections not going to the merits of the action or defense seem to be swept out of existence. Section 40 of chapter 125 provides: 'The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or

Amendment. — Generally, whenever and however the objection may be raised, if no substantial right of the defendant is violated, the court will allow an amendment and appoint a next friend to proceed with the cause.¹

c. MANNER OF RAISING OBJECTION — (1) *Plea in Abatement.* — Where an infant is prosecuting an action in his own name without a duly appointed next friend or guardian, the appropriate mode of raising the objection is by plea in abatement.² And

defect.' This is, evidently, any error or defect which does not affect the substantial rights of the plaintiff in error."

The foregoing cannot be said to be a decision, for the case was reversed on another ground, but the dictum was approved and followed in *Sabine v. Fisher*, 37 Wis. 376. In this case there was no guardian *ad litem* or next friend appointed for the plaintiff. On the trial the defendant moved to dismiss on this ground, but the court thereupon appointed a guardian *ad litem* and denied the motion to dismiss. On appeal the judgment was affirmed, the court, *per* Ryan, C. J., saying: "There is no error in the leave given to the respondent to amend, so as to prosecute the suit by her next friend. Had she proceeded without leave, the judgment could not be reversed on that ground." Citing *Hafern v. Davis*, 10 Wis. 501. See also *Hepp v. Huefner*, 61 Wis. 150; *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; *Kid v. Mitchell*, 1 Nott & M. (S. Car.) 334; *Smart v. Haring*, 14 Hun (N. Y.) 276; *Sims v. New York College of Dentistry*, 35 Hun (N. Y.) 344; *Matter of Cahill*, 74 Cal. 52. Compare *Middleditch v. Williams*, 47 N. J. Eq. 585. And see *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511, wherein it was held that where an infant sues otherwise than by a regular guardian, on objection a special guardian must be appointed, and for failure so to appoint the judgment will be reversed.

1. *California.* — *Matter of Cahill*, 74 Cal. 52.

Florida. — *Neal v. Spooner*, 20 Fla. 38.

Georgia. — *Bartlett v. Batts*, 14 Ga. 539.

Iowa. — *Webster v. Page*, 54 Iowa 461.

Massachusetts. — *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Trask v. Stone*, 7 Mass. 241.

Montana. — *Hoskins v. White*, 13 Mont. 70.

New Hampshire. — *Young v. Young*, 3 N. H. 345.

New Jersey. — *Middleditch v. Williams*, 47 N. J. Eq. 585; *Lamb v. Lamb*, (N. J. 1892) 23 Atl. Rep. 1009.

New York. — *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153; *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.) 597.

North Carolina. — *Hicks v. Beam*, 112 N. Car. 644; *Branch v. Houston*, Busb. L. (N. Car.) 85; *Clark v. Cameron*, 4 Ired. L. (N. Car.) 161; *Hawkins v. Hughes*, 87 N. Car. 115; *Blackwell v. Dibbrell*, 103 N. Car. 270; *Montague v. Brown*, 104 N. Car. 161; *Harrison v. Hoff*, 102 N. Car. 126.

South Carolina. — *Drago v. Moso*, 1 Spears L. (S. Car.) 212.

See also cases cited in the following section.

Substituting Next Friend for Infant on Appeal. — Although the *Iowa* statute requires an infant to bring an action by guardian or next friend, this requirement is not jurisdictional, and after an action has been begun by a minor in his own name before a justice of the peace and appealed, the district court may substitute a next friend for the minor. *Parkins v. Alexander*, (Iowa 1898) 74 N. W. Rep. 769, citing 10 ENCYC. OF PL. AND PR. 596, to the effect that a judgment against an infant not represented by guardian *ad litem* is merely erroneous and not void, and saying that the same rule is applicable to actions brought by minors.

2. *Alabama.* — *Howland v. Wallace*, 81 Ala. 238.

Connecticut. — *Apthorp v. Backus*, Kirby (Conn.) 407.

Delaware. — *Graham v. Cain*, 2 Harr. (Del.) 97.

Georgia. — *Jack v. Davis*, 29 Ga. 219.

Indiana. — *Greenman v. Cohee*, 61 Ind. 201.

Maryland. — *Albert v. State*, 66 Md. 325.

Massachusetts. — *Blood v. Harrington*, 8 Pick. (Mass.) 552.

Mississippi. — *Gully v. Dunlap*, 24 Miss. 410.

Appointment.

NEXT FRIEND. Effect of Failure to Appoint.

while cases are to be found apparently holding that a plea in abatement on that ground is no longer available,¹ all that is meant is that the court should allow an amendment by inserting the name of a next friend or guardian, and should not turn the infant out of court.²

(2) *Motion to Dismiss or Set Aside Proceedings.*—The defect under consideration may also be raised by motion to dismiss,³ or to set aside the proceedings.⁴ But the motion should be made

Missouri.—Holton v. Towner, 81 Mo. 360; Jones v. Steele, 36 Mo. 324.

New Hampshire.—Young v. Young, 3 N. H. 345.

New Jersey.—Smith v. Van Houten, 9 N. J. L. 381.

New York.—Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373; *Ex p.* Scott, 1 Cow. (N. Y.) 33; Treadwell v. Bruder, 3 E. D. Smith (N. Y.) 596; Matter of Watson, 2 Dem. (N. Y.) 642; Fellows v. Niver, 18 Wend. (N. Y.) 565.

North Carolina.—Hicks v. Beam, 112 N. Car. 642, 34 Am. St. Rep. 521; Tate v. Mott, 96 N. Car. 19.

Pennsylvania.—Heft v. McGill, 3 Pa. St. 256.

South Carolina.—Drago v. Moso, 1 Spears L. (S. Car.) 212, 40 Am. Dec. 592.

England.—Bird v. Pegg, 5 B. & Ald. 418, 7 E. C. L. 153; Finley v. Jowle, 13 East 6.

Infancy of a Coplaintiff is not ground for abatement, as there may be a recovery by the adult plaintiffs which will inure to the benefit of all. Lancaster v. Lancaster, (Ky. 1897) 41 S. W. Rep. 34.

Infancy of Plaintiff Must Be Pleaded in Abatement and Not in Bar.—Mundine v. Perry, 2 Stew. & P. (Ala.) 130; Howland v. Wallace, 81 Ala. 238; Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373; Fellows v. Niver, 18 Wend. (N. Y.) 564.

Under an issue formed to try the question of property between a claimant and a plaintiff in execution, the jury cannot render a verdict against the claimant on the ground of infancy. The proper course in such case is to move for an issue to try the question of infancy or for the appointment of a guardian. Mundine v. Perry, 2 Stew. & P. (Ala.) 130.

1. Roop v. Clark, 4 Greene (Iowa) 294.

That an infant who sues by next friend had a mother living is no cause for abating the writ, and if any objec-

tion, it must be made by a motion to stay proceedings. Trask v. Stone, 7 Mass. 241.

2. Iowa. — Roop v. Clark, 4 Greene (Iowa) 294.

Massachusetts.—Blood v. Harrington, 8 Pick. (Mass.) 552.

Mississippi.—Gully v. Dunlap, 24 Miss. 410.

New Hampshire.—Young v. Young, 3 N. H. 345.

New Jersey.—Middleditch v. Williams, 47 N. J. Eq. 585.

New York.—Matter of Watson, 2 Dem. (N. Y.) 642. See also Rima v. Rossie Iron Works, 47 Hun (N. Y.) 153, disapproving Imhoff v. Wurtz, 9 N. Y. Civ. Pro. Rep. (Erie County Ct.) 48.

Where suit was brought on a policy of insurance taken out for the benefit of a wife and minor children, and these beneficiaries sued as coplaintiffs, the fact that the mother was not designated as next friend was held no ground for abatement. Her appointment as next friend would have been a mere formality; the failure to make it would be cured by a verdict, and the court should have allowed an amendment instead of turning the minors out of court. Sick v. Michigan Aid Assoc., 49 Mich. 50.

3. C. & C. Bridge Co. v. Brennan, 16 Ky. L. Rep. 126; Haines v. Oatman, 2 Dougl. (Mich.) 430; Keeran v. Clowser, 5 Blackf. (Ind.) 604.

For failure of the next friend to file his consent to act before the issuance of process, the defendant may move to dismiss. Lumpkins v. Justice, 1 Ind. 557.

4. Kansas. — Sutton v. Nichols, 20 Kan. 43.

New York.—Wilder v. Ember, 12 Wend. (N. Y.) 191; Treadwell v. Bruder, 3 E. D. Smith (N. Y.) 596; Hoftailing v. Teal, 11 How. Pr. (N. Y. Supreme Ct.) 188; Freyberg v. Pelerin, 24 How. Pr. (N. Y. Supreme Ct.) 202; Fitch v. Fitch, 18 Wend. (N. Y.) 513; Rutter v. Puckhofer, 9 Bosw. (N. Y.)

before answer,¹ or trial upon the merits, or the irregularity will be cured in accordance with the rules stated in the preceding section. Before a suit is dismissed for this cause, however, an opportunity should be given to correct the error.²

(3) *Demurrer*. — The defect under consideration may be raised by demurrer where it appears upon the face of the pleadings;³ and while there are decisions apparently to the contrary, as in the case of pleas in abatement already considered, the real ruling is that the court should clothe the plaintiff with capacity to sue by the appointment of a next friend or guardian, and should not turn him out of court.⁴

638; *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

Where an action is commenced by an infant without the appointment of a guardian *ad litem*, the remedy of the defendant is to move to set aside the summons and complaint for irregularity. *Freyberg v. Pelerin*, 24 How. Pr. (N. Y. Supreme Ct.) 202.

Where the Appointment Is Not Made Before the Issuance of Process, as required by statute, the process and proceedings may be set aside on motion before pleading. *Wilder v. Ember*, 12 Wend. (N. Y.) 191. Compare *Ex p. Scott*, 1 Cow. (N. Y.) 33; *Fitch v. Fitch*, 18 Wend. (N. Y.) 513, wherein a capias was issued at the suit of the plaintiff, an infant, previous to the appointment of a next friend, and on this ground a motion was made to set aside the proceedings under 2 Rev. Stat. N. Y., 446, § 2. It appearing, however, that since the commencement of the suit a next friend had been appointed, the motion was denied, but the costs of the motion were directed to be paid by the plaintiff's attorney.

Vacating on Motion of Infant. — Where an infant plaintiff appears by attorney, a judgment against him may be set aside upon motion before or after majority. *Randalls v. Wilson*, 24 Mo. 76; *Powell v. Gott*, 13 Mo. 458.

1. **Motion Before Answer.** — Where a statute authorizes the appointment of a guardian *ad litem* for an infant by the court in which the action is prosecuted, the appointment is a matter of record in the court, and if the adverse party wishes to deny the appointment he should make a preliminary objection by motion before interposing an answer to the merits. *Schuek v. Hagar*, 24 Minn. 339.

2. **Opportunity Given to Correct Error.** — *Colvin v. Hauenstein*, 110 Mo. 575.

But the action may be dismissed on motion after the cause is ready for trial, unless the plaintiff amends. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118. See also *Sims v. New York College of Dentistry*, 35 Hun (N. Y.) 344, wherein a motion to dismiss the complaint was properly denied on the ground that the plaintiff had reached majority before the motion was made.

3. *Jones v. Steele*, 36 Mo. 324; *Hulbert v. Young*, 13 How. Pr. (N. Y. Supreme Ct.) 413.

Where the age of the plaintiff is not stated in the pleadings, his want of capacity to sue on the ground of infancy cannot be raised by demurrer. *Edwards v. Beall*, 75 Ind. 401.

Disability of Coplaintiff. — The fact that one of several coplaintiffs has not legal capacity to sue is not a ground of demurrer; the proper remedy in such case is by motion to strike from the petition the name of the party improperly joined. *White Oak v. Oskaloosa*, 44 Iowa 512.

4. See *Hoskins v. White*, 13 Mont. 70.

Demurrer, Motion, or Answer. — In *Sere v. Coit*, 5 Abb. Pr. (N. Y. Supreme Ct.) 481, it was held on demurrer that an objection for insufficiency in the statement of the appointment of the plaintiff's guardian *ad litem* could only be raised by motion to make the complaint more definite and certain. The court said: "One portion of the alleged difficulty is met by the fact stated on the face of the complaint — that the infant plaintiff sues, as he has a right to do (2 Rev. Stat. 115, 446; Code, §§ 115, 116), by 'a guardian duly appointed for the purpose of this action.' If that statement were deemed too general, the proper course, instead of demurring, was by motion to make

(4) *Answer or Plea to Merits.* — While infancy of the plaintiff is not available under the general issue,¹ or general denial,² it seems that it may be taken by answer, under the modern code practice.³

(5) *Demurrer Ore Tenus.* — An objection for failure to sue by next friend cannot be taken orally at the hearing⁴ or by demurrer *ore tenus*.⁵

(6) *Motion for Nonsuit.* — A failure to sue by next friend is no ground for a nonsuit at the trial,⁶ and the court may overrule a motion for a nonsuit and make the appointment.⁷

it more definite. The objection of insufficiency in the mode of statement cannot be raised by demurrer. Under the code, such objections must be raised before, if at all, or be deemed waived. If the statement were not well founded in fact, the defendant, instead of demurring to its sufficiency, should have denied its truth."

1. *Drago v. Moso*, 1 Spears L. (S. Car.) 212, 40 Am. Dec. 592.

2. *Hicks v. Beam*, 112 N. Car. 642.

3. *Code Practice.* — See *Sere v. Coit*, 5 Abb. Pr. (N. Y. Supreme Ct.) 481; *Martin v. Webb*, 5 Ark. 72. And see cases cited in the preceding section to the effect that the defect is waived unless objection is taken by demurrer, answer, or plea. Compare *Schuek v. Hagar*, 24 Minn. 339, holding that the allegation of appointment is not traversable, and that the objection must be made by preliminary motion.

In *Hicks v. Beam*, 112 N. Car. 644, the court said: "The defendant relied upon a general denial, which was equivalent to a plea of *nil debet*, and the subject-matter of the action being within the jurisdiction of the court, the defendant would have been required under the old rules of pleading to have filed a formal plea in abatement in order to avail himself of the objection to the disability of the plaintiff. *Branch v. Houston*, Busb. L. (N. Car.) 85; *Clark v. Cameron*, 4 Ired. L. (N. Car.) 161. Under the new system, however, such a defense must be in some way (though informally) set up in the answer and insisted on before the trial on the merits, and if not so pleaded it will be considered as waived. *Hawkins v. Hughes*, 87 N. Car. 115; *Blackwell v. Dibblell*, 103 N. Car. 270; *Montague v. Brown*, 104 N. Car. 161; *Harrison v. Hoff*, 102 N. Car. 126; *Pom. R. and R.*, § 72. The defendant in the case under consideration

might have set up this preliminary defense along with the general denial, either by memoranda in the nature of a plea or by an answer in the justice's court, or after appeal in the Superior Court by leave, and under the rule laid down in the cases which we have cited it was his right to demand that the defense be passed upon in some way before the trial on the merits. Following the suggestion made in *Blackwell v. Dibblell*, 103 N. Car. 270, the jury might have been instructed that if they should respond to the issue involving the question whether the plaintiff was an infant in the affirmative, it would be unnecessary to proceed further and pass upon those involving the merits."

4. *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175, holding that an objection that a married woman, one of several complainants, did not appear by a next friend would be disregarded when taken orally at the hearing.

5. *Webber v. Ward*, 94 Wis. 605.

6. *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; *Matter of Watson*, 2 Dem. (N. Y.) 642; *Fellows v. Niver*, 18 Wend. (N. Y.) 564; *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.) 596; *Drago v. Moso*, 1 Spears L. (S. Car.) 212, overruling *M'Daniel v. Nicholson*, 2 Mill (S. Car.) 344.

7. *McDonald v. Weir*, 76 Mich. 245.

Where it appears on the trial that the plaintiff is an infant and that no guardian *ad litem* has been appointed, which fact the defendant discovers for the first time at the trial, the court may nevertheless deny the defendant's motion for a nonsuit on that ground and may thereupon appoint a guardian *ad litem* and enter an order to that effect, *nunc pro tunc*, as of a date prior to the service of the summons. *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153. Citing *Smart v. Haring*, 14 Hun (N. Y.) 276; *Sims v. New York College of*

(7) *Motion in Arrest.* — Failure to sue by next friend is not available upon a motion in arrest of judgment.¹

3. *Power to Appoint.* — The court wherein the action is pending or in which it is about to be begun is the proper court to appoint the next friend.²

Courts exercising general chancery powers have inherent jurisdiction to make the appointment;³ but no other court can take any step in regard thereto without legislative sanction.⁴ This is especially true of surrogates' courts.⁵

Dentistry, 35 Hun (N. Y.) 344; Rutter v. Puckhofer, 9 Bosw. (N. Y.) 638; Parks v. Parks, 19 Abb. Pr. (N. Y. Supreme Ct.) 161; Treadwell v. Bruder, 3 E. D. Smith (N. Y.) 596; Fellows v. Niver, 18 Wend. (N. Y.) 563, and *disapproving* Imhoff v. Wurtz, 9 N. Y. Civ. Pro. Rep. (Erie County Ct.) 48, wherein under similar circumstances it had been held that the court had no authority to deny an application for such dismissal and allow the plaintiff to file a petition for the appointment of a guardian *ad litem nunc pro tunc*.

1. Albert v. State, 66 Md. 325; Jones v. Steele, 36 Mo. 324; Hamilton v. Foster, 1 Brev. (S. Car.) 464.

2. Hathaway v. White, 111 Cal. 270; Turner v. Patridge, 3 P. & W. (Pa.) 173; Budd v. Rutherford, 4 Ind. App. 386.

3. Matter of Watson, 2 Dem. (N. Y.) 642.

Inherent Chancery Jurisdiction. — In *Re Frits*, 2 Paige (N. Y.) 374, it was held that the Revised Statutes of New York, regulating the appointment of next friends or guardians *ad litem*, did not take from the Court of Chancery any of the powers it possessed before as the general guardian of the persons and estates of infants or to order the appointment of a next friend or guardian *ad litem*. But it was said that in the exercise of its powers, in this respect, it was proper to conform to the spirit of the statutory provisions, so far as it might be done consistently with the forms of the court and convenience of suitors and without unnecessary expense. See also *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

The *Georgia* Act of 1821, declaring that suits in favor of a guardian should not abate upon the revocation of his letters of guardianship, but that the removal being suggested of record a scire facias might issue to make the successor a party at any time after his qualification and appointment, did not

take from the chancery court the right of appointing a guardian *ad litem* to prosecute a suit already commenced in behalf of an infant, provided no appointment had been made by the ordinary. *Leonard v. Scarborough*, 2 Ga. 73.

4. "Before our first code an infant had to prosecute his action by his next friend, technically called *prochein amy*, or *ami*, and who was unknown to the law prior to the statute of 1 Westm., 3 Edw. I., c. 47. 'It is he who appears in court for an infant, who sues any action, and aids the infant in pursuit of his action.' The mode of procuring the appointment was then, and has since continued to be, very similar to that sought to be pursued in this case, but the proceeding was taken in courts having general jurisdiction. (Jacob's Law Dict., title *Prochein Amy*.) The term then used is now discarded, and the person appointed either to institute or to defend an action for an infant is denominated a special guardian, or guardian *ad litem*. It may be safe to say that ever since the statute 1 Westm., referred to, the various courts, except perhaps that of the chancellor and of those on which his powers are devolved, in making the appointment have found their authority to do so in some statute. This indicates the abiding solicitude of legislatures for the welfare of the dependent and helpless; for the protection of their person and property. No court, except as above, can take any step in regard thereto without legislative sanction." *Matter of Watson*, 2 Dem. (N. Y.) 642.

5. *Matter of Watson*, 2 Dem. (N. Y.) 642.

Surrogates' Courts. — In *New York*, the only direct grant of authority to a surrogate's court to appoint a guardian *ad litem* for an infant is contained in Code Civ. Pro., §§ 2527 and 2530, which apply exclusively to cases where he has been or is to be cited, or is already

4. Application and Proceedings for Appointment — Implied Appointment. — Where a suit is brought by a next friend, he is, in theory of the law, as originally he was in fact, appointed by the court,¹ though it seems that an actual appointment is still required in a few jurisdictions.²

Actual Appointment Unnecessary. — But in the great majority of states an action may be commenced and prosecuted by a next friend without any previous appointment or formal order of admission,³

a party to a special proceeding therein. Sections 468-477 of that code, regulating the mode in which infants may bring and defend actions, are not applicable to surrogates' courts. *Matter of Watson*, 2 Dem. (N. Y.) 642, holding that a surrogate's court can appoint a guardian *ad litem* only in a pending proceeding. It cannot appoint a guardian for an infant who intends to proceed to revoke the probate of a will but has not yet petitioned for such relief. It seems that the infant may petition, and the surrogate may appoint a guardian on the return of the citation.

Appointing on Appeal. — If the interests of an infant need protection in proceeding upon appeal from the surrogate, it is the province of the appellate court to appoint for that purpose a guardian *ad litem*. *Matter of Hewitt*, 1 Dem. (N. Y.) 249, 65 How. Pr. (N. Y.) 187, 4 Civ. Pro. Rep. (N. Y.) 57. *Citing Kellinger v. Roe*, 7 Paige (N. Y.) 363; *Underhill v. Dennis*, 9 Paige (N. Y.) 209; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 89; *Moody v. Gleason*, 7 Cow. (N. Y.) 482; *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567.

1. *Chudleigh v. Chicago, etc.*, R. Co., 51 Ill. App. 491; *Leavitt v. Bangor*, 41 Me. 458; *Deford v. State*, 30 Md. 179.

2. *Keeran v. Clowser*, 5 Blackf. (Ind.) 604; *Haines v. Oatman*, 2 Dougl. (Mich.) 430; *Fellows v. Niver*, 18 Wend. (N. Y.) 564. And see the codes and statutes of the various states.

Unless the *prochein ami* of an infant plaintiff is appointed by the court, the defendant is not obliged to plead to the action, and may have the suit dismissed. *Keeran v. Clowser*, 5 Blackf. (Ind.) 604; *Haines v. Oatman*, 2 Dougl. (Mich.) 430.

A next friend or guardian appointed out of the jurisdiction must have special authority to sue. *Williams v.*

Storrs, 6 Johns. Ch. (N. Y.) 353; *Verrier v. Verrier*, 7 Phila. (Pa.) 618.

3. *Alabama*. — *Barwick v. Rackley*, 45 Ala. 215; *Hutton v. Williams*, 60 Ala. 107; *Bethea v. McCall*, 3 Ala. 449; *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

Connecticut. — *Apthorp v. Backus*, Kirby (Conn.) 407; *Judson v. Blanchard*, 3 Conn. 584; *McCarrick v. Kealy*, 70 Conn. 642.

Delaware. — *Wilson v. Vandyke*, 2 Harr. (Del.) 29.

Illinois. — *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

Maryland. — *Deford v. State*, 30 Md. 179.

Mississippi. — *Klaus v. State*, 54 Miss. 644.

United States. — *Kingsbury v. Buckner*, 134 U. S. 650.

A guardian need not be specially admitted to sue or defend as such, but an infant cannot sue by guardian, unless such guardian has been actually appointed by the Orphans' Court; but he may sue by next friend without a special appointment. *Wilson v. Vandyke*, 2 Harr. (Del.) 29.

"An infant may sue by his next friend, appointed, at the common law, by the court in which the action is pending, and by our practice without any appointment at all. * * * But as the execution of the trust is under the supervision and control of the court, there is no reason why our practice of constituting a *prochein ami* without the express sanction of the court should be disturbed." *Turner v. Patridge*, 3 P. & W. (Pa.) 173.

The Appointment May Be Made by the Plaintiff, if a married woman, and an appointment by the court is not necessary. *Markham v. Markham*, 4 Mich. 305.

Origin of Practice. — "The probability is, that like many other such requisites, the practice of obtaining such previous order, from inconvenience, fell into disuse; probably in the

and it is not even necessary to obtain leave of court before beginning the suit.¹ The admission of the next friend to sue is implied until expressly disallowed.²

A Recital or Allegation in the Pleadings that the plaintiff sues by next friend is sufficient without a formal order.³

confidence that the authority would not be called in question, or, if called in question, could be supplied, when all was right and well intended, by an order *nunc pro tunc*; and if the defendant appeared and pleaded it would be too late then to question the authority of the *prochein ami*. It was put on the footing, in this respect, of a power of attorney, which is always presumed to exist, and which cannot be questioned unless seasonably challenged, and may then be supplied." *Guild v. Cranston*, 8 Cush. (Mass.) 506. See also *Barwick v. Rackley*, 45 Ala. 215; *Bethea v. McCall*, 3 Ala. 449; *Trask v. Stone*, 7 Mass. 241; *Boynton v. Clay*, 58 Me. 236; *Deford v. State*, 30 Md. 179; *Klaus v. State*, 54 Miss. 644; *Resor v. Resor*, 9 Ind. 347; *Judson v. Blanchard*, 3 Conn. 579; *Burwell v. Corbin*, 1 Rand. (Va.) 131. And see *Stumps v. Kelley*, 22 Ill. 140.

1. Leave of Court. — *Barwick v. Rackley*, 45 Ala. 215; *Bethea v. McCall*, 3 Ala. 449; *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; *Towner v. Towner*, 7 How. Pr. (N. Y. Supreme Ct.) 388.

2. *Deford v. State*, 30 Md. 179; *Sick v. Michigan Aid Assoc.*, 49 Mich. 50. Compare *Haines v. Oatman*, 2 Dougl. (Mich.) 430.

Reason for Rule. — "Code 1871, § 669, provides that 'in any case where such persons as be within age may have cause of action, their next friend shall be admitted to sue for them, and such next friend shall be liable for the costs.' In *Alabama* it is held that no formal leave of court in advance is required. *Bethea v. McCall*, 3 Ala. 449; *Isaacs v. Boyd*, 5 Port. (Ala.) 388. And in *Connecticut*, if the court permits the suit to continue, this will be equivalent to a formal order of allowance. *Judson v. Blanchard*, 3 Conn. 579. The doctrine is not universally so held; but we think this ruling most conformable to the established practice in this state, and best calculated to further the ends of justice. The *prochein ami* is an instrument of the court, subject at all times to its orders, who voluntarily makes himself liable for costs for the

purpose of giving the infant a standing in court. He may be changed by the court at pleasure, or required to give any bonds deemed necessary. He has no power to collect and receipt for the recovery obtained in the suit without special authorization. We think the fact that he is permitted by the court to carry on the litigation is itself an admission to sue under the statute." *Klaus v. State*, 54 Miss. 644.

Ancient and Modern Practice. — "Anciently, when a party exhibited a bill as the next friend of a person under disability, he was required to produce with the bill his authority for doing so; but the modern practice is to retain the bill unless the defendant requires the production of the authority from the next friend." *Hunt v. Wing*, 10 Heisk. (Tenn.) 139.

3. *Judson v. Blanchard*, 3 Conn. 579; *Apthorp v. Backus*, Kirby (Conn.) 407; *Resor v. Resor*, 9 Ind. 347; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Bent v. Maxwell Land Grant*, etc., Co., 3 N. Mex. 158.

Formal Allegation of Admission by Court. — "If the suit be by guardian, it is not now necessary that there should be any other record of admission than the recital of the fact in the count: 'J. R., per A. B., guardianum suum, ad hoc per curiam specialiter admissum, queritur, etc.' *Rawlyn's Case*, 4 Coke 53. It was formerly held that the defendant was not compellable to answer until the plaintiff showed a rule of court for his admittance. Com. Dig., tit. Pleader, 2, C. 1. But the rule now is that the *prochein ami*, as well as the guardian, is to be admitted by the court without any other record than a recital in the count." *Miles v. Boyden*, 3 Pick. (Mass.) 213. Citing *Judson v. Blanchard*, 3 Conn. 579; *Apthorp v. Backus*, Kirby (Conn.) 407; *Stewart v. Crabb*, 6 Munf. (Va.) 280; *Archer v. Frowde*, 1 Stra. 304.

Allegation of Admission Not Necessary. — "It is further objected here that there is no record of the admission of the *prochein ami*. By the practice of this court (and it is a matter to be governed by practice and the mode of pro-

Where a Formal Appointment Is Required, it is made upon a petition for that purpose,¹ presented by the infant himself or by some one on his behalf.² It has been held that the moving papers must

cess) it is not necessary there should be; it is enough that it appears from the files and pleadings, which become parcel of the record, that he doth in fact prosecute. This is sufficient to satisfy the court and to render the *prochein ami* responsible to the adverse party for costs, and to the infant for the conducting and consequences of the suit. As to the practice settled in the courts at Westminster Hall, in the Common Pleas there is a record of the admission; in the King's Bench there is not, but only a recital of it in the declaration: 'J. S., per A. B., *guardianum suum, ad hoc per cur. specialiter admissum, queritur*, etc.' Vide 3 Bac. Abr. 149, tit. Infancy and Age, K, 2, and authorities there referred to. And if the entry only is *per guardianum suum*, omitting the clause *ad hoc per cur. specialiter admissum*, still it is good. Carth. 256. In the Court of Chancery there is neither a record nor a recital of it, and the admission, as in our courts, is merely a tacit one. Any person who will befriend the infant brings a bill as *prochein ami* to him, without his consent, or any appointment of court; and if the court disapprove of him, or of his proceedings, they dismiss him, and, if need be, appoint another; and if two happen to sue, that suit is sustained which appears most for the benefit of the infant and the other is dismissed. 3 Bac. Abr. 149, tit. Infancy and Age, K, 2; Turner v. Turner, 1 Stra. 708; 3 Atk. 603. In this state, the declaration is parcel of the writ, and the *prochein ami* is therefore named in the writ, as in a chancery bill, and begins to act when the writ is prayed out, and before the court sits that is to have cognizance of the suit; nor are there courts here continually open who might admit or appoint him previous to the suit's being commenced. The *prochein ami* comes in therefore here, as in chancery in England, without any previous appointment or formal admission; and if the court disapprove of him they will, upon motion or without, when he comes to appear, or in any stage of the suit, displace him, and if the case requires it appoint another. Tacit admission, from the nature of the case and the mode of process here used, is suffi-

cient and all that practice has made necessary." Apthorp v. Backus, Kirby (Conn.) 407.

Naming in the Writ or Summons may be considered a sufficient appointment unless expressly disallowed. Judson v. Blanchard, 3 Conn. 579; Usher v. Cornwell, 3 Ind. 210.

1. Keeran v. Clowser, 5 Blackf. (Ind.) 604; Eades v. Booth, 8 Q. B. 718, 55 E. C. L. 718; Haines v. Oatman, 2 Dougl. (Mich.) 430; but as to the Michigan practice, compare Sick v. Michigan Aid Assoc., 49 Mich. 50.

"No Letters of Guardianship Are Issued to a guardian *ad litem*, but his authority is evidenced by the entry in the minutes of the court appointing him." Hathaway v. White, 111 Cal. 270.

2. **Who May Apply.**—An infant was admitted to sue by her father and next friend on a petition signed for her by the father, and on affidavit verifying the signature and stating that the infant was only twenty-one months old, and unable to write or make her mark. Eades v. Booth, 8 Q. B. 718, 55 E. C. L. 718, 3 D. & L. 770, 10 Jur. 311, 15 L. J. Q. B. 263.

A general guardian need not be appointed for the purpose of applying for a guardian *ad litem* to bring an action on behalf of infants, but the application may be made by his general guardian appointed in another state. Freund v. Washburn, 17 Hun (N. Y.) 543.

"The mode of appointment prescribed by the statute must be adhered to in all cases where a next friend is appointed by an officer out of court. But a literal compliance with the fourth section is not practicable in all cases, as it may be necessary to commence a suit in behalf of an infant who is too young to sign a petition, or even in behalf of a child *en ventre sa mere*. In such a case I think it would be competent for some relative or friend to present the petition in behalf of the infant." *Re Frits*, 2 Paige (N. Y.) 374, wherein a great number of infant legatees had a common interest in the prosecution of a suit, and the court, on the application of the guardians of some of the infants, in behalf of all the rest, appointed a next friend to prosecute a

show the pecuniary responsibility of the proposed guardian.¹ A written application is not necessary in a proceeding before a justice of the peace.²

No Appeal Lies from an order appointing a guardian *ad litem*.³

Consent to Act. — The next friend is sometimes required to file his consent.⁴ In *Indiana* a written consent to act must be filed before process shall issue.⁵

Infant's Consent Unnecessary. — A suit may be brought for an infant by a next friend without the knowledge or consent, and even against the wish, of the infant.⁶ The infant's rights are under

suit in the names and for the benefit of all the infant legatees.

1. *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434. But see *infra*, II. 7. *Who May Be Appointed*.

2. *Bunton v. Adams*, 65 Mo. App. 6.

3. *Hathaway v. White*, 111 Cal. 270.

4. *Lumpkins v. Justice*, 1 Ind. 557; *Dodd v. Moore*, 91 Ind. 522, 92 Ind. 397; *Markham v. Markham*, 4 Mich. 305; *Cole v. McGarvey*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 305.

In *New York* an order appointing a guardian *ad litem* is irregular when the consent of the person named as guardian to act as such is not acknowledged. In such case the order should be set aside, and an action brought by the guardian under such appointment should be dismissed. *Cole v. McGarvey*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 305, *construing* Code Civ. Pro., § 472.

5. 2 Rev. Stat., p. 29, § 11; *Resor v. Resor*, 9 Ind. 348.

But such statute has been held to be directory only as to the time of filing such consent, and process may issue and the cause proceed without such consent, until it is required by the defendant. *Budd v. Rutherford*, 4 Ind. App. 386, *citing* *Greenman v. Cohee*, 61 Ind. 201.

As a guardian *ad litem* appointed to prosecute a bill on behalf of an infant is not obliged to accept the appointment, a reasonable time should be allowed him to consider whether or not he will accept, and to prepare for trial. *Wells v. Winfree*, 2 Munf. (Va.) 342.

6. *Alabama*. — *Hutton v. Williams*, 60 Ala. 107; *Barwick v. Rackley*, 45 Ala. 215.

Connecticut. — *McCarrick v. Kealy*, 70 Conn. 642.

Illinois. — *Chudleigh v. Chicago*, etc., R. Co., 51 Ill. App. 491.

Massachusetts. — *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Pyne v. Wood*, 145 Mass. 558.

New York. — *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409.

Texas. — *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421.

United States. — *Kingsbury v. Buckner*, 134 U. S. 651.

England. — *Morgan v. Thorne*, 7 M. & W. 400, 9 Dowl. P. C. 228, 5 Jur. 294.

Consent of Infant — Age Immaterial. —

"It is not necessary that the *prochein ami* should have received authority from the infant to enable him to sue in her name. The law which permits her to sue and appear only by her guardian or next friend regards her at all times during her infancy as without sufficient knowledge and experience to properly decide when or how an action should be prosecuted for her benefit. 'The law knows no distinction between infants of tender and of mature years, and, as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of his attaining his majority.'" *McCarrick v. Kealy*, 70 Conn. 642. *Citing* *Morgan v. Thorne*, 7 M. & W. 400.

"In *England* the court will appoint a *prochein ami* as its officer to conduct a suit for an infant, and to look after his interests, and no appointment or subsequent confirmation by the infant party is requisite, whether he be an infant of the tenderest age or of years of discretion; nor does it signify at all whether he is cognizant of the proceedings or not, or whether he is in the country or abroad; and the infant cannot disavow the action. *Tyler Inf. and C.*, § 136; *Morgan v. Thorne*, 7 M. & W. 400. Said Lord Brougham, in *Nalder v. Hawkins*, 2 Myl. & K. 243: 'The true and just principle which should

the protection of the court, which will see that no suit is prosecuted which is not for the infant's benefit.¹

5. Time of Appointment. — The time when a next friend should be appointed is a matter to be determined by the local practice and statutes.² Thus, in some jurisdictions, the next friend or guardian *ad litem* is required to be appointed before process issues or the declaration or complaint is filed,³ while in other jurisdictions the next friend may regularly be appointed after process issues.⁴ But even where the appointment should regu-

govern in all such cases is this: No discouragement ought to be thrown in the way of persons *bona fide* suing as next friends, but no undue facility should be given to mere volunteers who interfere rather for their own purposes than for the infant's benefit.' " *Middleditch v. Williams*, 47 N. J. Eq. 585.

Consent of Feme Covert. — The next friend of a *feme covert* acts only by her consent, and in this respect differs from the next friend of an infant. *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178; *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 196.

Where Two Suits Are Instituted in behalf of the infant at the same time, the court will institute an inquiry which is most for the advantage of the infant. *Dormer v. Fortescue*, 3 Atk. 130.

1. See *infra*, IV. *Control and Duty of Court*.

Any one may sue in an infant's name, without his knowledge or consent, as next friend, but on proper application the court will refer the case to a master to ascertain whether the suit is for the infant's benefit or not, and if the master reports that it is not, the proceedings will be stayed. *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409.

2. See the codes and statutes of the various states.

An appointment made before an interlocutory decree in partition confers jurisdiction over the minor from the time of the appointment. *Chrisman v. Divinia*, 141 Mo. 122.

In *Security L. & T. Co. v. Kauffman*, 108 Cal. 214, it was held that the court had authority to appoint a guardian *ad litem* for an insane wife before the filing of a petition and intervention by her in an action to foreclose a mortgage.

3. *Rabidon v. Muskegon Circuit Judge*, 110 Mich. 297; *Sick v. Michigan Aid Assoc.*, 49 Mich. 50; *Wilder v. Ember*, 12 Wend. (N. Y.) 191; *Fitch v. Fitch*, 18 Wend. (N. Y.) 513; *Schilling*

v. Welman, 5 N. Y. Leg. Obs. 20; *Hill v. Thaxter*, 3 How. Pr. (N. Y. Supreme Ct.) 407, 2 Code Rep. (Washington Special Term) 3; *Buermann v. Buermann*, 17 Abb. N. Cas. (N. Y. Super. Ct.) 391.

In New York, under the Code of Procedure, which required that when an infant was a party he must appear by guardian, but which failed to say in terms at what stage the guardian should be appointed, it was held, in view of the former provisions of the statute requiring the appointment of a next friend before issuance of process, that a guardian *ad litem* for an infant plaintiff should be appointed before the issuance of the summons. *Hill v. Thaxter*, 3 How. Pr. (N. Y. Supreme Ct.) 407.

In California it seems that the appointment should be made before the complaint is filed, as the appointment is held to be a traversable fact which must be alleged in the complaint. See *Security L. & T. Co. v. Kauffman*, 108 Cal. 223; *Crawford v. Neal*, 56 Cal. 321. But see *Matter of Cahill*, 74 Cal. 52, wherein the court, after reciting the statute, said: "So far as the mere language of these provisions goes, it would seem that the appointment is to be made after the commencement of the suit. But it has been held that the appointment of the guardian must be alleged in the complaint. *Crawford v. Neal*, 56 Cal. 321. In this case it was said that the necessity to show the due appointment of the guardian *ad litem* remains as at common law."

4. *Groff v. Groff*, 3 N. J. L. 235.

It is not necessary that there should be a guardian or *prochein ami* for a minor at the time of issuing out process, but *præcipe* for the summons may be filed by an attorney. *Stumps v. Kelley*, 22 Ill. 140.

In Michigan the practice has been stated to be as follows: "If it is proposed to commence the suit by issuing

larly be made before process issues, a failure so to make it is not a jurisdictional defect,¹ and the appointment may be made *nunc pro tunc* at the trial² or even after appeal.³

Amendment. — A next friend or guardian *ad litem* may be allowed to come in by amendment and prosecute a suit commenced by an infant in his own name;⁴ and the court may allow this to be done even after advantage is sought to be taken of the defect, by a motion to dismiss or for nonsuit,⁵ or by other appropriate mode.⁶

After Judgment. — It has been held that a next friend may be appointed after judgment.⁷

On Appeal from a county court⁸ or justice of the peace,⁹ the Circuit or District Court may appoint a next friend or guardian *ad litem* where none was appointed below.

6. Order of Appointment. — Ordinarily, as has been seen, no

process, it ought to go out in the ordinary way; after its return, and before declaration is filed, application should be made to the court, in one of the modes indicated in the English practice, to allow a *prochein ami*. If the suit is intended to be commenced by declaration, the *prochein ami* must be appointed by the court, before the filing and service of the declaration. In either case, a copy of the order appointing a *prochein ami* must be served on the opposite party before the plaintiff will be entitled to a plea." *Haines v. Oatman*, 2 Dougl. (Mich.) 430. But compare *Sick v. Michigan Aid Assoc.*, 49 Mich. 50.

1. *Dillon v. Howe*, 98 Mich. 168; *Matter of Cahill*, 74 Cal. 52; *Fitch v. Fitch*, 18 Wend. (N. Y.) 513; *Fellows v. Niver*, 18 Wend. (N. Y.) 563.

In *Indiana*, where a formal appointment is not necessary, but it is required that a competent and responsible person shall, before process issues, consent in writing to appear as next friend, it has been held that the statute is merely directory in respect to the time when such consent shall be filed, and that process may issue and the cause proceed without such consent, until it is required by the defendant. *Budd v. Rutherford*, 4 Ind. App. 386; *Greenman v. Cohee*, 61 Ind. 205.

2. *Rima v. Rossie Iron Works*, 120 N. Y. 433, 47 Hun (N. Y.) 153.

Where an improper person, as an infant, has been appointed, a proper person may be appointed *nunc pro tunc*. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

3. *Seabrook v. Gregg*, 2 S. Car. 68, holding that the objection comes too

late if taken at the hearing of an appeal from the decree, and that leave will be given to the plaintiff to move the appointment *nunc pro tunc* in the Circuit Court.

4. *California*. — *Foley v. California Horseshoe Co.*, 115 Cal. 184; *Matter of Cahill*, 74 Cal. 52.

Florida. — *Neal v. Spooner*, 20 Fla. 38.

Massachusetts. — *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Smith v. Carney*, 127 Mass. 179.

New Hampshire. — *Young v. Young*, 3 N. H. 345.

New York. — *Hill v. Board of Water, etc., Com'rs*, 77 Hun (N. Y.) 491.

5. *McDonald v. Weir*, 76 Mich. 243; *Jones v. Steele*, 36 Mo. 324; *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153; *Coomes v. Knapp*, 11 Vt. 543.

In *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153, the case of *Imhoff v. Wurtz*, 9 N. Y. Civ. Pro. Rep. (Erie County Ct.) 48, wherein an action prosecuted by an infant plaintiff was dismissed at the trial and the application for the appointment of a guardian *ad litem* refused, was held contrary to the weight of authority.

6. See *supra*, II. 2. b. *Irregularity Cured or Waived*.

7. After a judgment in favor of an infant plaintiff without the appointment of a next friend at the commencement of the suit, the court may, upon his application, appoint a next friend and approve his bond, in order that the money recovered may be secured to the infant. *Jones v. Steele*, 36 Mo. 324.

8. *Hepp v. Huefner*, 61 Wis. 148.

9. *McDonald v. Weir*, 76 Mich. 243.

formal order of appointment is necessary.¹ Where a formal order is required, it has been held that a copy of the order must be served on the opposite party before the plaintiff will be entitled to a plea.²

7. Who May Be Appointed. — A next friend or guardian *ad litem* must be an actual and not a fictitious person,³ and he must be *sui juris*.⁴

Responsible Person. — A next friend should also be a responsible person,⁵ because he is liable for the proper conduct of the case, and may ultimately become liable for the costs.⁶ Accordingly, a

1. See *supra*, II. 4. *Application and Proceedings for Appointment*.

2. *Schilling v. Welman*, 5 N. Y. Leg. Obs. 20; *Haines v. Oatman*, 2 Dougl. (Mich.) 430. But compare *Sick v. Michigan Aid Assoc.*, 49 Mich. 50.

3. *Bullard v. Spoor*, 2 Cow. (N. Y.) 430.

4. **An Infant Cannot Act** as next friend for another infant. *Wolford v. Oakley*, 43 How. Pr. (Buffalo Super. Ct.) 118.

Married Women. — Under the recent statutes of *Indiana*, enlarging the civil rights of married women, a married woman may act in the capacity of next friend for a minor. The liability of a next friend for costs is imposed by statute, and is a direct primary liability, not in the nature of a suretyship, and a judgment may be rendered against a married woman upon such liability. *Budd v. Rutherford*, 4 Ind. App. 386.

5. *Dalrymple v. Lamb*, 3 Wend. (N. Y.) 424; *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178; *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233; *Ten Broeck v. Reynolds*, 13 How. Pr. (N. Y. Supreme Ct.) 462; *Hill v. Thaxter*, 3 How. Pr. (N. Y. Supreme Ct.) 407; *Towner v. Towner*, 7 How. Pr. (N. Y. Supreme Ct.) 388; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 269.

Where a next friend is irresponsible he may be removed. *Smith v. Anderson*, 1 Bailey L. (S. Car.) 123.

"I think it would be better that it should appear, before making the appointment, that he is responsible. Some of the forms of petition are so (3 Burr. Pr. 235; Yates' Forms 346; Monell 508; Hayden 352); others not (Till. Forms 232; Tidd's Forms 21; 2 Barb. C. Pr. 632). In some cases that was formerly required (Old Rule 163; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267; *Robertson v. Robertson*, 3 Paige (N. Y.) 387)." *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233.

"It has been before stated that any person who may be willing to undertake the office may be the next friend of an infant. * * * Though formerly doubted, yet the next friend of an infant need not be a person of substance." 1 *Daniell's Ch. Pl. and Pr.* 74. See also *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233.

Meaning of "Responsible Person." — In *Robertson v. Robertson*, 3 Paige (N. Y.) 387, it was held that the term "responsible person," in a rule of court requiring a next friend in divorce to be a responsible person, means that he should be worth at least \$250 above all debts.

In *Matter of Mang*, 50 N. Y. Super. Ct. 96, 5 Civ. Pro. Rep. (N. Y.) 162, the petition by a father for his appointment as guardian *ad litem* for his infant daughter alleged that he had a wife and five children to support, that he earned two dollars per day, and that neither he nor his child had any relatives or friends of greater means who would assume the position of guardian *ad litem*. It was held that the father was not a person of sufficient pecuniary ability to be appointed. See also *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434.

In *Rabidon v. Muskegon Circuit Judge*, 110 Mich. 297, it was held that a statute requiring a competent person to be appointed as next friend, who should be responsible for the costs, did not require the appointee to be absolutely responsible financially. The statute merely means that he shall be liable for the costs.

6. *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233.

Where a suit is brought *in forma pauperis* the next friend or guardian *ad litem* need not be responsible financially. *Hayes v. Second Ave. R. Co.*,

bankrupt¹ or an insolvent person² cannot ordinarily act as next friend.

Relatives.—The court may exercise its discretion in selecting a next friend,³ and while the appointee need not be a relative of the plaintiff,⁴ preference will be given to relatives.⁵

5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 155.

The Only Interest a Defendant Has in the appointment of a guardian for an infant plaintiff is that he shall be a responsible party, and of ability to respond for costs. Strong v. Jenkins, 21 N. Y. Civ. Pro. Rep. (Buffalo Super. Ct.) 9.

See also *infra*, VI. 1. Costs.

1. Where an uncertificated bankrupt was procured to be appointed *prochein ami* for an infant plaintiff, the court, on motion, removed him and ordered another to be appointed. Watson v. Fraser, 8 M. & W. 660, 9 Dowl. P. C. 741, 5 Jur. 682.

2. Smith v. Anderson, 1 Bailey L. (S. Car.) 123, holding that the court will not revoke the appointment of a next friend where his insolvency is doubted. Lees v. Smith, 5 H. & N. 632.

Discretion of Court.—The court in its discretion will allow a father, although an insolvent debtor, to prosecute an action as *prochein ami* for his infant son, if it is clearly shown that no fitter person can be obtained. Duckitt v. Satchwell, 1 D. & L. 980, 12 M. & W. 779, 13 L. J. Exch. 224. See also Budd v. Rutherford, 4 Ind. App. 386, wherein it is held that the *Indiana* statute gives power to the court to permit any person, without regard to the question of insolvency or responsibility, to prosecute any action on behalf of an infant plaintiff; that the court has power to remove the next friend if he is shown to be incompetent or irresponsible.

Upon Giving Security for Costs, but not otherwise, any person may act as next friend, irrespective of any question as to his responsibility. Fulton v. Rosevelt, 1 Paige (N. Y.) 178; Green v. Harrison, 3 Sneed (Tenn.) 131; Evans v. Mason, 1 Lea (Tenn.) 26; Musgrove v. Lusk, 5 Baxt. (Tenn.) 684; Stephenson v. Stephenson, 3 Hayw. (Tenn.) 123; Tucker v. Dabbs, 12 Heisk. (Tenn.) 18; Miles v. Kaigler, 10 Yerg. (Tenn.) 10; Smith v. Anderson, 1 Bailey L. (S. Car.) 123.

"In England a *prochein ami* is appointed by the court, and he must be a man of character and substance; but

here any person who chooses can act as such, no matter what his means and standing may be, provided he can give security for cost. We do not mean to say that this has been settled by judicial determination, but by a practice so long pursued and acquiesced in as to render it impossible to alter it but by legislative enactment." Miles v. Kaigler, 10 Yerg. (Tenn.) 10.

3. "The court * * * is not bound to accept any and every person as the next friend, but will exercise its discretion, giving preference to those who by kinship or otherwise are best calculated to champion the infant's rights." Middleditch v. Williams, 47 N. J. Eq. 585.

4. Bartlett v. Batts, 14 Ga. 539; Leavitt v. Bangor, 41 Me. 458; Guild v. Cranston, 8 Cush. (Mass.) 506; Burns v. Wilson, 1 Mo. App. 179.

"The nearest relative of the infant is supposed to be the person who will take the infant under his protection. As it is the nearest relative who sometimes invades the infant's rights or neglects to protect him against others, the court will permit any person to institute suits on his behalf." Middleditch v. Williams, 47 N. J. Eq. 585.

The General Guardian is ordinarily a proper person to be appointed as next friend. Straka v. Lander, 60 Wis. 115.

The Relation of Father is not essential to the position of next friend of an infant plaintiff. Bartlett v. Batts, 14 Ga. 539; Burns v. Wilson, 1 Mo. App. 179, citing Jones v. Steele, 36 Mo. 324. See also U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128.

5. Middleditch v. Williams, 47 N. J. Eq. 585.

The Father, as being the natural guardian of the infant, ought in the first instance to be appointed *prochein ami*. Rue v. Meirs, 43 N. J. Eq. 377; Stevens v. Cole, 7 Cush. (Mass.) 469; Middleditch v. Williams, 47 N. J. Eq. 585.

In Woolf v. Pemberton, 25 W. R. 873, 6 Ch. Div. 19, 37 L. T. N. S. 328, the father of the infant was appointed next friend in substitution for a stranger who had constituted himself next friend and commenced the action. See also

Adverse Interest. — A person who is hostile or is interested in the suit adversely to the infant will not be appointed next friend.¹

Attorneys or Officers of Court will not be appointed.²

Persons Beyond Reach of Process. — Nor will a person beyond reach of an attachment be appointed next friend.³

Where the Next Friend Is an Improper Person, the court may, in its discretion, dismiss the suit,⁴ or may remove him and appoint another person in his place.⁵

8. Oath and Bond — Oath. — It has been held that a next friend or guardian *ad litem* should be duly sworn.⁶

Bernard v. Merrill, 91 Me. 358; Rue v. Meirs, 43 N. J. Eq. 377.

1. *Alabama.* — Dowty v. Hall, 83 Ala. 165.

Illinois. — Patterson v. Pullman, 104 Ill. 80.

Maine. — Bernard v. Merrill, 91 Me. 358.

Massachusetts. — Stevens v. Cole, 7 Cush. (Mass.) 467.

Michigan. — Crittenden v. Canfield, 87 Mich. 152.

New York. — *Re Frits*, 2 Paige (N. Y.) 374; Cook v. Rawdon, 6 How. Pr. (N. Y. Supreme Ct.) 233.

North Carolina. — Walker v. Crowder, 2 Ired. Eq. (N. Car.) 478; George v. High, 85 N. Car. 113; Morris v. Gentry, 89 N. Car. 249.

Tennessee. — Simpson v. Alexander, 6 Coldw. (Tenn.) 629.

England. — Payne v. Little, 13 Beav. 114; Lewis v. Nobbs, 8 Ch. Div. 591.

But see Com. v. Kinnaird, 10 B. Mon. (Ky.) 249.

Illustrations. — The court will not permit any one who has any adverse interest to the infant to act as next friend. Walker v. Crowder, 2 Ired. Eq. (N. Car.) 478.

The defendant cannot be appointed as next friend. Payne v. Little, 13 Beav. 114. But where the next friend is a defendant in right of his wife, his name will be stricken out as defendant. Lewis v. Nobbs, 8 Ch. Div. 591.

In an action by an infant to recover her separate property, the husband cannot act as guardian or next friend. Cook v. Rawdon, 6 How. Pr. (N. Y. Supreme Ct.) 233.

One who may become a necessary party adversely interested should not be appointed. *Re Frits*, 2 Paige (N. Y.) 374.

3. *McVickar v. Constable*, Hopk. (N. Y.) 102; *Sinclair v. Sinclair*, 13 M. & W. 640; *Slaughter v. Talbot*, Willes 190.

In Cook v. Rawdon, 6 How. Pr. (N. Y. Supreme Ct.) 234, the court said: "I do not think that part of Rule 56 requiring the guardian *ad litem* to be the general guardian, or an attorney, etc., or other officer of the court, applies to a guardian for the plaintiff. Mr. Justice Willes, in *Slaughter v. Talbot*, Willes 190, said the practice of appointing officers, etc., was probably altered because they would be liable for costs. It might be very difficult to obtain a *prochein ami* under this rule. This being a suit to recover land, I do not think it necessary to determine whether he can now be compelled, as formerly, to give a bond. See 2 Rev. Stat. 446, § 5; Code, § 469."

In New York, surrogates' clerks or employees are prohibited from acting as special guardians in that court by Code Civ. Pro., § 2511.

3. *Ten Broeck v. Reynolds*, 13 How. Pr. (N. Y. Supreme Ct.) 462, holding that if such a person has been appointed, proceedings will be stayed on motion until the guardian gives security for costs, or a competent and responsible resident is substituted.

4. *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Patterson v. Pullman*, 104 Ill. 80.

Remanding with Directions. — Where, on appeal, it appears that part of the complainants were minors whose interests were adverse to that of their co-complainant, their father, and that the suit has been prosecuted to a final decree in his favor without the appointment of a guardian *ad litem*, the Supreme Court will remand the cause, with directions to appoint a guardian *ad litem* to properly represent them. *Linebaugh v. Atwater*, 173 Ill. 613.

5. *McCarrick v. Kealy*, 70 Conn. 642. *Citing Tyler on Infancy*, § 136; *Apthorp v. Backus*, Kirby (Conn.) 407; *Judson v. Blanchard*, 3 Conn. 579.

6. *Hamilton v. Flume*, 2 Tex. Unrep. Cas. 694.

Bond. — In some jurisdictions a bond to secure faithful performance of his duties is required of a next friend;¹ but a failure to give such bond is harmless error so far as the defendant is concerned.² The bond may be filed at the discretion of the court after the suit is begun.³ In some jurisdictions no bond is required.⁴

III. POWERS AND DUTIES — 1. In General. — A next friend has the control and management of the action,⁵ and all notices and rules are in his name.⁶ A next friend can do nothing to the injury of the infant.⁷ But while he cannot relinquish the infant's rights,⁸

1. *Higgins v. Hannibal, etc.*, R. Co., 36 Mo. 418; *Klaus v. State*, 54 Miss. 644; *Budd v. Rutherford*, 4 Ind. App. 386; *Illinois Cent. R. Co. v. Latimer*, 28 Ill. App. 552; *Hamilton v. Flume*, 2 Tex. Unrep. Cas. 694.

Waiver of Bond by Court. — In *Re Frits*, 2 Paige (N. Y.) 374, it was held that the statutory provision directing the officer making the appointment of a next friend to take security to the infant in certain cases, extends to cases where the infant sues jointly with others, but that the chancellor may waive the security. With reference to the waiver, the court said: "It would be a useless and unnecessary expense to execute a bond to each of the thirty infants in this case. And as the premises must be sold under the direction of a master, if a sale is decreed to pay the legacies, the court can control the fund without suffering it to pass into the hands of the next friend. The security may therefore be dispensed with, under the particular circumstances of this case."

In *Indiana* it is discretionary with the court to require the next friend of an infant, in an action for the recovery of money, to execute a written undertaking with sufficient sureties to account duly to the infant for all moneys received in the action. *Budd v. Rutherford*, 4 Ind. App. 386.

In *Florida* the statute requiring the next friend of an infant to give bond upon the institution of a suit has been held to relate exclusively to proceedings at the common law. *Pace v. Pace*, 19 Fla. 438, citing and overruling to this extent *Sanderson v. Sanderson*, 17 Fla. 820.

2. *Neal v. Spooner*, 20 Fla. 38.

3. *Illinois Cent. R. Co. v. Latimer*, 28 Ill. App. 552.

4. *Parsons v. Jones*, 9 Mass. 106; *Smith v. Floyd*, 1 Pick. (Mass.) 275.

"Neither the statutes regulating chancery proceedings nor the rules of practice in chancery require such a bond. The chancellor, however, should adopt such measures as are necessary to fully and completely protect the interest of the infant." *Pace v. Pace*, 19 Fla. 438. Compare *Sanderson v. Sanderson*, 17 Fla. 820.

5. *Sutton v. Nichols*, 20 Kan. 43; *Bernard v. Merrill*, 91 Me. 358.

"His authority is commensurate with the writ, the plaintiff's cause of action, *pro hac vice*, being intrusted to him." *Tripp v. Gifford*, 155 Mass. 109.

Liability for Negligence. — A next friend is liable to the infant for negligence in the conduct of the suit, *Tripp v. Gifford*, 155 Mass. 109; as by failing to apply for a receiver in the cause. *Wessells v. Wessells*, 1 Tenn. Ch. 63.

6. *People v. New York C. Pl.*, 11 Wend. (N. Y.) 164.

Illustrations. — The next friend is the proper person to swear to the bill or other proceedings in the cause. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

The next friend may make the suggestion and affidavit for removal of the cause to another court on the ground of prejudice. *Deford v. State*, 30 Md. 179. See also *Albert v. State*, 66 Md. 325.

A trial of right of property may be prosecuted in the name of the infant by a *prochein ami*, who may execute the bond, and, if necessary, make the affidavit required by statute. *Strode v. Clark*, 12 Ala. 621.

7. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40.

8. *Burt v. McBain*, 29 Mich. 260; *Kingsbury v. Buckner*, 134 U. S. 650.

A next friend has power to claim and pursue the rights of the infant, but is powerless to yield or cede them to others. *Pittsburg, etc.*, R. Co. v.

he may consent to such arrangements as will facilitate the termination of the action.¹

Power to Dismiss. — A next friend has power only to prosecute, and neither he nor his attorney can dismiss the case.²

Extent of Authority. — His authority is limited to the particular action wherein he was appointed,³ and as his authority commences with the suit, it has been held that he can maintain a suit only for such causes as require no special demand before commencement of the action, unless the defendant has waived a demand.⁴

He Cannot Elect for the infant or bring an action depending upon election, except by direction of the court made upon investigation.⁵

Signing Judgment After Death of Infant. — Where an infant dies after verdict in his favor, the next friend may sign judgment.⁶

Powers of Beneficial Plaintiff. — An infant cannot personally or by attorney control a suit prosecuted for him by his next friend;⁷

Healey, 170 Ill. 610. *Citing* Chicago, etc., R. Co. v. Kennedy, 70 Ill. 350.

1. In *Kingsbury v. Buckner*, 134 U. S. 650, it was held that a next friend or guardian *ad litem* could consent that the case be heard in a particular division of the Supreme Court of Illinois, although in the absence of consent the Supreme Court sitting in one division cannot take cognizance of a case from another division. So also it was held that a statutory provision requiring ten days' notice for the suing out of a commission to take depositions might be waived by a guardian *ad litem* or next friend without the imputation upon him of fraud or collusion.

Findings of Fact may be waived by the guardian *ad litem* or next friend. *Western Lumber Co. v. Phillips*, 94 Cal. 54.

Waiver of Proof. — In *Missouri* a guardian *ad litem* in partition suits has, by virtue of the statute, authority to bind his ward by stipulations in the nature of a waiver of proof. *Le Bourgeoise v. McNamara*, 82 Mo. 189. But compare *Crotty v. Eagle*, 35 W. Va. 143.

2. Chicago, etc., R. Co. v. Kennedy, 70 Ill. 350. But see *Isaacs v. Boyd*, 5 Port. (Ala.) 388, wherein the court said: "He can, it is true, dismiss a suit, because he is himself liable for the costs, though even this may well be questioned when injury to the minor would be the result." See also *Ball v. Miller*, 59 Iowa 634.

3. The authority of a next friend or guardian *ad litem* does not extend to the bringing or prosecuting of more than the one particular action in which he was appointed. *Rosso v. Second Ave. R. Co.*, 13 N. Y. App. Div. 375.

The next friend of an infant in an action of ejectment has no authority to appear and defend for the infant in an action brought against the latter to enjoin the prosecution of such ejectment suit. *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364.

4. *Miles v. Boyden*, 3 Pick. (Mass.) 213, wherein the court said: "It must follow, therefore, that the *prochein ami*, commencing his authority with the writ and declaration, can only maintain the suit for such causes of action as may be prosecuted without special demand, as for personal injuries done to the infant, or for sums of money where the writ itself is considered as the demand."

5. *Chipman v. Montgomery*, 63 N. Y. 221; *Parsons v. Kinzer*, 3 Lea (Tenn.) 347.

6. *Kramer v. Waymark*, L. R. 1 Exch. 241, 35 L. J. Exch. 148, 14 W. R. 659.

7. In *Wainwright v. Wilkinson*, 62 Md. 146, an infant brought a suit by her *prochein ami*. Subsequently the infant employed an attorney and requested him to dismiss the suit, which was done. Afterwards a motion was made by the plaintiff by *prochein ami* to strike out the entry of "off," and reinstate the case. It was held that the *prochein ami* was the only person competent to employ an attorney or to prosecute the suit; that the appointment of an attorney by the infant was void and could not be ratified upon coming of age; and that the case should be reinstated, and appeal would lie from a refusal of the court so to order. To the same effect, see *Bernard v.*

but a married woman has a right to dismiss an action in respect to her separate estate, even against the wish of her next friend.¹

2. Employment of Attorney.—A next friend has power to employ an attorney to conduct the case, and it is his duty to do so;² but he cannot bind the infant by a contract for attorney's fees.³ The court may fix the attorney's compensation without regard to the contract.⁴

3. Payment and Satisfaction of Judgment.—In numerous cases it has been held that a next friend has no authority to collect the proceeds of a judgment recovered by him and to enter satisfaction thereof,⁵ but that only a regularly qualified guardian of the

Merrill, 91 Me. 358. Compare *Cadwallader v. McClay*, 37 Neb. 359, wherein the defendant, relying upon the infant plaintiff's promise to dismiss a suit, suffered a default, and the default was set aside, it appearing that the infant had been permitted by the next friend to transact the business concerning which the action was brought, and that the defendant was misled by the infant's being apparently of good judgment and discretion.

Change of Venue.—An infant over fifteen years of age may make the suggestion and affidavit required for the removal of the cause on the ground that he believes that he cannot have a fair and impartial trial. *Albert v. State*, 66 Md. 325, wherein the court said: "What an adult *prochein ami* could certainly have done for him, an infant who had arrived at fifteen years of age could do for himself. It might present a different question if the equitable plaintiff was of such tender years that no presumption could arise of sufficient intelligence to understand the nature of the right claimed or of an oath."

1. *Browner v. Bell*, 30 Ga. 334.

2. *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619; *Wainwright v. Wilkinson*, 62 Md. 147; *Beliveau v. Amoskeag Mfg. Co.*, (N. H. 1895) 40 Atl. Rep. 734, citing *Davis v. Merrill*, 47 N. H. 208.

"One of the duties required of him is that of employing an attorney to conduct the suit, as he is not supposed to be a person learned in the law, and his intervention is by no means designed to dispense with the services of an attorney to carry on the proceedings, and to try the cause, if necessary." *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619, citing *Collins v. Brook*, 4 H. & N. 270.

The attorney of the next friend is liable to the infant in an action for money had and received. *Collins v. Brook*, 4 H. & N. 270, affirmed on appeal 5 H. & N. 700.

The Authority of the Attorney of the next friend "is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied." *Beliveau v. Amoskeag Mfg. Co.*, (N. H. 1895) 40 Atl. Rep. 734. Citing *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619.

An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit to the same extent as a person of full age. *Thompson v. Maxwell Land Grant, etc., Co.*, 18 Supreme Ct. Rep. (U. S.) 121. Citing *Tillotson v. Hargrave*, 3 Madd. 494; *Levy v. Levy*, 3 Madd. 245.

3. *Houck v. Bridwell*, 28 Mo. App. 644; *Cole v. Superior Ct.*, 63 Cal. 86.

4. *Cole v. Superior Ct.*, 63 Cal. 86.

5. *Alabama*.—*Smith v. Redus*, 9 Ala. 99; *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

Maryland.—*Albert v. State*, 66 Md. 325.

New York.—*Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3.

South Carolina.—*Allen v. Roundtree*, 1 Spears L. (S. Car.) 80.

Tennessee.—*Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Benton v. Pope*, 5 Humph. (Tenn.) 392; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522.

Texas.—*Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; *Austin v. Col-*

infant can do so.¹ Where there is no general guardian, the proceeds of the judgment should be paid into court until a guardian is regularly appointed or the infant reaches majority.² On the other hand, there are cases wherein it is held or intimated that

gate, (Tex. Civ. App. 1894) 27 S. W. Rep. 896.

In the *Absence of Statute*, the next friend has no right to collect a judgment recovered in his name for the use and benefit of a minor until he has qualified as guardian. *Gulf, etc., R. Co. v. Younger*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1032. *Citing Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; *Galveston Oil Co. v. Thompson*, 76 Tex. 235.

It is doubtful if the father who prosecutes as next friend can discharge the judgment, as it is said his authority is only commensurate with the writ. *Bernard v. Merrill*, 91 Me. 358. *Citing Miles v. Boyden*, 3 Pick. (Mass.) 219; *Linton v. Walker*, 8 Fla. 144; *Perry v. Carmichael*, 95 Ill. 519; *Clark v. Smith*, 13 S. Car. 585; *Jackson v. Combs*, 7 Cow. (N. Y.) 36; *Rotheram v. Fanshaw*, 3 Atk. 628; *Tripp v. Gifford*, 155 Mass. 108; *Johnson v. Waterhouse*, 152 Mass. 585.

A *Payment to a Prochein Ami* who has recovered a sum of money for the benefit of a minor is not a legal payment or satisfaction of the recovery, unless it has been actually or legally ratified and confirmed by the minor on attaining to maturity, or his legal representatives after his death. A *prochein ami* is merely authorized to prosecute the suit to final judgment. *Allen v. Roundtree*, 1 Spears L. (S. Car.) 80.

"But a *prochein ami* is not entitled to the custody of either the person or property of the infant. He is, to use a phrase which seems to have gained currency in this court, a mere 'man of straw,' set up for the purpose of managing his cause in court, but not to receive his property or money. When that becomes necessary a guardian must be appointed, which the ordinary might have done in this case." *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 203.

His *Power Ceases* when the judgment debtor files his bill in chancery to enjoin further proceedings on the judgment. *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425.

In *Texas*, by statute (R. S. 1895, tit. 72, c. 1, art. 3498 w), where the amount of the judgment recovered does not ex-

ceed \$500, and the minor has no guardian, the next friend or any person authorized by the court may receive the money upon giving bond as required by the statute. *Gulf, etc., R. Co. v. Younger*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1030.

1. *Payment to General Guardian*—*South Carolina*.—*Allen v. Roundtree*, 1 Spears L. (S. Car.) 80; *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 203.

Tennessee.—*Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Benton v. Pope*, 5 Humph. (Tenn.) 392; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522.

Texas.—*Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896.

2. *Payment into Court*—*Alabama*.—*Smith v. Redus*, 9 Ala. 99.

Mississippi.—*Klaus v. State*, 54 Miss. 644.

Tennessee.—*Miles v. Kaigler*, 10 Yerg. (Tenn.) 10.

Texas.—*Brooke v. Clark*, 57 Tex. 105; *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896.

Where the clerk of a County Court, who was also guardian *ad litem* to a minor, received payment as clerk of a judgment in favor of the minor, and gave his receipt as clerk, it was held that he could not by an entry on his docket change the character of the payment so as to make it appear that he received it as guardian *ad litem*. *Haynes v. Wheat*, 9 Ala. 239.

Duty of Court.—Where a next friend of a minor recovers a judgment and the money is paid into court, it is the duty of the court of its own motion to take such steps as are necessary to fully protect the interests of the minor whenever it comes to the knowledge of the court, no matter how the information is obtained, that the property of the minor is being diverted or used in a manner prohibited by law. *Gulf, etc., R. Co. v. Younger*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1030.

under certain circumstances a next friend may receive payment and satisfy the judgment.¹ Thus, in the absence of a general guardian it has been held that the next friend may receive payment and enter satisfaction of the judgment.² So also it has been held that the next friend cannot enter satisfaction of the judgment without the sanction of the court,³ and that an insolvent next friend should not be permitted to receive the proceeds of a judgment.⁴ Where a guardian *ad litem* has not given bond, the court may direct payment into court and cancel the judgment.⁵

4. Effect of Defaults, Admissions, etc. — The court will not allow an infant to be prejudiced by any act, default, or omission of his next friend or guardian *ad litem* in the conduct of the cause.⁶

An Infant Is Not Bound by Admissions in pleadings or otherwise of his next friend or guardian *ad litem*.⁷

1. See *O'Donnell v. Broad*, 2 Pa. Dist. Rep. 84; *Jones v. Steele*, 36 Mo. 324; *Tripp v. Gifford*, 155 Mass. 109.

Upon a Sale in Partition the share of an infant party should be paid to his guardian *ad litem*, and not to his general guardian. *Cook v. Lee*, 6 Paige (N. Y.) 158.

2. *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619. See also *Collins v. Brook*, 4 H. & N. 270.

3. *O'Donnell v. Broad*, 149 Pa. St. 24.

A next friend has no power, without special authorization, to collect and receipt for money recovered in the suit. *Klaus v. State*, 54 Miss. 646.

4. *Johnson v. Beauchamp*, 5 Dana (Ky.) 70, holding that in such case the execution of the decree may be suspended until the giving of refunding bonds or the appointment of a statutory guardian.

5. *Calmbacher v. Newman*, 60 N. Y. Super. Ct. 404, 28 Abb. N. Cas. (N. Y.) 155.

To the effect that a guardian *ad litem* cannot receive money or property awarded without first giving security to the infant, see *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40; *Sere v. Coit*, 5 Abb. Pr. (N. Y. Supreme Ct.) 481.

6. The protection which the court affords to an infant in proceedings in which his rights are involved has been fully considered in the article INFANTS, vol. 10, p. 581, to which reference should be made.

Illustrations. — The chancellor should always look to the interests of infants; and where one suing as next friend for an infant has omitted the proper party, the court should not dismiss the peti-

tion, but should order the person omitted to be made a party to the action. *Andrews v. Hurt*, 14 Ky. L. Rep. 765.

It is a well settled rule that an infant cannot be bound by the admissions of his guardian or next friend unless they are for his benefit, nor by his errors or omissions in his answers or pleadings. The court will suffer no advantage to be taken of those acting in the infant's behalf to the detriment of the infant. *Seaton v. Tohill*, (Colo.) 53 Pac. Rep. 170, citing many cases.

Although the infancy of a party to a proceeding requires the court to see that his interests are not prejudiced, notwithstanding the steps were not taken in the proceedings in his behalf which would be required of an adult to raise an objection on appeal, yet if it fairly appears that he has not been prejudiced by the irregularity complained of, and it was such that it might have been waived by an adult by omission to raise it at the proper time, the proceedings will not be set aside. *Matter of New York, etc., R. Co.*, 35 Hun (N. Y.) 575. Citing *Lefevre v. Laraway*, 22 Barb. (N. Y.) 168, *Sherman v. Wright*, 49 N. Y. 227; *Howell v. Mills*, 53 N. Y. 322.

7. *Colorado*. — *Seaton v. Tohill*, (Colo. App. 1898) 53 Pac. Rep. 170, reviewing many cases.

Illinois. — *Atchison, etc., R. Co. v. Elder*, 50 Ill. App. 276.

Massachusetts. — *Tripp v. Gifford*, 155 Mass. 109.

Utah. — *Chipman v. Union Pac. R. Co.*, 12 Utah 68.

United States. — *Kingsbury v. Buckner*, 134 U. S. 650; *Walton v. Coulson*, 1 McLean (U. S.) 120.

5. Arbitration, Compromise, and Settlement. — A next friend cannot compound a judgment,¹ nor release nor discharge a cause of action out of court.² He has no power to compromise³ or settle⁴ without the express sanction of the court.⁵ But a com-

England. — *Cowling v. Ely*, 2 Stark. 366, 3 E. C. L. 447.

Compare Finn v. Hempstead, 24 Ark. 111; *McClay v. Norris*, 9 Ill. 370.

Contra, *Tenney v. Evans*, 14 N. H. 343, holding that in a suit by an infant suing by his guardian the declarations of the guardian are admissible against the plaintiff, although the infant on coming of age prosecutes the suit in his own name. *Compare* the rule as to admissions and waivers of guardians *ad litem* of infant defendants, article INFANTS, vol. 10, p. 675 *et seq.*

Allegations in the Pleadings as to his appointment do not preclude a guardian *ad litem* from showing the real facts when material. *Albrecht v. Canfield*, 92 Hun (N. Y.) 240.

The Next Friend Cannot by Admissions or Stipulations surrender the rights of the infant. *Kingsbury v. Buckner*, 134 U. S. 650. See also *Burt v. McBain*, 29 Mich. 260; *Chandler v. McKinney*, 6 Mich. 217. *Compare Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162.

1. *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Miles v. Kalgler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522.

2. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Tripp v. Gifford*, 155 Mass. 109; *O'Donnell v. Broad*, 2 Pa. Dist. Rep. 84.

3. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Johnson v. McCann*, 61 Ill. App. 110; *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40; *O'Donnell v. Broad*, 11 Pa. Co. Ct. Rep. 622, 149 Pa. St. 24; *Clark v. Crout*, 34 S. Car. 417; *Miles v. Kalgler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425.

A next friend is but a species of attorney, who may prosecute a right for an infant, but can do nothing to operate to its injury, and cannot release nor compromise a suit prosecuted on behalf of a minor. *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

Where a judgment was recovered by a minor by her next friend, and, pending an appeal, the next friend compromised the case without the sanction of the court and against the judgment of the counsel in the case, it was held that the next friend should be dismissed. *O'Donnell v. Broad*, 11 Pa. Co. Ct. Rep. 622, 149 Pa. St. 24.

A Father or Mother as Natural Guardian has no power to release or compromise a suit pending and prosecuted on behalf of a minor child. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Houston, etc., R. Co. v. Bradley*, 45 Tex. 172; *Pittsburg, etc., R. Co. v. Healey*, 170 Ill. 610.

4. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Tripp v. Gifford*, 155 Mass. 108; *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589.

"The authority conferred upon him is to prosecute, not to settle; to obtain for the infant an adjudication as to his rights, not to barter away those rights in such manner as the guardian may choose." *Edsall v. Vandemark*, 39 Barb. (N. Y.) 599. To the same effect, see *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

5. *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Johnson v. McCann*, 61 Ill. App. 110; *Pittsburg, etc., R. Co. v. Healey*, 170 Ill. 610; *Tripp v. Gifford*, 155 Mass. 109; *Walsh v. Walsh*, 116 Mass. 377; *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589; *O'Donnell v. Broad*, 11 Pa. Co. Ct. Rep. 622, 1 Pa. Dist. Rep. 650; *Clark v. Crout*, 34 S. Car. 417; *Miles v. Kalgler*, 10 Yerg. (Tenn.) 10; *Crotty v. Eagle*, 35 W. Va. 143.

A next friend cannot compromise and discharge an action by agreement made in good faith out of court, where no judgment is entered in pursuance of such agreement, and it is never approved by the court. If, however, judgment should be entered in accordance with the agreement, it would no doubt bind the infant. In the absence of such judgment or approval, the agreement is not admissible in bar of the action nor in mitigation of damages. *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530.

Proceedings to Procure Sanction of Compromise. — A compromise on behalf of infants is to be obtained upon petition, supported by an affidavit of a solicitor that counsel's opinion has been given that the compromise is for the benefit of the infants. *Gray v. Paul*, 46 L. J. Ch. Div. 818, 25 W. R. 874.

Compromises affecting rights of infants, when to their advantage, will, on their application or the application of their trustee, be sanctioned and made binding on all parties by decree. *Reynolds v. Brandon*, 3 Heisk. (Tenn.) 593.

promise may be enforced by the court when made for the infant's benefit.¹ A next friend cannot submit the case to arbitration.²

IV. CONTROL AND DUTY OF COURT — 1. In General. — It is the court's duty to protect the infant fully and to see that he is not prejudiced by any act or omission of the next friend or guardian *ad litem*.³ To this end the court may control the suit,⁴ and the next friend or guardian *ad litem* is at all times subject to the control and direction of the court.⁵ The court may, at its pleasure, revoke the authority of the next friend and substitute a new one,⁶ and it is the duty of the court to do so whenever the

1. *Livingston's Petition*, 34 N. Y. 577. *Citing Rogers v. Cruger*, 7 Johns. (N. Y.) 557; *Savil's Case*, Mosely 224.

2. *Tucker v. Dabbs*, 12 Heisk. (Tenn.) 18; *Hannum v. Wallace*, 9 Humph. (Tenn.) 129; *Biddell v. Dowse*, 6 B. & C. 255, 13 E. C. L. 164.

But the defendant cannot object to the award because of the plaintiff's infancy. *Tucker v. Dabbs*, 12 Heisk. (Tenn.) 18.

3. See *supra*, III. 4. *Effect of Defaults, Admissions, etc.* See also article INFANTS, vol. 10, p. 581.

An infant is entitled to the same protection upon a summary application as in an action. *Howell v. Mills*, 53 N. Y. 322.

"It is the duty of the Court of Chancery to protect the interests of parties under disability, and to supervise and control the action of next friends and guardians *ad litem*; and it will not suffer any agreement or consent of these representatives to prejudice the rights of the wards of the court." *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

Illustrations. — In *Serie v. St. Eloy*, 2 P. Wms. 386, although an infant, by her own bill, had mistakenly submitted to pay off a mortgage, yet the court said that it must take care of the infant and not suffer her to be caught by any mistake of her agent. See also *Middleditch v. Williams*, 47 N. J. Eq. 585.

The court can order the infant to be placed on the other side of the case, if it is shown that he is on the wrong side. *Le Fort v. Delafield*, 3 Edw. Ch. (N. Y.) 32.

In *Howard v. Shrewsbury*, L. R. 17 Eq. 378, 43 L. J. Ch. 495, 22 W. R. 290, 29 L. T. N. S. 862, an infant filed a bill claiming real estate under an equitable title. It was held at the hearing that on the true construction of the documents he had a legal title, but the court

made a decree without requiring any amendment.

An infant plaintiff cannot be compelled to answer an interrogatory. *Mayor v. Collins*, 24 Q. B. Div. 361.

4. The court may stay proceedings in a suit by next friend, or direct their abandonment. *King v. McLean Asylum*, 64 Fed. Rep. 336, 21 U. S. App. 481.

The court may dismiss the suit of an infant without the consent of the next friend. It should permit and direct what is most for the interest of the infant. *Longnecker v. Greenwade*, 5 Dana (Ky.) 516.

The next friend cannot withdraw from the case without the permission of the court. *Melling v. Melling*, 4 Madd. 261.

5. *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491; *Longnecker v. Greenwade*, 5 Dana (Ky.) 516; *Deford v. State*, 30 Md. 179; *Klaus v. State*, 54 Miss. 646; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

"The courts have always encouraged persons to appear as the next friend of an infant and institute suits in her behalf, and have always exercised a supervision over the character and conduct of the *prochein ami*, having regard to the interests of the infant." *Middleditch v. Williams*, 47 N. J. Eq. 585.

6. *Alabama*. — *Hutton v. Williams*, 60 Ala. 107; *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

California. — *Hathaway v. White*, 111 Cal. 270.

Illinois. — *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491.

Indiana. — *Hood v. Pearson*, 67 Ind. 368.

Iowa. — *Thurston v. Cavenor*, 8 Iowa 155.

Maryland. — *Deford v. State*, 30 Md. 179.

Massachusetts. — *Tripp v. Gifford*, 179.

infant's interests would otherwise be likely to suffer.¹

The Discretion of the Court in removing a next friend for financial

155 Mass. 109; *Guild v. Cranston*, 8 Cush. (Mass.) 506.

Mississippi. — *Klaus v. State*, 54 Miss. 646.

New York. — *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148.

South Carolina. — *Smith v. Anderson*, 1 Bailey L. (S. Car.) 123.

Tennessee. — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

Texas. — *Martin v. Weyman*, 26 Tex. 460.

England. — *Woolf v. Pemberton*, 25 W. R. 873, 6 Ch. Div. 19, 37 L. T. N. S. 328.

"The court may appoint a *prochein ami*, or revoke his appointment, whenever such course shall be deemed necessary for the protection of the minor."

Soule v. Winslow, 64 Me. 518, citing *Guild v. Cranston*, 8 Cush. (Mass.) 506.

An appellate court will presume in favor of the correctness of the order of removal until the contrary is shown. *Hood v. Pearson*, 67 Ind. 368.

"The court will be slow to interfere and revoke his authority, but when proper cause is shown it will do so, and appoint another or stay proceedings. * * *

The court will always interpose to protect the infant against the collusion of the next friend with the adverse party, or any misconduct."

Tripp v. Gifford, 155 Mass. 109, citing *The Etna*, 1 Ware (U. S.) 462.

Superseding Next Friend by Guardian Ad Litem. — "The especial power of the court to supersede the next friend by a guardian *ad litem* is so well established

that it requires no comment, except to say that it would be a reproach to the law if, in the case of a person unable, through weakness of intellect, or age, to conduct his own litigation understandingly, the court had not the right to supersede a volunteer when, in its just discretion, it finds it for the interests of the petitioner or plaintiff to do so. This is illustrated in *Sale v. Sale*, 1 Beav. 586, where the master of the rolls found that the next friend filed the bill to promote his own views, and said that he never had seen a more crafty attempt to defraud infants. We need make no distinction between infants and lunatics, with reference to the matters we are discussing, whatever the ancient law might have been. *Story Eq. Jur.*, §§ 1362, 1363. This

power to make substitution is broad and is necessarily exercised in a summary way; and there is no basis for the contention of the petitioner that it could not be done without notice to the next friend, or other formal proceedings. In the opinion filed in this case June 4th we affirmed 'the broad and flexible character of the rules of practice relating to next friends and guardians *ad litem*, and their adaptability to reach every case where they can be needed for the protection of those classes which they are intended to protect, or for effectuating natural justice.'

We agree with the conclusions involved in *King's Case*, 161 Mass. 46, already referred to, sustaining the right to supersede a next friend by a guardian *ad litem*, subject to the qualifications expressed in our prior opinion touching appeals under federal procedure." *King v. McLean Asylum*, 64 Fed. Rep. 354, 21 U. S. App. 481.

1. *Alabama*. — *Barwick v. Rackley*, 45 Ala. 215.

Georgia. — *Bartlett v. Batts*, 14 Ga. 539.

Indiana. — *Hood v. Pearson*, 67 Ind. 368.

Maryland. — *Deford v. State*, 30 Md. 179; *Humes v. Shillington*, 22 Md. 346.

Massachusetts. — *Guild v. Cranston*, 8 Cush. (Mass.) 506.

Mississippi. — *Klaus v. State*, 54 Miss. 644.

New York. — *Colden v. Haskins*, 3 Edw. Ch. (N. Y.) 311; *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341, 9 N. Y. Leg. Obs. 182.

North Carolina. — *Tate v. Mott*, 96 N. Car. 19.

Pennsylvania. — *O'Donnell v. Broad*, 11 Pa. Co. Ct. Rep. 622, 149 Pa. St. 24.

Tennessee. — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

Texas. — *Martin v. Weyman*, 26 Tex. 460.

Vermont. — *Brown v. Hull*, 16 Vt. 673.

United States. — *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

England. — *Davies v. Lockett*, 4 Taunt. 765; *Dupuy v. Welsford*, 28 W. R. 762; *Ward v. Ward*, 3 Meriv. 706; *Russell v. Sharpe*, 1 Jac. & W. 462.

Where the next friend is in any way connected with the defendant he should be removed. *Burgess v. Bottomley*, 25

irresponsibility will not be reviewed on appeal.¹

Proceedings May Be Stayed Until Majority upon the petition of an infant of twenty years, when it does not appear that his rights will be impaired by postponement.²

2. Inquiry Whether Suit Is for Benefit of Infant. — Upon proper application,³ or even upon its own motion,⁴ the court may direct an inquiry or reference to ascertain whether the suit is a fit and proper one and for the benefit of the plaintiff, or whether the next friend is a proper person to conduct the suit,⁵ and if the suit is found to be an improper one it may be dismissed⁶ or stayed.⁷

Ch. Div. 243; *Gee v. Gee*, 12 W. R. 187. And see *Ball v. Miller*, 59 Iowa 634. So if he shows an unwillingness to prosecute the action. *Hardy v. Scanlin*, 1 Miles (Pa.) 87; *Ward v. Ward*, 3 Meriv. 706.

So where the next friend refuses to appeal, he should be removed. *Dupuy v. Welsford*, 28 W. R. 762; *Ward v. Ward*, 3 Meriv. 706; *Russell v. Sharpe*, 1 Jac. & W. 462.

1. *Budd v. Rutherford*, 4 Ind. App. 386.

2. *Guild v. Cranston*, 8 Cush. (Mass.) 506.

3. **Who May Apply.** — Any person acting as next friend for the purpose of the application may apply for an inquiry. *Guy v. Guy*, 2 Beav. 460.

A reference will be directed upon a petition and affidavit of the infant. *Garr v. Drake*, 2 Johns. Ch. (N. Y.) 542. See also *Hutton v. Williams*, 60 Ala. 107.

A near relative or guardian may apply. *Hutton v. Williams*, 60 Ala. 107. But an inquiry will not be made at the instigation of the next friend himself. 1 Dan. Ch. Pr. (6th Am. ed.) 71, citing *Jones v. Powell*, 2 Meriv. 141.

4. *Chudleigh v. Chicago, etc.*, R. Co., 51 Ill. App. 491.

5. *Alabama*. — *Hutton v. Williams*, 60 Ala. 107.

Illinois. — *Chudleigh v. Chicago, etc.*, R. Co., 51 Ill. App. 491.

New Jersey. — *Middleditch v. Williams*, 47 N. J. Eq. 585.

New York. — *Fulton v. Rosevelt*, 1 Paige (N. Y.) 178; *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148; *Le Fort v. Delafield*, 3 Edw. Ch. (N. Y.) 32; *Garr v. Drake*, 2 Johns. Ch. (N. Y.) 542.

England. — *Richardson v. Miller*, 1 Sim. 133; *Thomas v. Elsum*, 46 L. J. Ch. Div. 793; *Nalder v. Hawkins*, 2 Myl. & K. 243; *Sale v. Sale*, 1 Beav. 586.

"Any person may bring a suit in their name, as their next friend, because he does it at his peril. * * *

The only check upon this general license is, that on a proper application the court will refer it to a master to inquire whether such suit is for the benefit of the infants; and if the master reports that it is not for their benefit, or that it is not for their interest that it should be prosecuted by the particular person who has instituted the suit, the court will order the proceedings to be stayed." *Fulton v. Rosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409, citing *Da Costa v. Da Costa*, 3 P. Wms. 140; *Sullivan v. Sullivan*, 2 Meriv. 40.

The Order May Be Made Summarily and Without Inquiry where it is clearly shown by affidavit that the suit was brought by a next friend to promote his own private purposes. 1 Dan. Ch. Pl. & Pr. (6th Am. ed.) 72, citing *Sale v. Sale*, 1 Beav. 586.

6. *Ball v. Miller*, 59 Iowa 634; *Green v. Harrison*, 3 Sneed (Tenn.) 131.

On Appeal, a finding that an action was not being prosecuted for the benefit of a minor, and that the further prosecution of such action was not for the best interests of the minor, in the absence of a showing to the contrary, will be presumed to have been made upon sufficient evidence. *Ball v. Miller*, 59 Iowa 634.

7. *Hutton v. Williams*, 60 Ala. 107; *Chudleigh v. Chicago, etc.*, R. Co., 51 Ill. App. 491; *Middleditch v. Williams*, 47 N. J. Eq. 585; *Fulton v. Rosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; *Da Costa v. Da Costa*, 3 P. Wms. 140.

The Court Is Bound to Arrest the Progress of a suit, commenced in behalf of an infant, by his next friend, if it appears not to be for the benefit of the infant, whenever the suggestion is made. *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148.

The Discretion of the Court in this matter will not be reviewed on appeal.¹

V. TERMINATION OF OFFICE. — It has been held that the office of next friend, and with it his powers and duties, terminates upon the entry of final judgment,² although, as will be seen, it has been held that a next friend may prosecute an appeal.³ His authority is likewise terminated upon his removal by the court,⁴ or by the expiration of the minority of the infant for whom he is prosecuting.⁵

VI. COSTS, FEES, AND ALLOWANCES — 1. Costs — a. LIABILITY —
(1) *In General* — Next Friend Primarily Liable. — The matter of costs is universally regulated by statute, but it is the general rule that in an action prosecuted by a next friend for an infant, the infant is not primarily liable for costs⁶ of an unsuccessful suit; these

Where Two or More Suits for the Same Purpose are brought in the infant's name by different persons, each acting as his next friend, the court will, before any decree has been made, direct an inquiry as to which suit is most for the infant's benefit, and will stay the proceedings in the other suits. Dan. Ch. Pl. & Pr. (6th Am. ed.) 70. *Citing* Mortimer v. West, 1 Swanst. 358; Virtue v. Miller, 19 W. R. 406.

Where a decree has been made in any of the suits, it is not usual to direct an inquiry, but the other suits will be stayed, liberty being given to each of the next friends in the said suits to apply for the conduct of the suit in which the decree was made. Dan. Ch. Pl. & Pr. (6th Am. ed.) 70 [*citing* Taylor v. Oldham, Jac. 527]; Kenyon v. Kenyon, 35 Beav. 300.

1. Pensotti v. Pensotti, 30 L. T. N. S. 348, 22 W. R. 461.

2. Allen v. Roundtree, 1 Spears L. (S. Car.) 80.

See also, as to the right of a next friend to receive payment of the judgment, *supra*, III. Powers and Duties.

The Dismissal of an Action puts an end to the authority of a guardian *ad litem* appointed therein, and he cannot thereafter, as next friend, apply for leave to sue *in forma pauperis* in another action. Rosso v. Second Ave. R. Co., 13 N. Y. App. Div. 375.

In New York a special guardian appointed in a proceeding pending in surrogate's court does not become *functus officio* upon the rendition of a decree in that court. Matter of Stewart, 23 N. Y. App. Div. 17.

3. See *infra*, IX. Appeal and Error.

4. See *supra*, IV. Control and Duty of Court.

5. Lang v. Belloff, 53 N. J. Eq. 298.

6. Albee v. Winterink, 55 Iowa 184; Klaus v. State, 54 Miss. 644; Newton v. London, etc., R. Co., 7 D. & L. 328; Beames v. Farley, 5 C. B. 178, 57 E. C. L. 178; Swain v. Follows, 18 Q. B. Div. 585. Compare Vance v. Fall, 48 Iowa 364; Holmes v. Adkins, 2 Ind. 398; Evans v. Mason, 1 Lea (Tenn.) 26; Baltimore, etc., R. Co. v. Fitzpatrick, 36 Md. 619; Sproule v. Botts, 5 J. J. Marsh. (Ky.) 162; Perryman v. Burgster, 6 Port. (Ala.) 99; Mill v. Mill, 8 Ont. Rep. 370; Proudfoot v. Boyle, 3 D. & L. 524.

Reason for Rule. — "An infant is supposed to be incapable of appointing an attorney to appear for him, or of binding himself for costs. Hence the necessity of his suing by guardian or next friend." Green v. Harrison, 3 Sneed (Tenn.) 131.

"No execution issues against the infant for the cost; for it is said costs came in lieu of the common-law amercement of the plaintiff *pro falso clamore*, and the infant could not be subject to an amercement, and of course could not be liable to its substitute." Cook v. Adams, 27 Ala. 294. See also Heft v. McGill, 3 Pa. St. 256; Sproule v. Botts, 5 J. J. Marsh. (Ky.) 162; Bouche v. Ryan, 3 Blackf. (Ind.) 472.

Where the Decree Is Made During Infancy, the infant is not personally chargeable with costs. Waring v. Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

On Dismissal for Failure to Sue by Next Friend or guardian *ad litem*, costs cannot be awarded against the infant plaintiff. Imhoff v. Wurtz, 9 N. Y. Civ. Pro. Rep. (Erie County Ct.) 48.

must be borne, in the first instance, by the next friend or guardian *ad litem*, and this very liability has frequently been said to be one of the reasons for the appointment of a next friend or guardian *ad litem*.¹

But see *Finley v. Jowle*, 13 East 6, where the court refused on motion to discharge an infant who had sued without *prochein ami* or guardian and was in execution for the costs.

1. *Alabama*. — *Hughes v. Hughes*, 44 Ala. 698; *Smith v. Gaffard*, 33 Ala. 168; *Gray v. Gray*, 15 Ala. 779.

Florida. — *Sanderson v. Sanderson*, 20 Fla. 292.

Georgia. — *Harper v. Whitehead*, 33 Ga. 138.

Indiana. — *Tague v. Hayward*, 25 Ind. 427; *Holmes v. Adkins*, 2 Ind. 398; *Budd v. Rutherford*, 4 Ind. App. 386; *Keeran v. Clowser*, 5 Blackf. (Ind.) 604.

Iowa. — *Albee v. Winterink*, 55 Iowa 184.

Kansas. — *Sutton v. Nichols*, 20 Kan. 43.

Kentucky. — *Yeizer v. Stone*, 7 T. B. Mon. (Ky.) 189; *Wilson v. M'Gee*, 2 A. K. Marsh. (Ky.) 601.

Maryland. — *Wainwright v. Wilkin-*

son, 62 Md. 146.

Massachusetts. — *Smith v. Floyd*, 1 Pick. (Mass.) 275.

Michigan. — *Benedict v. Beurmann*, 90 Mich. 396; *Crittenden v. Canfield*, 87 Mich. 152; *Rabidon v. Muskegon Circuit Judge*, 110 Mich. 207.

Mississippi. — *Klaus v. State*, 54 Miss. 644.

Nebraska. — *Kleffel v. Bullock*, 8 Neb. 336.

New York. — *Re Ryder*, 11 Paige (N. Y.) 185; *Hernandez v. Billotte*, 2 N. Y. City Ct. 319; *Schoen v. Schles-*

singer, 57 How. Pr. (N. Y. Supreme Ct.) 490, 7 Abb. N. Cas. (N. Y.) 399;

Wice v. Commercial F. Ins. Co., 8 Daly (N. Y.) 70; *Grantman v. Thrall*, 31

How. Pr. (N. Y. Supreme Ct.) 464;

Wead v. Cantwell, 36 Hun (N. Y.) 528;

Leopold v. Meyer, 10 Abb. Pr. (N. Y. C. Pl.) 40; *People v. New York C. Pl.*

11 Wend. (N. Y.) 166; *Fellows v.*

Niver, 18 Wend. (N. Y.) 564; *Cook v.*

Rawdon, 6 How. Pr. (N. Y. Supreme Ct.) 233; *Strong v. Jenkins*, 21 N. Y.

Civ. Pro. Rep. (Buffalo Super. Ct.) 9;

Hulburt v. Newell, 4 How. Pr. (N. Y. Supreme Ct.) 93; *Waring v. Crane*, 2

Paige (N. Y.) 79, 21 Am. Dec. 70; *Rima*

v. Rossie Iron Works, 120 N. Y. 433;

Linner v. Crouse, 61 Barb. (N. Y.) 289.

North Carolina. — *Smith v. Smith*, 108 N. Car. 365.

Tennessee. — *Stephenson v. Stephen-*

son, 3 Hayw. (Tenn.) 123; *Hackney v.*

Hackney, 8 Humph. (Tenn.) 452;

Ruohs v. Backer, 6 Heisk. (Tenn.) 395.

Texas. — *Johnson v. Taylor*, 43 Tex. 121; *Galveston Oil Co. v. Thompson*,

76 Tex. 235.

England. — Anonymous, 1 Atk. 570;

Newton v. London, etc., R. Co., 7 D.

& L. 328; *Beames v. Farley*, 5 C. B.

178, 57 E. C. L. 178; *Swain v. Follows*,

18 Q. B. Div. 585.

Statutory Liability. — In some juris-

dictions the liability of the next friend

to pay costs is statutory. See *Kleffel*

v. Bullock, 8 Neb. 336; *Linner v.*

Crouse, 61 Barb. (N. Y.) 289; and the

codes and statutes of the various states.

A Judgment for Costs in an action by

an infant brought by a guardian *ad*

litem must be entered against the

guardian. *Hernandez v. Billotte*, 2

N. Y. City Ct. 319. Compare *Smith*

v. Floyd, 1 Pick. (Mass.) 275, wherein

the court said: "It is said, however,

that it is not necessary that a judg-

ment should be rendered against the

infant for costs, because the *prochein*

ami, or the indorser of the original

writ, is liable. But there must be a

judgment against the infant before the

defendant can proceed against the *pro-*

chein ami or any one else."

Execution for Costs issues against the

estate of the guardian. *Schoen v.*

Schlessinger, 57 How. Pr. (N. Y. Su-

reme Ct.) 490.

"The guardian or next friend is

liable for costs and brings the suit at

his peril; and execution issues against

him for costs of the suit in case the in-

fant fails in the action; though if his

conduct were proper in bringing the

suit, he will be refunded his costs out

of the infant's property. There is some

difference of opinion as to whether the

defendant in whose favor judgment is

rendered for costs may not elect to take

execution either against the infant or

against the next friend or guardian;

the better opinion, however, seems to

be that no execution for costs can issue

against the infant. The judgment for

costs was given instead of the common-

law amercement of the plaintiff, *pro*

Recourse Against Infant. — But although the next friend is primarily or collaterally liable for costs, it seems that he may have recourse over against the infant or his estate where the action was properly brought and was prosecuted in good faith.¹ Thus where a fund of the infant is in court, costs may be decreed out of it even though the next friend fail in the suit, provided it was brought and prosecuted in good faith.² But costs are not chargeable on the infant's estate unless it appears that the suit was brought with the *bona fide* intent to benefit him.³

Infant and Not Next Friend. — In a few jurisdictions it has been held that the infant, and not the next friend, is liable for the costs,⁴

falso clamore; and as an infant could not be subject to an amercement, it would seem that he could not be liable for costs." *Green v. Harrison*, 3 Sneed (Tenn.) 131.

A Next Friend of an Alleged Insane Person is not liable for costs where the jury finds the plaintiff sane, unless he officiously and unnecessarily caused himself to be appointed, and a special finding of such fact must be made in order to charge him. *Smith v. Smith*, 108 N. Car. 365.

An Order to Pay Costs Is Final against the next friend personally, and cannot be reopened on further consideration when made at the hearing without any reservation of the question how the costs are ultimately to be borne. *Caley v. Caley*, 25 W. R. 528.

1. *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Collins v. Brook*, 5 H. & N. 700; *Cook v. Adams*, 27 Ala. 294. See also *Taner v. Ivie*, 2 Ves. 466; *Whitaker v. Marlar*, 1 Cox 285.

In *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40, the court, in referring to *Slaughter v. Talbot*, Willes 190, quoted the remark that "the *prochein amis* may have satisfaction over against the infants, and generally they take security," and said that the same liability still exists and is enforced in the same manner.

A Next Friend Is Entitled to Be Reimbursed out of the estate of the person in whose behalf he sues, although his suit is unsuccessful, if it appears that he acted in good faith and with reasonable caution and simply with a view to protect a person who was unable to protect himself. The rights of the *prochein ami* in this respect are the same whether the disability of the person whom he has sought to protect arises from in-

fancy, non-sane mind, or drunkenness. *Voorhees v. Polhemus*, 36 N. J. Eq. 456. Citing 1 Dan. Ch. Prac. 79; *Whitaker v. Marlar*, 1 Cox 285; *Pearce v. Pearce*, 9 Ves. Jr. 548.

2. Payment Out of Fund in Court — *Michigan*. — *Moyer v. Fletcher*, 56 Mich. 509.

New Jersey. — *Voorhees v. Polhemus*, 36 N. J. Eq. 456; *Pyatt v. Pyatt*, 44 N. J. Eq. 491.

New York. — *Waring v. Crane*, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

Pennsylvania. — *McElhenny's Appeal*, 46 Pa. St. 347.

South Carolina. — *Ramsay v. Joyce*, McMull. Eq. (S. Car.) 236, 37 Am. Dec. 550.

England. — *Barlee v. Barlee*, 1 Sim. & S. 100.

3. *Waring v. Crane*, 2 Paige (N. Y.) 79, 21 Am. Dec. 70; *Mowatt v. Carow*, 7 Paige (N. Y.) 328, 32 Am. Dec. 641; *Pearce v. Pearce*, 9 Ves. Jr. 548; *Whitaker v. Marlar*, 1 Cox 285.

In *Thomas v. Elsum*, 46 L. J. Ch. Div. 793, a next friend of infant plaintiffs was ordered to pay the costs of an action against executors for administration, the chief clerk having found, in answer to an inquiry directed shortly after the issue of the writ, that it would not be fit and proper and for the benefit of the plaintiffs that the action should be further prosecuted.

4. *Maine*. — *Soule v. Winslow*, 64 Me. 518; *Leavitt v. Bangor*, 41 Me. 458; *Sanborn v. Merrill*, 41 Me. 467; *Bernard v. Merrill*, 91 Me. 358; *Sandford v. Phillips*, 68 Me. 431.

Massachusetts. — *Crandall v. Slaid*, 11 Met. (Mass.) 288; *Smith v. Floyd*, 1 Pick. (Mass.) 275; *Tripp v. Gifford*, 155 Mass. 109; *Blood v. Harrington*, 8 Pick. (Mass.) 552.

North Carolina. — *Howett v. Alexander*, 1 Dev. L. (N. Car.) 431.

and an execution may issue against the infant for their collection.¹

Remedies. — It has been held that a next friend must be subjected to costs by attachment,² and that payment cannot be enforced by contempt proceedings.³

Allowance on Revoking Judgment. — Where a judgment for costs against an infant is revoked for error in fact in that he appeared by attorney, costs will not be allowed.⁴

(2) *Infant's Arrival at Majority* — *Effect* — *Where Infant Prosecutes.* — Where an infant arrives at majority *pendente lite* and thereafter prosecutes the suit, he, and not the next friend or guardian *ad litem*, is liable for the costs.⁵

Where the infant elects to dismiss the suit on coming of age, he must pay all the costs, provided the suit was properly brought,⁶ but if the suit was improperly brought, then the next friend must pay the costs; and a reference may be had to determine whether or not the suit was properly brought.⁷ An infant is not liable for costs where he sued during infancy without a next friend or guardian *ad litem*, and at the first opportunity after coming of age elected to dismiss.⁸

b. **SECURITY FOR COSTS.** — In some states a next friend is required by statute to give security for costs, and in such case the defendant may require him to do so as a matter of right.⁹

England. — *Collins v. Brook*, 5 H. & N. 700.

"The authorities seem to show that the infant may be attached for non-payment of costs, and if the *prochein ami* sued the infant for costs thus incurred, it would not lie in the infant's mouth to say that they were not necessities." *Collins v. Brook*, 5 H. & N. 700.

A minor suing by next friend is bound by a judgment against him for costs. *Albee v. Winterink*, 55 Iowa 184.

1. **Execution Against Infant for Costs.** — *Wilson v. M'Gee*, 2 A. K. Marsh. (Ky.) 601; *Howett v. Alexander*, 1 Dev. L. (N. Car.) 431; *Finley v. Jowle*, 13 East 6; *Dow v. Clark*, 1 Crompt. & M. 860, 2 Dowl. P. C. 302.

In a suit brought by Samuel Winslow, next friend of H. Joy, a minor, etc., it was held that the execution for costs should run against the plaintiff of record, Samuel Winslow. *Soule v. Winslow*, 64 Me. 518.

2. *Wilson v. M'Gee*, 2 A. K. Marsh. (Ky.) 601; *Granholm v. Sweigle*, 3 N. Dak. 476; *Grantman v. Theall*, 19 Abb. Pr. (N. Y. Supreme Ct.) 308, 31 How. Pr. (N. Y.) 464.

The Surety of a Next Friend cannot be charged with costs summarily and

without process. *Hackney v. Hackney*, 8 Humph. (Tenn.) 452.

3. *Granholm v. Sweigle*, 3 N. Dak. 476.

4. *Maynard v. Downer*, 13 Wend. (N. Y.) 576.

5. *Waring v. Crane*, 2 Paige (N. Y.) 79, 21 Am. Dec. 70; *Sparmann v. Keim*, 6 Abb. N. Cas. (N. Y. Super. Ct.) 353; *Frankel v. Black*, 2 N. Y. Month. L. Bul. 87.

While it is competent for the court, after the infant has arrived at the age of twenty-one years, to discharge the *prochein ami* and give the infant control over her suit, it must make such equitable order as will protect the *prochein ami* from costs already incurred and relieve her from liability in the future. *Wainwright v. Wilkinson*, 62 Md. 146.

6. *Waring v. Crane*, 2 Paige (N. Y.) 79, 21 Am. Dec. 70; *Anonymous*, 4 Madd. 461.

7. *Waring v. Crane*, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

8. *Kleffel v. Bullock*, 8 Neb. 336.

9. *Georgia.* — *Bartlett v. Batts*, 14 Ga. 539.

Illinois. — *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163.

Maryland. — *Helms v. Franciscus*, 2 Bland (Md.) 544.

But in the absence of such a statute security for costs cannot be demanded as a matter of course,¹ and it is within the discretion of the court to require it or not as it sees fit.² The court may allow a next friend to prosecute without bond for costs.³ A nonresident,⁴ or an insolvent,⁵ next friend, or guardian *ad litem* may properly be required to give security for costs. Where the infant sues *pro forma pauperis* his guardian *ad litem* need not give security for costs.⁶ The filing of a bond, though required by statute, has been held not to be a jurisdictional prerequisite.⁷

c. SUING IN FORMA PAUPERIS. — In a number of jurisdictions an infant may sue as a poor person by his next friend without liability for costs,⁸ while under the construction of the statutes

New York. — *Colden v. Haskins*, 3 Edw. Ch. (N. Y.) 311; *Morpie v. Manhattan Brass Co.*, 60 N. Y. Super. Ct. 423; *Hulburt v. Newell*, 4 How. Pr. (N. Y. Supreme Ct.) 93.

Tennessee. — *Miles v. Kalgler*, 10 Yerg. (Tenn.) 10; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Evans v. Mason*, 1 Lea (Tenn.) 26; *Musgrove v. Lusk*, 5 Baxt. (Tenn.) 684; *Stephenson v. Stephenson*, 3 Hayw. (Tenn.) 123; *Tucker v. Dabbs*, 12 Heisk. (Tenn.) 18.

United States. — *Kingsbury v. Buckner*, 134 U. S. 651.

In *New York* it has been held that where the infant does not sue as a poor person, it is error to overrule a motion for security for costs. *Morpie v. Manhattan Brass Co.*, 60 N. Y. Super. Ct. 423.

1. *Grantman v. Theall*, 19 Abb. Pr. (N. Y. Supreme Ct.) 308, 29 How. Pr. (N. Y.) 344.

"A defendant has no right to exact security for costs from an infant plaintiff unless it be conferred by the statute under consideration. At common law a next friend is appointed by the court to represent an infant plaintiff, and such infant cannot be required to furnish security for costs even when the next friend, who is solely liable therefor, is utterly insolvent." *Budd v. Rutherford*, 4 Ind. App. 386, citing *Tidd's Pr.* 100.

2. *Rabidon v. Muskegon Circuit Judge*, 110 Mich. 297.

In *Davenport v. Davenport*, 1 Sim. & S. 101, on the discharge of a next friend and the substitution of a new one, the court required the retiring next friend to give security for the costs already incurred.

3. *Hayes v. Second Ave. R. Co.*, 5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 155;

St. Louis, etc., R. Co. v. Reagan, 52 Ill. App. 488.

4. *Ten Broeck v. Reynolds*, 13 How. Pr. (N. Y. Supreme Ct.) 462.

5. *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434; *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; *Smith v. Anderson*, 1 Bailey L. (S. Car.) 123; *Wale v. Salter*, Mosely 47.

The Court, in its Discretion, will allow a father, though an insolvent debtor, to prosecute an action as *prochein ami* for his infant son if it is clearly shown that no fitter person can be obtained; and poverty is no ground for requiring security for costs. *Duckitt v. Satchwell*, 1 D. & L. 980, 12 M. & W. 779, 8 Jur. 408, 13 L. J. Exch. 224.

6. *Hayes v. Second Ave. R. Co.*, 5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 155.

7. *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, holding that under the *Illinois* statute the right to bring a suit by next friend does not depend upon the execution by him of a bond for costs, though he may be required to give such bond before the suit proceeds to final judgment and execution.

8. *Chicago, etc., R. Co. v. Lane*, 130 Ill. 116; *Tobias v. Broadway, etc., R. Co.*, (City Ct.) 14 N. Y. Supp. 641; *Hayes v. Second Ave. R. Co.*, 5 Civ. Pro. Rep. (N. Y. Supreme Ct.) 155; *Rosso v. Second Ave. R. Co.*, 13 N. Y. App. Div. 375; *Matter of Byrne*, 1 Edw. Ch. (N. Y.) 41; *Rowark v. Gaston*, 67 N. Car. 291; *Brendle v. Heron*, 68 N. Car. 496; *Briant v. Wagner*, 3 Jur. 460. *Contra, In re Daly*, (Marine Ct.) 1 N. Y. City Ct. 437.

In *Indiana* an infant may sue as a poor person, but in this case no next friend is necessary or proper, the infant being represented by an attorney. *Wright v. McLarinan*, 92 Ind. 103;

in other jurisdictions he is denied this privilege.¹ In a few cases the rule has been cautiously stated that if unable to indemnify a responsible person for costs, the court might permit an infant to sue *in forma pauperis*.² See also article POOR PERSONS.

2. Fees and Allowances.—A next friend is, of course, entitled to be reimbursed for his reasonable and necessary expenses,³ and where there is a fund in court, his costs, charges, and expenses may be allowed out of it.⁴ It has been held that a guardian *ad litem* is entitled to compensation although there is no fund in court.⁵

VII. PLEADINGS—1. In Whose Name.—An infant must be the plaintiff on his own cause of action.⁶ Accordingly, the suit should be in the name of the minor, described as suing by his

Hood v. Pearson, 67 Ind. 368; Britton v. State, 115 Ind. 55; Budd v. Rutherford, 4 Ind. App. 386.

1. Cargle v. Nashville, etc., R. Co., 7 Lea (Tenn.) 717; Green v. Harrison, 3 Sneed (Tenn.) 131; McCoy v. Broderick, 3 Sneed (Tenn.) 203; Hawkins v. Hawkins, 4 Sneed (Tenn.) 105; Musgrove v. Lusk, 5 Baxt. (Tenn.) 684; Roy v. Louisville, etc., R. Co., 34 Fed. Rep. 276.

Where a Wife Sues by Next Friend she cannot sue as a poor person. But where the suit may be prosecuted in her own name, as, for instance, a suit for divorce or alimony, she may sue as a poor person. Hawkins v. Hawkins, 4 Sneed (Tenn.) 105.

2. See Fulton v. Roosevelt, 1 Paige (N. Y.) 178, 19 Am. Dec. 409, wherein the court said: "Perhaps, in a proper case, on an application to the court, an infant who had no means to indemnify a responsible person for costs might be permitted to sue by his next friend *in forma pauperis*. I see no objection to such a proceeding, though Lord Eldon intimated it could not be done. But in such a case the court would, in the first place, see that there was probable cause for the proceeding, and appoint a proper person to prosecute the suit as *prochein ami*." But see other *New York* cases holding that an infant may sue as a poor person, *supra*.

In Kentucky it has been held that the code contemplates that when an infant, being unable to procure a next friend who will become responsible for costs, sues in his own name, the court may appoint a next friend and allow him to sue *in forma pauperis*. Richardson v. Hunt, 5 Ky. L. Rep. 931.

3. Garman v. Kauffman, 3 Lanc. L. Rev. (Pa.) 321; Leopold v. Meyer, 10

Abb. Pr. (N. Y. C. Pl.) 40; Palmer v. Jones, 22 W. R. 909.

4. Palmer v. Jones, 22 W. R. 909.

While moneys recovered for an infant or *feme covert* are in custody of the court, it will order the expenses of a guardian *ad litem* or *prochein ami* to be reimbursed; but after payment to the general guardian, such expenses can only be reimbursed by an ordinary action or proceeding against the moneys in the hands of husband or guardian. Leopold v. Myers, 2 Hilt. (N. Y.) 580.

Lien.—The next friend has a lien upon the recovery in the action for his expenses, but not for his personal services. If the decree is for an interest in remainder his reimbursement should be secured out of that and not out of the life estate. Daniel v. Powell, 29 Ga. 730.

5. Richardson v. Van Voorhis, (Supreme Ct.) 20 N. Y. St. Rep. 667 (decided under a rule of court).

The Remedy to Enforce His Compensation where there is no fund in court, is against the infant's personal property, and an order to commit the infant for contempt in failing to pay the compensation allowed cannot be granted. Richardson v. Van Voorhis, (Supreme Ct.) 20 N. Y. St. Rep. 667.

6. Alabama.—Benziger v. Miller, 50 Ala. 206.

Georgia.—Evans v. Collier, 79 Ga. 319.

Illinois.—Hoare v. Harris, 11 Ill.

24.

Iowa.—Hanna v. Hawes, 45 Iowa 437.

Kansas.—Wilson v. Me-ne-chas, 40 Kan. 648.

Michigan.—Osburn v. Farr, 42 Mich. 134.

next friend or guardian *ad litem*,¹ and not in the name of the next friend or guardian described as suing for the infant.² It has been held, however, that although minors ought regularly to sue by next friend, yet if the next friend sues in behalf of the minors it is the same in substance, and the irregularity is immaterial.³

New Jersey. — Longstreet v. Tilton, 1 N. J. L. 45.

New York. — Hartfield v. Roper, 21 Wend. (N. Y.) 615; Hoyt v. Hilton, 2 Edw. Ch. (N. Y.) 202.

North Carolina. — Simpson v. King, 1 Ired. Eq. (N. Car.) 11; Kent v. Bottoms, 3 Jones Eq. (N. Car.) 69.

Virginia. — Lemon v. Hansbarger, 6 Gratt. (Va.) 301.

United States. — Plummer v. Webb, 1 Ware (U. S.) 75.

In Baltimore, etc., R. Co. v. Taylor, 6 App. Cas. (D. C.) 259, the court said that with a few exceptions referred to the rule is universal in the United States that suits with respect to the property of a ward, where recovery is sought for his benefit, must be in the name of the ward, and not in the name of his guardian, unless statutory authority is given to the latter to so institute the suit, and the only point as to which there may be doubt or controversy is whether the suit shall purport to be by guardian or by next friend.

1. *Alabama*. — Bowie v. Minter, 2 Ala. 406; Tate v. Gilbert, 5 Stew. & P. (Ala.) 114.

Arkansas. — Roberts v. Maddox, 5 Ark. 51; Turner v. Alexander, 41 Ark. 254.

Florida. — Sanderson v. Sanderson, 17 Fla. 820.

Georgia. — Jack v. Davis, 29 Ga. 219; Oliver v. McDuffie, 28 Ga. 522.

Illinois. — Bowles v. McAllen, 16 Ill. 30; Hoare v. Harris, 11 Ill. 24.

Kentucky. — McChord v. Fisher, 13 B. Mon. (Ky.) 193.

Maine. — Soule v. Winslow, 65 Me. 518.

West Virginia. — Burdett v. Cain, 8 W. Va. 282.

United States. — Morgan v. Potter, 157 U. S. 195.

The statute giving guardians the right "to prosecute and defend for their wards" does not affect this rule; it merely gives control of proceedings. Hoare v. Harris, 11 Ill. 24.

An Infant Must Sue in His Own Name, either by his guardian or next friend, and the guardian cannot make himself

the principal actor in the suit. Sutherland v. Goff, 5 Port. (Ala.) 508; M'Leod v. Mason, 5 Port. (Ala.) 223; Gregg v. Bethea, 6 Port. (Ala.) 9; Croft v. Topp, 4 Ala. 238; Dearman v. Dearman, 5 Ala. 202; Hooks v. Smith, 18 Ala. 338; Cook v. Adams, 27 Ala. 294.

A suit by John W. Paul, next friend of Esther J. Paul, a minor, is not a suit in the name of the minor. It should be Esther J. Paul by her next friend, John W. Paul. Paul v. Frierson, 21 Fla. 529, citing Sanderson v. Sanderson, 17 Fla. 820.

Proper Form. — In *Arkansas*, by statute, a guardian may sue in his own name for the benefit of his ward, but it is better that the suit be in the name of the ward by his guardian. Turner v. Alexander, 41 Ark. 254.

2. A petition by a guardian in his own name cannot be taken as filed for the ward, although the plaintiff describes himself as guardian. Bowles v. McAllen, 16 Ill. 30.

In a suit brought by Samuel Winslow, next friend to Harrison Joy, a minor, etc., Samuel Winslow is the plaintiff. The execution for costs in such case should run against the plaintiff of record, Samuel Winslow. In a suit by a minor he should be declared as plaintiff "who sues by S. W., of —, etc., the next friend of the said plaintiff," etc. Soule v. Winslow, 64 Me. 518.

An Infant Is Not Bound by the Judgment in an action brought in the name of another person, although the latter describes himself as guardian or next friend, since where the action is so brought the infant is not a party thereto. Swift v. Yanaway, 153 Ill. 197; Sanderson v. Sanderson, 17 Fla. 820.

3. *Georgia*. — Van Pelt v. Chattanooga, etc., R. Co., 89 Ga. 706.

Kansas. — Freeman v. McAtee, 4 Kan. App. 695; Wilson v. Mc-ne-chas, 40 Kan. 648.

Michigan. — Kees v. Maxim, 99 Mich. 493.

Tennessee. — Elrod v. Lancaster, 2 Head (Tenn.) 571.

Texas. — Gulf, etc., R. Co. v. Styron, Volume XIV.

Technical Accuracy in the description of the capacity in which a person appears for an infant is not necessary.¹

2. Allegations as to Plaintiff's Disability.—Where an action is prosecuted by a next friend, disability of the plaintiff must be averred or a demurrer will lie.² Thus, for example, minority

66 Tex. 421; *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171.

Where the summons was sued out in the name of A, guardian *ad litem* of B, a minor, it was held that though informal yet it would not be set aside because sufficient on its face to show what was intended, and it did not appear that the defendant was misled. *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135.

Argument in Support of Rule.—"When it appears with certainty, as it does in this case, that the action is based on the right of the minor, that the relief sought is such as the minor alone would be entitled to on the facts pleaded, and that this is sought for the use and benefit of the minor, then we are of the opinion that the minor is the real plaintiff, whatsoever may be the formula used. This is in accordance with what we understand to have been the effect of the rulings heretofore made in this state. *Cannon v. Hemphill*, 7 Tex. 199; *Moore v. Minerva*, 17 Tex. 23; *Martin v. Weyman*, 26 Tex. 469; *Houston, etc., R. Co. v. Bradley*, 45 Tex. 175; *Abrahams v. Vollbaum*, 54 Tex. 227. Such a rule commends itself to reason and, as fully as would that insisted upon, secures the right of a minor without prejudice to a defendant. There is no doubt that cases may be found in which it has been held that the pleadings must show, in so many words, that the action is brought by the minor by next friend. Such rulings, however, seem to us to give effect to form rather than to substance. Whether the petition be worded in the one formula or the other, the adverse party and the court are equally advised of the cause of action, the right in which the recovery is sought, and of the person to whose benefit the recovery is to inure. In the one case as in the other, the court has the same power over the person who appears as next friend; and, with equal facility, may protect the interest of the minor by shaping its judgment or decree to that end." *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421.

1. Illustrations.—An infant with a

legally appointed guardian may sue by his next friend, and it requires no particular phraseology to constitute this relationship between the infant and the party by whose aid he seeks to assert his right. Where the father, as the natural guardian of the infant, sues in that capacity, and he is recognized by the court in that character in its action, the proceedings cannot be held void for a mere technical inaccuracy in the description of the capacity in which he appears. *Martin v. Weyman*, 26 Tex. 460.

A petition in equity by B, and A his minor daughter, for the sale of certain trust property, ran in the name of himself and of "A, by her father and natural guardian, B," and was signed by both with their respective names, simply. It was held that she was bound by the decree, and, at all events, could not attack it collaterally. *Clark v. Platt*, 30 Conn. 285.

If a general guardian of an infant institutes a suit as guardian *ad litem*, but his true relation is sufficiently shown by the body of the complaint, the error is of no consequence, as a general guardian is authorized to sue for his ward. *Spear v. Ward*, 20 Cal. 659.

A woman sued in behalf of herself and her two minor children without stating that she was their "next friend." It was held that the defect would be cured by verdict, and that a recovery would protect the defendant from any other suit by other next friends in regard to the same subject-matter. *King v. King*, 37 Ga. 205.

2. West v. Reynolds, 35 Fla. 317.

In *Hunt v. Wing*, 10 Heisk. (Tenn.) 139, the court said: "We can find neither precedent nor authority for allowing a person under no incapacity whatever to sue by next friend. * * * Anciently, when a party exhibited a bill as the next friend of a person under disability, he was required to produce with the bill his authority for doing so; but the modern practice is to retain the bill, unless the defendant requires the production of the authority from the next friend. This shows that a person cannot, as a matter of common

should be alleged, that it may be traversed.¹

Naming Plaintiff in the Caption of a complaint as minors suing by next friend is not a sufficient averment of minority.²

Infancy Admitted by Plea. — Pleas of not guilty and of accord and satisfaction admit the truth of an averment of infancy.³

3. Allegations as to Appointment or Admission to Sue. — The suit must purport to be brought by next friend,⁴ and his admission to sue should be averred in the declaration.⁵ Where it is the practice to make a formal appointment, due appointment of the next friend must be averred.⁶ Such allegation may be traversed, and if it is traversed it must be proved.⁷ In the absence of any

right, institute suit as next friend, and the right to do so being exceptional, good pleading requires that it should appear on the face of the bill that the case is within the rule."

1. *M'Gillicuddy v. Forsythe*, 5 Blackf. (Ind.) 435; *Boyd v. Boyd*, 6 Gill & J. (Md.) 25; *Hanly v. Levin*, 5 Ohio 227; *Porter v. Hannibal*, etc., R. Co., 60 Mo. 160. *Contra*, see *Meyenberg v. Eldred*, 37 Minn. 508, holding that where infancy of the plaintiff is denied it nevertheless need not be proved, as the cause of action does not depend upon it. See also *Dodd v. Moore*, 91 Ind. 522, 92 Ind. 397.

In *Funk v. Davis*, 103 Ind. 281, it was held that the fact that a complaint fails to aver that some of the plaintiffs are minors suing by their next friend, will not make it bad on demurrer.

Where Minority Was Not Alleged, but the plaintiff had declared by his next friend, and it was assigned as error that the record did not show that the plaintiff was an infant, it was held that it would be presumed that he was of full age, and the curatorship would be rejected as surplusage. *Hanly v. Levin*, 5 Ohio 227. Compare *Shirley v. Hagar*, 3 Blackf. (Ind.) 225, where a declaration under such circumstances was held bad on general demurrer.

2. *Funk v. Davis*, 103 Ind. 281. To the same effect, see *Jones v. Steele*, 36 Mo. 324, holding that the caption forms no part of the petition.

3. *Hubbert v. Collier*, 6 Ala. 269.

4. *Ash v. Mathes*, 52 Mich. 615, holding that an action of replevin brought by a father in his own name, cannot proceed on the theory that he is suing in his child's behalf as guardian or next friend.

The Caption Is Controlled by the Body of the complaint. Accordingly, where one of the parties plaintiff is named in

the caption as "E. G., heir at law of R. G. deceased, by her guardian W. B.," but in the body of the complaint W. B. is spoken of as the plaintiff, the action must be treated as brought by W. B. as plaintiff. *McKinney v. Jones*, 55 Wis. 39.

5. *Fellows v. Niver*, 18 Wend. (N. Y.) 564.

In *Wilson v. Vandyke*, 2 Harr. (Del.) 29, it was held that when an infant sues by next friend the admission to sue must be stated in the narration, suits by next friend differing in this respect from suits by a guardian, who need not aver a special admission to sue.

Demurrer. — A declaration stating that the plaintiff sues by *prochein ami* without showing the plaintiff's infancy and the *prochein ami's* admission, is bad on general demurrer. *Shirley v. Hagar*, 3 Blackf. (Ind.) 225.

6. *Crawford v. Neal*, 56 Cal. 321; *Jones v. Steele*, 36 Mo. 324; *Higgins v. Hannibal*, etc., R. Co., 36 Mo. 418; *Hulbert v. Young*, 13 How. Pr. (N. Y. Supreme Ct.) 413; *Grantman v. Thrall*, 44 Barb. (N. Y.) 173.

The appointment of a guardian for an infant plaintiff being *ex parte*, no objection to the appointment of a guardian can then be made; hence the failure to allege the appointment in the complaint furnishes a good ground for error. *Crawford v. Neal*, 56 Cal. 321.

The Caption Forms No Part of the Petition, and hence will not take the place of an averment of appointment. *Jones v. Steele*, 36 Mo. 324.

Recital in Bill. — A bill in equity reciting that infants appear by their next friend without showing that an order of appointment was made is sufficient. *Bent v. Maxwell Land Grant*, etc., Co., 3 N. Mex. 158.

7. *California*. — *Crawford v. Neal*, 56

objection the appointment need not be proved.¹

Alleging Relationship. — No relationship between the infant and the next friend need be alleged.²

Alleging Consent of Next Friend. — Nor need the complaint aver that the written consent of the next friend to act has been filed as required by statute.³

Negating Existence of General Guardian. — Failure of the petition by next friend to negative the existence of a general guardian is cured by verdict.⁴

Plea to the Appointment. — It has been held that on the general issue of not guilty the plaintiff's character as guardian is put in issue.⁵ But, on the other hand, it has been held that a denial of the authority of a guardian to bring suit should be by plea in abatement.⁶

Cal. 321; *Matter of Cahill*, 74 Cal. 52; *O'Callaghan v. Bode*, 84 Cal. 489.

Iowa. — *Byers v. Des Moines Valley R. Co.*, 21 Iowa 54.

Maryland. — *Boyd v. Boyd*, 6 Gill & J. (Md.) 25.

Missouri. — *Porter v. Hannibal, etc.*, R. Co., 60 Mo. 160.

New York. — *Hulbert v. Young*, 13 How. Pr. (N. Y. Supreme Ct.) 413; *Hill v. Water, etc.*, Com'rs, 77 Hun (N. Y.) 491; *Sere v. Coit*, 5 Abb. Pr. (N. Y. Supreme Ct.) 481.

England. — *Fitzgerald v. Villiers*, 3 Mod. 236.

Contra, *Meyenberg v. Eldred*, 37 Minn. 508.

A Demurrer on the ground that the plaintiff has not the legal capacity to sue is sufficient to raise the objection that the complaint does not sufficiently state the appointment of a guardian *ad litem*. *Hulbert v. Young*, 13 How. Pr. (N. Y. Supreme Ct.) 413. See also *Crawford v. Neal*, 56 Cal. 321.

Demurrer to Evidence. — "The judgment in this case must be reversed because the petition alleges the minority of plaintiff and the appointment of a next friend by the Circuit Court of Buchanan county, which allegations are denied in the answer, and no proof was offered on the subject. The point was raised in the Circuit Court by a demurrer to the evidence." *Porter v. Hannibal, etc.*, R. Co., 60 Mo. 160.

Appointment at Trial or Failure of Proof.

— Where a complaint averred the appointment of a guardian *ad litem* and the averment was traversed by the answer, and on the trial the plaintiff undertook to make proof of the appointment, which proof was held insufficient and the appointment therefore

void, the court permitted the plaintiff, over the objection of the defendant, to file a new petition, and then and there made an order appointing a guardian *ad litem* and ordered the trial to proceed. *Foley v. California Horseshoe Co.*, 115 Cal. 184.

1. *Tate v. Gilbert*, 5 Stew. & P. (Ala.) 114; *O'Callaghan v. Bode*, 84 Cal. 489; *Bramel v. Cunningham*, 3 Ky. L. Rep. 512; *Strong v. Jenkins*, 21 N. Y. Civ. Pro. Rep. (Buffalo Super. Ct.) 9.

Presumption on Appeal. — Unless the adverse party objects to the sufficiency of proof of the appointment of a guardian *ad litem* for an infant plaintiff, it will be presumed on appeal, in the absence of any complete showing as to the proof, that it was sufficient. *O'Callaghan v. Bode*, 84 Cal. 489.

2. *Burns v. Wilson*, 1 Mo. App. 179, holding that an allegation of such relationship does not constitute an issuable fact.

3. *Dodd v. Moore*, 91 Ind. 522, 92 Ind. 397; *Lumpkins v. Justice*, 1 Ind. 557. See also *Funk v. Davis*, 103 Ind. 281.

"It is true that the statute requires the *prochein ami's* written consent to act to be given, and to be filed before the process issues, * * * but we can see no reason why the declaration should allege those facts. When the statute, as to this matter, has not been complied with, the defendant may move to dismiss the suit." *Lumpkins v. Justice*, 1 Ind. 557.

4. *Gulf, etc., R. Co. v. Reagan*, (Tex. Civ. App. 1896) 34 S. W. Rep. 796.

5. *Wilson v. Vandyke*, 2 Harr. (Del.) 29.

6. *Conkey v. Kingman*, 24 Pick. (Mass.) 115.

Demurrer. — A complaint alleging that the guardian was "duly appointed" has been held good on demurrer.¹ A demurrer on the ground that the complaint does not state sufficient facts to constitute a cause of action does not raise the question of the plaintiff's capacity to sue.²

4. Particular Actions by Infants. — Various rulings as to the pleadings in particular cases wherein infants appear as plaintiffs are collected in the notes.³

VIII. JUDGMENT — 1. In General. — Where infants sue by their next friend they are as much bound by the judgment or decree as if they had been adults,⁴ except, perhaps, where the next

In Minnesota it has been held that an allegation of appointment is not traversable, and that objection must be made by preliminary motion; a general denial will not put the appointment in issue. *Schuek v. Hagar*, 24 Minn. 339.

1. Thus, in *Sere v. Coit*, 5 Abb. Pr. (N. Y. Supreme Ct.) 481, a complaint by an infant stated that he sued by "a guardian duly appointed for the purpose of this action." It was held that the proper mode of challenging the statement was by a motion to make the complaint more definite, and not by demurrer, and it was further held that if the statement was not well founded in fact, the defendant, instead of demurring to its sufficiency, should have denied its truth. Compare *Hulbert v. Young*, 13 How. Pr. (N. Y. Supreme Ct.) 413, where the plaintiff described himself as guardian in the declaration, and a demurrer was sustained because he did not show how he was guardian, or that he was specially appointed by the court.

The language of a demurrer that "plaintiff has not the legal capacity to sue, for the reason that plaintiff is a minor and has no legally appointed guardian," is not sufficient to raise an issue of law where the allegation of the complaint is that the plaintiff is a minor under eighteen years of age and that "G. B. is her duly appointed and acting guardian." *Morrell v. Morgan*, 65 Cal. 575.

2. *Edwards v. Beall*, 75 Ind. 401.

3. **Availing Return of or Inability to Return Consideration.** — In an action of ejectment in disaffirmance of a conveyance during infancy, the plaintiff need not allege a return of the consideration nor inability to return it. *Clark v. Tate*, 7 Mont. 171.

Averment as to Manumission. — In an

action brought by an infant by his next friend for work and labor done for and at the request of the defendant, a complaint is sufficient which avers that, though an infant, the plaintiff had been manumitted and set free by his father. The further averment in the complaint that the plaintiff was living with his father at the time the action was instituted, and was so living with him during the entire time the work was being performed, does not vitiate the averment as to his full emancipation. *Haugh, etc., Iron Works v. Duncan*, 2 Ind. App. 264.

A Declaration on a Contract of Marriage need not aver the consent of the parent or guardian, although the plaintiff is an infant. *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76.

An Agreement by Infants to Dismiss Must Be Pleaded as a defense, if available at all, and is not available upon a motion to dismiss. *Hopkins v. Virgin*, 11 Bush (Ky.) 678.

Averment of Disaffirmance. — The complaint on a note assigned by an infant need not show disaffirmance by the latter before payment to his assignee, that being a matter of affirmative defense. *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503.

Service of the Bill on Minor. — Where minors come in as plaintiffs by amendment and appear by next friend, a copy of the bill need not be served on them. *Wallace v. Jones*, 93 Ga. 419.

4. **California.** — *Reed v. Ring*, 93 Cal. 96.

Connecticut. — *Clark v. Platt*, 30 Conn. 282.

Georgia. — *Evans v. Collier*, 79 Ga. 319.

Illinois. — *Burger v. Potter*, 32 Ill. 66; *McClay v. Norris*, 9 Ill. 370; *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491.

friend fails through collusion, neglect, or mistake to lay the case properly before the court, in which case a new suit may be brought.¹

Collateral Attack. — Accordingly the judgment cannot be collaterally attacked, although it is erroneous² or fraudulent.³

2. Infant's Day in Court. — As a general rule, infant complainants

Kansas. — *Burdette v. Corgan*, 26 Kan. 102.

Kentucky. — *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; *Jame-son v. Moseley*, 4 T. B. Mon. (Ky.) 414; *Abernathy v. Ross*, (Ky. 1892) 20 S. W. Rep. 222; *Mason v. Chambers*, 4 J. J. Marsh. (Ky.) 425; *Williamson v. Johnston*, 4 T. B. Mon. (Ky.) 255.

Louisiana. — *Ross v. Enaut*, 46 La. Ann. 1250.

Massachusetts. — *Walsh v. Walsh*, 116 Mass. 377; *Tripp v. Gifford*, 155 Mass. 109.

Mississippi. — *Johns v. Harper*, 61 Miss. 145; *McLemore v. Chicago, etc.*, R. Co., 58 Miss. 514.

New York. — *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Darvin v. Hatfield*, 4 Sandf. (N. Y.) 468.

North Carolina. — *Hicks v. Beam*, 112 N. Car. 642, 34 Am. St. Rep. 521; *Becton v. Becton*, 3 Jones Eq. (N. Car.) 419.

Texas. — *Cannon v. Hemphill*, 7 Tex. 185.

Virginia. — *Zirkle v. McCue*, 26 Gratt. (Va.) 517; *Brown v. Armistead*, 6 Rand. (Va.) 594.

United States. — *Kingsbury v. Buckner*, 134 U. S. 674; *Kansas City, etc., R. Co. v. Morgan*, 76 Fed. Rep. 429, 47 U. S. App. 1.

England. — *Brook v. Hertford*, 2 P. Wms. 518; *Gregory v. Molesworth*, 3 Atk. 626; *Williamson v. Gordon*, 19 Ves. Jr. 114.

"It is well settled that an infant plaintiff is as much bound and as little privileged as a person of full age. This was so held in *Brook v. Hertford*, 2 P. Wms. 518, and in *Gregory v. Molesworth*, 3 Atk. 626, and has been held to be good law ever since." *Darvin v. Hatfield*, 4 Sandf. (N. Y.) 478. *Citing* *Sears v. Hyer*, 1 Paige (N. Y.) 486; *Morison v. Morison*, 4 Myl. & C. 225.

Under the *Minnesota* statute a father is authorized to sue for an injury to his minor child, for the latter's benefit, and the judgment in such an action by the father is a bar to any subsequent action by the minor or his guardian, either

before or after reaching majority. *Lathrop v. Schutte*, 61 Minn. 196.

A judgment on appeal prosecuted by an infant by next friend is binding upon the infant. *Kingsbury v. Buckner*, 134 U. S. 650.

1. *Abernathy v. Ross*, (Ky. 1892) 20 S. W. Rep. 222; *Gusdofer v. Gundy*, 72 Miss. 312; *Cannon v. Hemphill*, 7 Tex. 184; *Robson v. Osborn*, 13 Tex. 298. But see *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491, holding that a judgment obtained by an infant suing by his next friend is conclusive in a subsequent action at law by the infant for the same cause, though the former action was instituted without the infant's knowledge and in collusion with the defendant.

2. *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; *Reed v. Ring*, 93 Cal. 96, holding that, in an action by infant plaintiffs, through guardians *ad litem*, to set aside a sale by an administrator and guardian, an adjudication that the sale was valid as to one parcel and invalid as to another parcel, however erroneous as to the portion held valid, is conclusive as against a collateral attack, and binds the infants, if not reversed upon appeal.

3. A judgment in an action brought by next friend, in collusion with the defendant, though voidable, is not void, and it is conclusive against the infant until regularly set aside in a direct proceeding, and cannot be collaterally impeached by the infant for fraud. This is true although the action is brought without the knowledge or consent of the infant, and though he had no notice of the judgment until long afterwards; and it makes no difference whether the fraud and collusion appear in the record or do not appear, and are shown only by evidence *dehors* the record. *Chudleigh v. Chicago, etc., R. Co.*, 51 Ill. App. 491. To the same effect, see *Lowe v. Equitable Mortgage Co.*, (Ga. 1897) 29 S. E. Rep. 148 [*citing* *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Watkins v. Lawton*, 69 Ga. 671; *Freeman v. Prendergast*, 94 Ga. 385].

are bound by the judgment or decree entered in the cause, and are not entitled to a day after coming of age to show cause against it.¹ In a proceeding by an infant defendant to show cause against a decree previously entered against him, he is regarded as a plaintiff and is bound by the new decree without the right to show cause against it.²

3. Bills to Impeach. — It has been held that infant plaintiffs may maintain a bill to impeach the judgment or decree for fraud or error apparent.³ But it has been held that in the absence of fraud a successful infant complainant cannot maintain a bill to impeach the judgment.⁴

4. Form of Judgment. — The judgment should be entered in favor of the infant plaintiff in his own name, and not in that of

1. *Arkansas*. — Woodall v. Moore, 55 Ark. 22.

Illinois. — McClay v. Norris, 9 Ill. 370.

Kentucky. — Jameson v. Moseley, 4 T. B. Mon. (Ky.) 416; Williamson v. Johnston, 4 T. B. Mon. (Ky.) 255; Hanna v. Spotts, 5 B. Mon. (Ky.) 362; Williamson v. Johnston, 4 T. B. Mon. (Ky.) 255.

Missouri. — Hendricks v. McLean, 18 Mo. 39.

North Carolina. — Becton v. Becton, 3 Jones Eq. (N. Car.) 422.

Tennessee. — Simpson v. Alexander, 6 Coldw. (Tenn.) 619.

Texas. — Cannon v. Hemphill, 7 Tex. 184.

Virginia. — Brown v. Armistead, 6 Rand. (Va.) 594.

Generally, as to an infant's day in court, see article INFANTS, vol. 10, p. 709 *et seq.*

Distinction Between Decrees Affecting Realty and Personality. — There are, however, cases in which it is attempted to draw a distinction between decrees affecting real estate and decrees affecting only personality, the infant complainant being held entitled to a day to show cause against decrees of the former but not of the latter class. See Napier v. Effingham, 2 P. Wms. 401, 3 Bro. P. C. 1; Gregory v. Molesworth, 3 Ark. 627; 2 Madd. Ch. Pr. 461; 1 Dan. Ch. Pr. 73. This distinction, however, has been *disapproved*. See Cannon v. Hemphill, 7 Tex. 184.

The Virginia Code, § 3424, allowing an infant within six months after he becomes of age to show cause against a decree or order in certain cases, does not prevent him from asserting his rights while an infant by a next friend

as soon as he sees fit to do so. Harrison v. Wallton, (Va. 1898) 30 S. E. Rep. 372. Citing Richmond v. Tayleur, 1 P. Wms. 734; Tennent v. Pattons, 6 Leigh (Va.) 208; 1 Dan. Ch. Pl. & Pr. 173.

2. McLemore v. Chicago, etc., R. Co., 58 Miss. 514.

3. Coffin v. Argo, 134 Ill. 276; Tremper v. Barton, 18 Ohio 418. See also article INFANTS, vol. 10, p. 706 *et seq.*

The right of the minor complainants to maintain a bill to impeach the former decree for fraud, or for error appearing on the face of the record, is clearly established in *Illinois*. Loyd v. Malone, 23 Ill. 43; Kuckenbeiser v. Beckert, 41 Ill. 172; Hess v. Voss, 52 Ill. 472; Gooch v. Green, 102 Ill. 507; Lloyd v. Kirkwood, 112 Ill. 329; Haines v. Hewitt, 129 Ill. 347.

A bill to impeach the decree lies where the proceeding by next friend was really adverse to the infant and not in his interest. Wright v. Gay, 101 Ill. 233.

Leave of Court to file an original bill after majority to vacate a decree obtained by an infant during her minority is not necessary. Grimes v. Grimes, 143 Ill. 550.

4. Johns v. Harper, 61 Miss. 142. See also Kingsbury v. Buckner, 134 U. S. 650.

An Original Bill Will Not Lie in favor of infants who were co-complainants with adults to vacate a decree in their favor, taken by consent of all parties, in the absence of any fraud or collusion, although the decree is erroneous and in consenting they mistook their legal rights. Gusdofer v. Gundy, 72 Miss. 312, citing Johns v. Harper, 61 Miss. 142.

his next friend.¹ But a judgment in favor of the next friend which clearly shows that it is for the sole benefit of the minors has been held good as a judgment for the minors.² The judgment may require the money collected on it to be deposited in court until the appointment of a guardian or the attainment of majority.³

5. By Agreement or Consent. — As a general rule, where an infant's rights are concerned the judgment must be supported by full proof, notwithstanding any admissions or consent of the parties, the next friend, or the guardian *ad litem*.⁴ But a judgment by

1. *Taylor v. Cline*, (Ky. 1896) 35 S. W. Rep. 109; *Galveston Oil Co. v. Thompson*, 76 Tex. 235; *Island City Sav. Bank v. Wales*, 3 Tex. App. Civ. Cas., § 244; *Railway Co. v. Styron*, 3 Tex. Law Rev. 394.

In *Taylor v. Cline*, (Ky. 1896) 35 S. W. Rep. 109, the action was prosecuted by the guardian of infant plaintiffs, and a default judgment was taken in favor of the infants by their next friend instead of by their guardian. This was held not to require a reversal.

In *Collins v. Brook*, 5 H. & N. 700, the court said: "In this case it is clear that the judgment in the action must in form be a judgment in favor of the infant, and in the name of the infant. According to the entry of judgment in *Chandler v. Vilett*, 2 Saund. 117f, in an action by an infant suing by *prochein ami*, the judgment is for the infant, not only for the debt but also for costs. That record has been subjected to very acute eyes, and no one has ever found fault with that form of entry of judgment. I think, therefore, that it is the proper form. To enforce the judgment, execution would issue in the name of the infant, by *feri facias* indorsed to levy the damages and costs due to him."

In *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, it was held that a judgment rendered directly in favor of an infant plaintiff should be corrected so as to read in favor of such plaintiff by her next friend, naming him.

2. *Wygall v. Myers*, 76 Tex. 598.

Form of Verdict and Judgment Held Sufficient. — "The verdict of the jury is as follows: 'We, the jury, find for the plaintiff, and assess the damages at \$8,000.' The judgment of the court, after usual recitals, is as follows: 'It is the opinion of the court that the verdict of the jury should be in all things approved. It is therefore ordered, ad-

judged, and decreed by the court that the plaintiff, W. W. Styron, do have and recover of and from the Gulf, Colorado, & Santa Fe Railway Company the sum of \$8,000 and all costs in this behalf expended, for which let execution be issued as directed by law. The sum to be recovered as aforesaid by W. W. Styron for the sole use and exclusive benefit of Millie Styron, minor as aforesaid.' The verdict construed in the light of the pleadings is a verdict in favor of the minor, as is the judgment a judgment for her sole and exclusive benefit." *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421.

3. *Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896.

4. See article INFANTS, vol. 10, p. 719 *et seq.*

Where an infant's interests are involved, nothing can be established by admissions or stipulations; proof is necessary. In partition facts must be inquired into, whether the infant is a complainant or a defendant. *Claxton v. Claxton*, 16 Mich. 557.

The rights of infant defendants can in no case be judicially affected except upon proper issues and proof, and when they are plaintiffs should not be so affected upon their own application by guardian or next friend, without a reference to the master, or the chancellor's own examination, to ascertain whether the thing asked be really for their benefit. *Evans v. Davies*, 39 Ark. 235.

Consent Judgment Not a Bar. — Where the father of a minor, without the latter's knowledge, agrees with a railroad company to settle a claim for damages for personal injuries to the son for a nominal sum, and in pursuance of such contract brings an action as next friend against the company, and the parties

consent, although erroneous, is not void, and cases are to be found where the infant has been held bound by a consent decree.¹ A dismissal by agreement of the attorneys does not estop an infant from suing again.²

IX. APPEAL AND ERROR — By Whom Taken. — An appeal or writ of error may be prosecuted by a next friend or guardian *ad litem* of an insane person³ or an infant.⁴ So also a minor may bring

procure a judgment to be rendered against the defendant for such nominal sum without the introduction of any evidence, such judgment is no bar to a subsequent action in the name of the son, by his next friend, to recover damages against the company for the same injuries, though such judgment recites that it was rendered on the introduction of evidence. *Tennessee Coal, etc., Co. v. Hayes*, 97 Ala. 201. See also *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173.

1. *Georgia*. — *Wallace v. Jones*, 93 Ga. 419.

Massachusetts. — *Walsh v. Walsh*, 116 Mass. 377; *Tripp v. Gifford*, 155 Mass. 109.

Mississippi. — *Gusdofer v. Gundy*, 72 Miss. 312.

Tennessee. — *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

Texas. — *Ivey v. Harrell*, 1 Tex. Civ. App. 226. See also article INFANTS, vol. 10, p. 727 *et seq.*

In *Milly v. Harrison*, 7 Coldw. (Tenn.) 191, it was held that a decree by consent without a reference to ascertain whether or not it will be for the infant's benefit is not void, and if found to be beneficial it will not be reversed merely because made without a reference.

In *Tripp v. Gifford*, 155 Mass. 109, the court said: "Many of the numerous cases in which infants sue by next friends are never brought to a trial, but are so compromised or adjusted by the parties or counsel that they are disposed of by judgments entered in fact by consent. Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made and the judgment entered without calling the attention of the presiding justice to it or obtaining his approval. That such judgments conclude the minor we have no doubt, since he is ordinarily bound to the same extent as a person of full age by acts done in good faith by his counsel in the course

of a suit; and even in equity, if a decree is entered against him by consent without special inquiry, he will be bound by the decree." See also *Walsh v. Walsh*, 116 Mass. 377, and *Beliveau v. Amoskeag Mfg. Co.*, (N. H. 1895) 40 Atl. Rep. 734, wherein it was held that an infant was bound by a judgment entered upon the consent of the attorney employed by the next friend. The court expressly approved and followed *Tripp v. Gifford*, 155 Mass. 109.

Presumption on Appeal. — Infants are bound by a consent decree agreed to in good faith by their attorneys, and as before entering a consent decree the court should inquire whether the terms of it are for the interests of the infants, it will be presumed in the absence of any showing to the contrary that the court has performed its duties. *Thompson v. Maxwell Land Grant, etc., Co.*, 18 Supreme Ct. Rep. (U. S.) 121.

2. *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 350.

3. *Finney v. Speed*, 71 Miss. 32; *King v. McLean Asylum*, 64 Fed. Rep. 325, 21 U. S. App. 407.

4. *Illinois*. — *Ames v. Ames*, 148 Ill. 321; *McClay v. Norris*, 9 Ill. 370.

Kentucky. — *McKee v. Hann*, 9 Dana (Ky.) 526.

Tennessee. — *Loftis v. Loftis*, 94 Tenn. 232.

Texas. — *Carlton v. Miller*, 2 Tex. Civ. App. 619; *Schonfield v. Turner*, (Tex. 1887) 6 S. W. Rep. 628.

United States. — *Kingsbury v. Buckner*, 134 U. S. 650.

England. — *Dupuy v. Welsford*, 28 W. R. 762; *Ward v. Ward*, 3 Meriv. 706; *Russell v. Sharpe*, 1 Jac. & W. 462.

Where an infant prosecutes a writ of error in his own name, a joinder in error waives his disability. *McClay v. Norris*, 9 Ill. 370.

A Person Other than the One by Whom the Suit Was Originally Brought may bring a writ of error for an infant, such writ being regarded as a beginning of a new suit. *Ames v. Ames*, 148 Ill. 321,

certiorari by a guardian *ad litem*.¹

Time of Taking. — Appeals may be taken before the removal of the disability of insanity² or infancy,³ and the time for doing so is usually extended beyond that allowed to persons not laboring under any disability.⁴

The Ordinary Presumptions and Rules of Decision on appeal prevail in many respects in cases wherein next friends or guardians *ad litem* are concerned.⁵

Where a Next Friend Refuses to Appeal, the court has authority to remove him. *Dupuy v. Welsford*, 28 W. R. 762; *Ward v. Ward*, 3 Meriv. 706; *Russell v. Sharpe*, 1 Jac. & W. 462.

An Appeal by an Infant Must Be Sued Out by His Next Friend or Guardian, and where the appeal is sued out by the infant in his own name, and errors are assigned by attorney, the appeal will be dismissed on motion, on the fact of such infancy being brought to the knowledge of the court by affidavit. *Cook v. Adams*, 27 Ala. 204.

In New York, under N. Y. Code Civ. Pro., § 2573, a special guardian appointed in a proceeding pending in a surrogate's court may take and prosecute an appeal from the decree and there is no necessity for the appointment by the appellate division of another special guardian *ad litem* to take and prosecute such appeal. *Matter of Stewart*, 23 N. Y. App. Div. 17.

1. *Bowers v. Kanaday*, 94 Ga. 209, holding that an affidavit verifying a petition for certiorari may be made by an infant provided he has sufficient discretion to understand the nature of an oath and to form a rational opinion as to his interests.

2. *Finney v. Speed*, 71 Miss. 32.

3. *Moss v. Hall*, 79 Ky. 40; *Ridgely v. Bennett*, 13 Lea (Tenn.) 206. See also article INFANTS, vol. 10, p. 729.

An appeal by an infant during his minority is a complete bar to a prosecution by him of an appeal after his majority. *Moss v. Hall*, 79 Ky. 40.

4. See *Finney v. Speed*, 71 Miss. 32; *Moss v. Hall*, 79 Ky. 40. See also article INFANTS, vol. 10, p. 730.

5. **Presumption in Favor of Lower Court.** — A cause in which the plaintiff has appeared by his next friend having been appealed by the defendant from the judgment of a justice of the peace

to the Circuit Court, and no question having been made in the appeal papers as to the regularity of such appearance, it must be assumed for all further purposes in the appellate court that the appointment of the next friend and his appearance before the justice were regular. *Kearney v. Doyle*, 22 Mich. 294.

Where the complainant in a bastardy process appeared by attorney but pleaded by guardian, upon certiorari after judgment it was held that the fact that she was an infant, not appearing of record, was not to be inferred from her pleading by guardian, because a guardian might have been appointed for some cause other than infancy. *Com. v. Moore*, 3 Pick. (Mass.) 194.

In an action by a guardian, where guardianship is denied, the record not showing that any attention was called to the absence of proof of guardianship, and no assignment of errors pointing to the defect, the appellate court will consider the plea as waived. *March v. Walker*, 48 Tex. 372.

An order dismissing an infant's suit will not be reversed at the instance of a *prochein ami* merely because he objected to the dismissal. Unless it appears by bill of exceptions or otherwise that it was prejudicial to the infant, the order must be presumed to be right, and must be sustained. *Longnecker v. Greenwade*, 5 Dana (Ky.) 516.

Objections Not Raised Below. — The want of a formal order of appointment cannot be raised for the first time on appeal. *French v. Creath*, 1 Ill. 31.

Record. — Unless the age of the plaintiff is stated in a complaint or in an answer, the record does not present the question of his incapacity to sue because of infancy. *Edwards v. Beall*, 75 Ind. 401; *Haugh, etc., Iron Works v. Duncan*, 2 Ind. App. 264.

NIL DEBET.

See articles *DEBT*, vol. 5, p. 894; *PLEAS AT LAW*.

NIL DICIT.

See articles *DEFAULTS*, vol. 6, p. 1; *DISMISSAL, DISCONTINUANCE, AND NONSUIT*, vol. 6, p. 823.

NIL HABUIT IN TENEMENTIS.

See article *COVENANT*, vol. 5, p. 384.

NOLLE PROSEQUI.

See articles *DISMISSAL, DISCONTINUANCE, AND NON-SUIT*, vol. 6, p. 823; *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 556.

NOLO CONTENDERE.

See article *ARRAIGNMENT AND PLEA*, vol. 2, p. 787.

NOMINAL DAMAGES.

See article *DAMAGES*, vol. 5, p. 704.

NOMINAL PARTIES.

See article *PARTIES*. See also article *COSTS*, vol. 5, p. 149.

NON ASSUMPSIT.

See articles *ASSUMPSIT*, vol. 2, p. 987; *PLEAS AT LAW*.

NON CEPIT.

See articles *REPLEVIN*; *PLEAS AT LAW*.

NON DAMNIFICATUS.

See articles *BONDS*, vol. 3, p. 663; *COVENANT*, vol. 5, p. 383;
DEPARTURE, vol. 6, p. 465; *OFFICIAL BONDS*.

NON DETINET.

See article *DETINUE*, vol. 6, p. 654.

NON EST FACTUM.

See generally article *PLEAS AT LAW*.

As to *Plea of Non Est Factum in Particular Actions and concerning special subject matter*, see the various titles in this work, as *BONDS*, vol. 3, p. 635; *COVENANT*, vol. 5, p. 378; *DEBT*, vol. 5, p. 923; and consult the General Index.

In *Actions on Negotiable Instruments*, see article *NEGOTIABLE INSTRUMENTS*, *ante*, p. 347.

NON EST INVENTUS.

See article *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8, p. 584.

NON INFREGIT CONVENTIONEM.

See article *COVENANT*, vol. 5, p. 383.

NONJOINDER.

See article *PARTIES*, and references there given. See also article *ABATEMENT IN PLEADING*, vol. 1, p. 14.

NON OBSTANTE VEREDICTO.

See articles *JUDGMENTS*, vol. 11, p. 912 *et seq.*; *SPECIAL FINDINGS OF JURIES*.

NON PROSEQUITUR.

See article *DISMISSAL, DISCONTINUANCE, AND NON-SUIT*, vol. 6, p. 823.

NONRESIDENTS.

As to *Appeals by*, see article *APPEALS*, vol. 2, p. 157.
Appearance of, see article *APPEARANCES*, vol. 2, p. 640.
Arrest of Judgment, see article *ARREST OF JUDGMENT*, vol. 2, p. 797.
Nonresidence of Debtor; Exhaustion of Legal Remedies, see article *CREDITORS' BILLS*, vol. 5, p. 523.
Judgment Against, see article *DEFAULTS*, vol. 6, p. 34.
Service on Nonresident Infants, see article *INFANTS*, vol. 10, p. 609.
Jurisdiction over Absent Insane Person, see article *INSANE PERSONS*, vol. 10, pp. 1175, 1176.
Jurisdiction over Foreign Corporations, see article *JURISDICTION*, vol. 12, p. 147.
Jurisdiction over Person or Property of, see article *JURISDICTION*, vol. 12, p. 143.
Examination of Nonresidents Before Trial, see article *EXAMINATION OF PARTIES BEFORE TRIAL*, vol. 8, p. 50.
And see in general articles *PUBLICATION; SERVICE OF PROCESS; SUMMONS AND PROCESS*.

NONSUIT.

See article *DISMISSAL, DISCONTINUANCE, AND NON-SUIT*, vol. 6, p. 823.

NON TENURE.

See articles *ABATEMENT IN PLEADING*, vol. 1, p. 19; *ENTRY, WRIT OF*, vol. 7, p. 727; *REAL ACTIONS*.

NOTARIES.

See articles *AFFIDAVITS*, vol. 1, p. 329; *ATTACHMENT*, vol. 3, p. 6.

NOTES.

See article *NEGOTIABLE INSTRUMENTS*, *ante*, p. 347.

NOTES OF ISSUE.

BY ALFRED PIZEY.

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CROSS-REFERENCES.

See generally articles *CALENDARS AND TRIAL DOCKETS*, vol. 3, p. 801.

As to *Notice of Trial*, see article *TRIALS*.

I. DEFINITION AND CHARACTER.—A note of issue is a memorandum filed with the clerk of the court, to regulate the order in which a civil cause shall appear on the trial calendar and the time and manner of entering it. This method of getting causes on the trial calendar is followed in several states. The note may be made out by either party to the suit. What it shall contain, and how and when it shall be filed, are determined by the local statutes and by rules of court not inconsistent therewith.¹

1. The states having this practice and the sections of the codes or statutes applicable are the following:

Michigan.—2 How. Annot. Stat. 1882, § 7552. See also Circuit Court Rule 16, Stevens's Mich. Rev. Rules of Practice.

Minnesota.—2 Minn. Stat. 1894, § 5362; 1 Minn. Stat. 1894, §§ 1337, 4861.

New Mexico.—A similar practice exists in New Mexico for cases where jury trials are necessary. Comp. Laws 1897, § 2685, subsec. 112.

New York.—Code of Civ. Pro. (Diossy 1891), § 977 (amended 1896, 1 Laws, p. 645, c. 565). §§ 794, 795, 3162. See also Regulations of Circuit Calendars, 13 How. Pr. (N. Y. Supreme Ct.) 345.

North Dakota.—Rev. Code 1895, § 5422.

South Carolina.—Code 1893, § 276.

South Dakota.—Comp. Laws 1887, § 5034.

Washington.—2 Codes and Statutes 1897, § 4970.

Wisconsin.—2 Stat. 1898, § 2845, p.

1094, Appeals and Certiorari, Issue, § 1. See also Rules XIV., XV., Old Circuit Court Rules, 3 Pin. (Wis.) 563.

Notes of Issue in South Carolina.—In South Carolina the note of issue consists in an indorsement made by the plaintiff upon the summons and complaint, or by the defendant upon a copy of said papers, giving the date of the issue and the number of the calendar upon which it shall be placed. Claussen v. Johnson, 32 S. Car. 86; Steffens v. Bulwinkle, 48 S. Car. 357; Camden Bank v. Thompson, 46 S. Car. 499; Threatt v. Brewer Min. Co., 42 S. Car. 92.

Notice of Argument.—Under an early rule of the Supreme Court of New Jersey a similar practice was required with reference to docketing a case for argument. It was, however, held to be merely for the convenience of the clerk, and the failure to file a note was no ground for striking out the cause. Kennedy v. Kennedy, 18 N. J. L. 51, overruling Earl v. Burr, 12 N. J. L.

321.

II. WHEN FILED — 1. In General. — To get a cause properly on the calendar, the note of issue should be filed with reference to the term for which the cause is noticed for trial. Otherwise it will have no validity.¹

2. Amended Pleadings. — Where a change of issue takes place by virtue of amendments to the pleading, the vitality of the old note of issue is gone and a new note is necessary to get the cause on the docket for a subsequent term.²

In Cases Transferred to New York Supreme Court by Constitution of 1894. — Rule 8 of the Appellate Division of the N. Y. Supreme Court relating to the filing of notes of issue must be complied with in cases transferred to the Supreme Court by section 5 of article 6 of the constitution of 1894. *Finelite v. Dorian*, 14 N. Y. App. Div. 125.

Error in Name of Party. — A note of issue in which the Christian name of a party was wrongfully given will not be invalid on that account, where it was apparent that the error was merely clerical, and the adverse party was not in fact misled thereby. *Homburger v. Brandenburg*, 35 Minn. 401.

1. *Siefke v. Siefke*, 21 Misc. Rep. (N. Y. Supreme Ct.) 407; *Bruxey v. Burke*, 21 Misc. Rep. (N. Y. Supreme Ct.) 564; *Gowing v. Levy*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 10; *Finelite v. Dorian*, 14 N. Y. App. Div. 125; *Leonard v. Faber*, 28 Civ. Pro. Rep. (N. Y. Supreme Ct.) 18.

Wisconsin and Michigan. — In Wisconsin it is discretionary with the court to place the cause on the trial docket, though no note of issue is filed, if the cause has been properly noticed for trial. 2 Wis. Stat. 1898, § 2845. And it is so provided by rule in Michigan. Rule 16, Cir. Ct. Rules, Stevens's Mich. Rev. Rules of Practice.

New York. — In the first judicial district, where a cause has been properly noticed for trial for a term and a note of issue filed, no new note of issue is necessary for succeeding terms, in the absence of a change of issue by virtue of amended pleadings (see *infra*, II. 2. *Amended Pleadings*), but the action remains on the calendar until disposed of. *Marden v. Marden*, 28 N. Y. App. Div. 301, 27 Civ. Pro. Rep. (N. Y. Supreme Ct.) 279.

2. *Leonard v. Faber*, 28 Civ. Pro. Rep. (N. Y. Supreme Ct.) 18; *Romaine v. Bowdoin*, 70 Hun (N. Y.) 366; *Wright v. Zimmerman*, 21 Misc. Rep. (N. Y. Supreme Ct.) 407; *Yates v. McAdam*, 18 Misc. Rep. (N. Y. Supreme

Ct.) 295; *Fisher v. Gunn*, 12 Misc. Rep. (N. Y. Super. Ct.) 207; *Gair v. Birmingham*, 20 Civ. Pro. Rep. (N. Y. Super. Ct.) 233; *Graham v. Stirling Ins. Co.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 452; *Coler v. Lamb*, 19 N. Y. App. Div. 236; *Ostrander v. Conkey*, 20 Hun (N. Y.) 421; *Haskin v. Murray*, (Supreme Ct.) 51 N. Y. Supp. 542. *Contra*, *Stevens v. Curry*, 10 Minn. 316.

In *Graham v. Stirling Ins. Co.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 452, the court, in considering this subject, said that "the note of issue required by the code to be filed should be filed as often as the issue is changed in order to comply with the code; that the cause is not on the calendar according to its date of issue unless on the calendar under the date of the new issue; that the code has not provided for the care of amendments after issue joined, and the provisions of section 977 do not apply to such a case; and, finally, that the delay caused by a new notice is for the plaintiff to consider when he applies for his amendment."

"By the service of the amended pleading the issue theretofore joined and noticed for trial was destroyed, and the action cannot be brought on to trial by plaintiff until the new issues have been regularly noticed for trial by him." *Yates v. McAdam*, 18 Misc. Rep. (N. Y. Supreme Ct.) 295.

As to when the old note may be amended *nunc pro tunc* and no new note need be filed, see *infra*, III. *Amendments*.

Waiver of Filing. — The filing of a new note after issues have been changed by amendment will be waived by a failure of the adverse party promptly to stand on his rights. *Levey v. Tribune Assoc.*, 22 Misc. Rep. (N. Y. Supreme Ct.) 245.

And in a case in *Michigan* (*Sherwood, C. J.*, dissenting), it was determined that the absence of all the statutory prerequisites for bringing on a trial might be waived. *Peninsular Stove Co. v. Osmun*, 73 Mich. 570.

3. Supplemental Pleadings. — Supplemental pleadings, however, have no effect on the issues and do not require the filing of a new note.¹

4. Cause Reversed on Appeal. — Where a cause has been reversed in a higher court and remanded for another trial, it seems that a new note of issue is unnecessary.²

III. AMENDMENTS — In General. — A failure to file any note of issue in a case will not generally be remedied by a permission to file one *nunc pro tunc*.³ But such permission may be given as a condition of granting a favor to the adverse party in the suit, as the right to amend and the like.⁴

Amending Old Note. — After the issues have been changed by amendments to the pleading, a note of issue previously filed of record may be amended *nunc pro tunc* if the case has been properly noticed for trial.⁵

1. *Lovatt v. Watson*, 35 Hun (N. Y.) 553; *Fisher v. Gunn*, 12 Misc. Rep. (N. Y. Super. Ct.) 207. See also *Myers v. Metropolitan El. R. Co.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 448.

"The distinction between a supplemental and an amended pleading is that the latter takes the place of the original, while the former does not. When an amended complaint is served, it supersedes the original for the purposes of the issues in an action. A supplemental complaint, however, never takes the place of an original, and the issues joined under the original pleadings remain as issues to be tried in the action; and, indeed, as a general rule, a supplemental complaint does not state a cause of action." *Fisher v. Gunn*, 12 Misc. Rep. (N. Y. Super. Ct.) 207.

2. *Watson v. Phyfe*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 484, 44 Hun (N. Y.) 562, 18 Abb. N. Cas. (N. Y.) 469, 12 Civ. Pro. Rep. (N. Y.) 173. *Contra*, *Mead v. Billings*, 43 Minn. 239.

3. *National Carbonating Co. v. Standard Aerating Co.*, (Supreme Ct.) 47 N. Y. Supp. 1016; *Bruxey v. Burke*, 21 Misc. Rep. (N. Y. Supreme Ct.) 564.

Filing Note in Wrong Office. — A mistake made through filing a note of issue in the wrong office may be remedied by an order *nunc pro tunc*. *Tweedy v. United L. Ins. Assoc.*, 24 Civ. Pro. Rep. (N. Y. C. Pl.) 259.

Under Early New York Codes. — Under section 174 of the code, which provided that the court may in its discretion "supply an omission in any proceeding," a note of issue not filed through mistake might be supplied if relief was asked on the first day of the

term. *Clinton v. Myers*, 43 How. Pr. (N. Y. Supreme Ct.) 95. But where the party waited until the last day but one for filing a note of issue and then was unavoidably prevented from filing it, no relief would be granted. *Wilkin v. Pearce*, 4 How. Pr. (N. Y. Ct. App.) 26.

First Department New York Supreme Court. — A failure to file a note of issue with the clerk of part 3 of the special term in the first judicial district, as required by rule 8 of the appellate division of the first department of the Supreme Court, may be remedied by properly moving under that rule. *Finelite v. Dorian*, 14 N. Y. App. Div. 125.

4. *Wright v. Zimmerman*, 21 Misc. Rep. (N. Y. Supreme Ct.) 407; *Yates v. McAdam*, 18 Misc. Rep. (N. Y. Supreme Ct.) 295; *Graham v. Stirling Ins. Co.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 452; *Myers v. Metropolitan El. R. Co.*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 448; *National Carbonating Co. v. Standard Aerating Co.*, (Supreme Ct.) 47 N. Y. Supp. 1016, where the court said: "While the court may incorporate such a provision in an order as a condition of granting a favor for which the opposite party applies, it becomes effective only through the acceptance of the benefits of the order granting the relief asked for."

5. *Wright v. Zimmerman*, 21 Misc. Rep. (N. Y. Supreme Ct.) 407; *Bruxey v. Burke*, 21 Misc. Rep. (N. Y. Supreme Ct.) 564; *Fisher v. Gunn*, 12 Misc. Rep. (N. Y. Super. Ct.) 207; *Gair v. Birmingham*, 20 Civ. Pro. Rep. (N. Y. Super. Ct.) 233; *Honeywell v. Shaffer*, 18 Civ. Pro. Rep. (N. Y. City Ct.) 336.

NOT GUILTY.

See article *ARRAIGNMENT AND PLEA*, vol. 2, p. 760; *COVENANT*, vol. 5, p. 383; *PLEAS AT LAW*; *TRESPASS*.

NOTICE.

By S. B. FISHER.

I. NECESSITY TO AVER NOTICE, 1066.

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CROSS-REFERENCES.

As to *matters of Substantive Law and Evidence*, consult the title *NOTICE*, AM. AND ENG. ENCYC. OF LAW.

Notice when Used as a Process in Interlocutory Proceedings or Otherwise, see article *SUMMONS AND PROCESS*.

Notice of Defense, see article *NOTICE OR BRIEF STATEMENT OF DEFENSE*, *post*.

As to *the Numerous Notices of Various Kinds Used in Practice*, see the particular titles in this work, and consult the General Index under the title *NOTICE*.

I. NECESSITY TO AVER NOTICE — 1. Matter Within Peculiar Knowledge of Plaintiff. — The General Rule in regard to the averment of notice is that where the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plain-

tiff than of the defendant, the plaintiff should allege that the defendant had notice thereof.¹

Notice Necessary by Terms or Nature of Contract. — Whenever notice is necessary either by the terms or nature of the contract, it is the gist of the action and must be specially averred in the declaration, petition, or complaint, since without such averment no complete right of action can appear.²

2. Matter Not Within Peculiar Knowledge of Plaintiff. — Notice Need Not Be Averred when the matter does not lie more properly in the knowledge of the plaintiff than of the defendant,³ or where

1. *Alabama.* — Huff v. Campbell, 1 Stew. (Ala.) 543; Lawson v. Townes, 2 Ala. 373.

Connecticut. — Hammond v. Gilmore, 14 Conn. 486; Spalding v. Spalding, 2 Root (Conn.) 273; Spencer v. Overton, 1 Day (Conn.) 183.

Illinois. — Chase v. Sycamore, etc., R. Co., 38 Ill. 215.

Iowa. — Brace v. Reid, 3 Greene (Iowa) 422.

Kentucky. — Rountree v. Hendrick, 1 B. Mon. (Ky.) 189.

Massachusetts. — Lent v. Padelford, 10 Mass. 238; Spooner v. Baxter, 16 Pick. (Mass.) 411; Whitaker v. Smith, 4 Pick. (Mass.) 83.

Michigan. — Barrows v. Baughman, 9 Mich. 213.

New Hampshire. — Hillsborough County v. Londonderry, 43 N. H. 451; Watson v. Walker, 23 N. H. 471; Dix v. Flanders, 1 N. H. 246.

New York. — Cole v. Jessup, 2 Barb. (N. Y.) 309; Clough v. Hoffman, 5 Wend. (N. Y.) 500; Shultz v. Depuy, 3 Abb. Pr. (N. Y. Super. Ct.) 252; Harker v. Anderson, 21 Wend. (N. Y.) 372.

Ohio. — Bush v. Critchfield, 4 Ohio 103.

Pennsylvania. — Weigley v. Weir, 7 S. & R. (Pa.) 309.

Tennessee. — Tumley v. Clarksville, etc., R. Co., 2 Coldw. (Tenn.) 327; Harlan v. Dew, 3 Head (Tenn.) 505; Knott v. Hicks, 2 Humph. (Tenn.) 162.

Virginia. — Austin v. Richardson, 3 Call (Va.) 201.

Wisconsin. — Catlin v. Jones, 1 Pin. (Wis.) 130; Susenguth v. Rantoul, 48 Wis. 334.

United States. — Slacum v. Pomery, 6 Cranch (U. S.) 221.

England. — Com. Dig., Pleader, c. 73; Palgrave v. Windham, 1 Stra. 212; Brable v. Hollywell, 1 Cro. Eliz. 250; Rex v. Hollond, 5 T. R. 624; Smith v. —, 11 Mod. 48; Rushton v. Aspinall,

2 Doug. 679; Bristow v. Waddington, 2 B. & P. N. R. 355; Lundie v. Robertson, 7 East 231.

2. *Watson v. Walker*, 23 N. H. 471; *Lent v. Padelford*, 10 Mass. 238; *Clough v. Hoffman*, 5 Wend. (N. Y.) 500; *Rex v. Hollond*, 5 T. R. 621; 1 Saund. on Plead. and Ev. 132.

3. *Alabama.* — Huff v. Campbell, 1 Stew. (Ala.) 543.

California. — People v. Edwards, 9 Cal. 286.

Connecticut. — Marcy v. Crawford, 16 Conn. 549; Hammond v. Gilmore, 14 Conn. 486; Ward v. Henry, 5 Conn. 600; Spalding v. Spalding, 2 Root (Conn.) 273; Bulkley v. Elderkin, Kirby (Conn.) 188; Jones v. Hoyt, 25 Conn. 385; Breed v. Hillhouse, 7 Conn. 523; Williams v. Granger, 4 Day (Conn.) 444.

Kentucky. — Muldrow v. M'Clelland, 1 Litt. (Ky.) 1; Keys v. Powell, 2 A. K. Marsh. (Ky.) 253; Peck v. M'Murtry, 2 A. K. Marsh. (Ky.) 358.

Massachusetts. — Lent v. Padelford, 10 Mass. 230; Hobart v. Hilliard, 11 Pick. (Mass.) 143.

New Hampshire. — Hillsborough County v. Londonderry, 43 N. H. 451; Watson v. Walker, 23 N. H. 471; Dix v. Flanders, 1 N. H. 246.

New York. — Clough v. Hoffman, 5 Wend. (N. Y.) 500; Kemble v. Wallis, 10 Wend. (N. Y.) 374.

Ohio. — Bush v. Critchfield, 4 Ohio 105.

England. — Com. Dig., Pleader, c. 75; Smith v. —, 11 Mod. 48; Cutler v. Southern, 1 Saund. 116; Cole's Case, 1 Cro. Eliz. 97; Rex v. Hollond, 5 T. R. 607.

Demand of Performance of Contract. — Where a promise is to do a certain act or pay a sum of money, and the defendant has not done the act, a special request to pay the money need not be alleged. *Lent v. Padelford*, 10 Mass. 230.

the defendant has the same means of information as the plaintiff.¹

Actions on Awards. — Although it is the usual practice to aver in an action of debt upon an award that the defendant had notice of the award,² yet such averment is held to be unnecessary,³ since the defendant in such a case may take notice of the award as well as the plaintiff.⁴

Action on Indemnity Bond. — If a man be bound to another to indemnify him against the acts of a third person, no notice of those acts is necessary to be alleged.⁵

3. Effect of Omissions or Defects — *a.* **AT COMMON LAW** — **Alder by Verdict.** — At common law it seems that while the omission

Illustration — Delivery of Bond to Obligor. — A declaration stating that the defendant promised to pay in consideration that the plaintiff would deliver up such a bond, averring generally that the bond was given up, is good, without stating notice to the defendant, or stating to whom the bond was delivered. *Smith v. —*, 11 Mod. 48.

Time for Performance. — Where one receives lottery tickets from a manager of a lottery, promising to return them three days before the day to be appointed by the manager for drawing the lottery, or pay five dollars for each ticket, he is bound to take notice of the day appointed at his peril, and there can be a recovery for a breach of the contract without alleging and proving notice of the day of drawing. *Dix v. Flanders*, 1 N. H. 246.

Amount of Indebtedness. — An action lies on a promise to pay or secure an account for services rendered, without averring notice of its amount. *Bulkley v. Elderkin*, Kirby (Conn.) 188.

1. *Huff v. Campbell*, 1 Stew. (Ala.) 543; *Jones v. Hoyt*, 25 Conn. 385; *Muldrow v. McClelland*, 1 Litt. (Ky.) 1; *Keys v. Powell*, 2 A. K. Marsh. (Ky.) 253; *Hobart v. Hilliard*, 11 Pick. (Mass.) 143; *Dix v. Flanders*, 1 N. H. 246; *Lamphere v. Cowen*, 42 Vt. 175.

Defendant's Means of Ascertaining Fact. — An averment of notice of a fact is unnecessary if the fact is reasonably as well within the knowledge of the defendant as of the plaintiff, or if the defendant has the means of ascertaining the happening of the contingency. *Peck v. M'Murtry*, 2 A. K. Marsh. (Ky.) 358.

2. *Hodsden v. Harridge*, 2 Saund. 62a, note.

3. *Hodsden v. Harridge*, 2 Saund. 62a, note; *Rex v. Hollond*, 5 T. R. 620.

4. *Hodsden v. Harridge*, 2 Saund. 62a, note; *Fraunce's Case*, Cro. Car. 133.

Where Submission Requires Notice. — Where, however, it is provided that the award should be notified to the parties, it is no award until notice be given. *Hodsden v. Harridge*, 2 Saund. 62a, note.

5. *Lilly v. Hewitt*, 11 Price 494; *Cutler v. Southern*, 1 Saund. 116; 1 Chitty's Pleading, 320; Com. Dig., tit. Pleader, C, 73; *Clough v. Hoffman*, 5 Wend. (N. Y.) 499.

Illustration. — Where, on the dissolution of a firm, one of the partners covenants to pay all the company's debts, in an action against him for a breach of that covenant by his partner, who has been compelled to pay a debt of the firm, it is not necessary to aver notice to the defendant of the debt, nor of the suit, recovery, and payment. *Clough v. Hoffman*, 5 Wend. (N. Y.) 499. In this case the court said: "I am inclined to think that the averments, the want of which is objected to, were not necessary, and that the declaration is good upon general demurrer. The covenant of the defendants bound them not only to indemnify the plaintiff against, but also absolutely to pay, all the company debts. These debts must be presumed to be as well known to the defendants as to the plaintiff. It is also to be presumed, nay, it is expressly averred in the second count, that all the books of account, vouchers, etc., belonging to the firm were handed over and transferred to them. They therefore had more ample means for ascertaining the debts due from as well to the firm than were in the possession of the plaintiff; and it is a general rule in pleading that where the matter does not lie more properly in the knowledge of the plain-

to aver notice when necessary would be fatal on demurrer or would vitiate a judgment by default,¹ it will be aided by verdict.²

6. UNDER THE CODE — Omission to Aver Notice Fatal. — According to the decisions in the code states it would seem that the omission to aver notice, when necessary, is fatal, and is not aided by verdict,³ but is ground for reversal upon appeal.⁴

Reason of Rule. — This is based upon the ground that the omission is not matter of form to be cured by the judgment,⁵ but that, by reason of such omission, there is a failure to state any title or cause of action.⁶

II. AVERMENT OF EXCUSE OR WAIVER—1. What Allegations Necessary. — Where no notice has been given and the plaintiff

tiff than of the defendant, notice need not be averred.⁷

1. — *v. Henning*, Cro. Jac. 432; Chitty's Pleading 339.

2. *Spencer v. Overton*, 1 Day (Conn.) 183; *Rountree v. Hendrick*, 1 B. Mon. (Ky.) 189; *Colt v. Root*, 17 Mass. 229; *Crocker v. Gilbert*, 9 Cush. (Mass.) 131; *Weigley v. Weir*, 7 S. & R. (Pa.) 309; *Pasteur v. Parker*, 3 Rand. (Va.) 458; *Palgrave v. Windham*, 1 Stra. 214; *Seymour v. Gartside*, 2 D. & R. 55, 16 E. C. L. 72.

Motion in Arrest Denied. — In *Colt v. Root*, 17 Mass. 229, the court said: "The motion in arrest of judgment cannot obtain. The declaration, although defective in form, is substantially good after verdict. A sufficient consideration for the promise is shown and the promise is distinctly averred. The declaration is defective in not alleging notice to the defendant that the plaintiff had performed the condition which was the consideration of the promise. But this notice must be presumed to have been proved, as it was involved in the issue and necessary to have been proved or admitted. The defect is therefore cured by the verdict."

3. *Knott v. Hicks*, 2 Humph. (Tenn.) 162; *Harlan v. Dew*, 3 Head (Tenn.) 505; *Slacum v. Pomery*, 6 Cranch (U. S.) 221.

4. *Tumley v. Clarksville, etc., R. Co.*, 2 Coldw. (Tenn.) 327; *Slacum v. Pomery*, 6 Cranch (U. S.) 221, where the court, holding that it is not too late to allege as error in the appellate court a fault in the declaration which ought to have prevented the rendition of a judgment in the court below, said: "In giving the action of debt to the holder of a bill of exchange, and in giving it the dignity of a specialty, the legislature has not

altered the character of the paper in other respects. It is still a pure commercial transaction governed by commercial law. Notice of the protest is still necessary, and the omission to aver it in the declaration is still fatal. Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege as error, in this court, a fault in the declaration which ought to have prevented the rendition of a judgment in the court below. The judgment is reversed, and the cause remanded with direction that the judgment be arrested."

5. *Harlan v. Dew*, 3 Head (Tenn.) 505.

6. *Harlan v. Dew*, 3 Head (Tenn.) 505; *Tumley v. Clarksville, etc., R. Co.*, 2 Coldw. (Tenn.) 327.

In *Harlan v. Dew*, 3 Head (Tenn.) 505, it was said: "It was decided by the Supreme Court of this state, at its December term, 1840, in *Knott v. Hicks*, 2 Humph. (Tenn.) 162, that the want of an averment of notice of the dishonor of a note in a declaration against the indorser was fatal to the plaintiff's title, and was not aided by verdict. And *a fortiori* this must be so in a judgment by default. There is nothing in the code which shakes this well-established rule of pleading, but much to confirm it. The precedents there given show that these averments are still required, and at section 2883 it is made the duty of the court to see that the rules of pleading are substantially adhered to, and for this purpose it is empowered to impose terms upon delinquents. The omission cannot be obviated upon the notion that it is a matter of form, or is cured by the judgment. It is not the case of a defective statement of a valid title, or right of

relies on facts excusing such notice or showing a waiver thereof, such facts must be specifically alleged by the plaintiff.¹ This is in accordance with the rule that all the facts which constitute the cause of action must be stated by the plaintiff, and every fact on which an action depends is deemed constitutive.²

2. Proof Under Averment of Due Notice. — Although, according to numerous early decisions, both in England and in this country, it has been held that facts excusing notice or showing waiver thereof may be given in evidence under an averment of due notice,³ yet the better rule is, it would seem, that such facts in

recovery, which may be aided by verdict; but it is the entire neglect to state any title whatever."

1. *Indiana*. — *Curtis v. State Bank*, 6 Blackf. (Ind.) 312.

Iowa. — *Lumbert v. Palmer*, 29 Iowa 104.

Massachusetts. — *Blakely v. Grant*, 6 Mass. 386.

Missouri. — *Pier v. Heinrichoffen*, 52 Mo. 333.

New York. — *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665; *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252.

Tennessee. — *Harlan v. Dew*, 3 Head (Tenn.) 505.

Texas. — *Cole v. Wintercost*, 12 Tex. 118.

England. — *Burgh v. Legge*, 5 M. & W. 418; *Allen v. Edmundson*, 2 Exch. 719; *Nurse v. Frampton*, 1 Salk. 214; *Harris v. Richardson*, 4 C. & P. 522, 19 E. C. L. 506.

2. *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665.

In *Pier v. Heinrichoffen*, 52 Mo. 333, the court said: "Facts which dispense with the necessity of making demand of payment and giving notice to the indorser are as essential to the plaintiffs' right of recovery as the fact that the defendant indorsed the note, or that it was executed and delivered by the maker, or that plaintiff is the holder. And the defendant has the right to controvert the one or the other in his answer. He should therefore be informed by proper averments in the petition what facts are relied on to charge him, so that he may have an opportunity to controvert them. Such an allegation of demand of payment at maturity, and due notice thereof to the indorser, could give no intimation to the defendant of the nature of the evidence by which the plaintiff proposed to sustain it. He could only know that he received no notice; but of what steps, if

any, were taken to give it, or of the causes of the failure to give it, or of the facts relied on to excuse the want of it, he of course is presumed to have no knowledge. These are matters within the knowledge peculiarly of the plaintiff, which he should allege in his pleading and prove. He alleges facts the legal effect of which, if true, could charge the defendant; but he claims that he should be allowed to sustain this allegation by facts of a totally different character, not alleged in his petition, because the same legal consequences would follow."

3. *Norton v. Lewis*, 2 Conn. 478; *Windham Bank v. Norton*, 22 Conn. 213; *Whiteford v. Burckmyer*, 1 Gill. (Md.) 127; *Whitridge v. Rider*, 22 Md. 567; *North Bank v. Abbot*, 13 Pick. (Mass.) 465; *Harrison v. Bailey*, 99 Mass. 620; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Pier v. Heinrichoffen*, 52 Mo. 333; *Williams v. Matthews*, 3 Cow. (N. Y.) 252; *Stewart v. Eden*, 2 Cai. (N. Y.) 121.

Massachusetts Rule Disapproved. — In *Colt v. Miller*, 10 Cush. (Mass.) 49, the court, in holding that a declaration that a plaintiff has performed his part of a mutual agreement is not supported by proof that the defendant has waived such performance, said: "The ground taken by the plaintiff is that the defendant, by his conduct, waived his right to be furnished with the materials according to the agreement, and that proof of such waiver supports the averment that the plaintiff did furnish them according to the agreement. And two cases were cited in which it was held that, in an action by the indorsee of a note against the indorser, the allegation that notice was given to the defendant of nonpayment by the promisor was supported by proof that the defendant waived such notice. Those decisions have often

excuse or showing waiver should be specially alleged in order that they may be admissible in evidence.¹

Modification of Rule.—It has, however, been held in at least one case, that where notice has been given but a justifiable delay in giving it at the regular time has occurred, the excusing such delay may be proved under an averment that notice has been given.²

III. MANNER OF ALLEGING NOTICE — 1. In General — Necessity to Allege Facts.—In averring notice, the usual rule prevails that facts, and not conclusions of law, should be pleaded.³ A general averment that the defendant had notice is not sufficient.⁴

Allegation in Terms Unnecessary.—An allegation of facts which, in law, constitute notice is equivalent to an allegation that the parties affected had notice and is sufficient without in terms alleging that notice was given.⁵

Requisite Particularity.—The notice should be particularly set forth in order that the court may judge of its sufficiency.⁶

2. Time of Notice.—Where notice is necessary it ought to appear

been questioned, and are certainly contrary to the law as held in England. *Burgh v. Legge*, 5 M. & W. 418; *Chit. on Bills* (10th Am. ed.) 577. But supposing them to have been rightly decided, they only show a single exception to an established rule."

1. *Curtis v. State Bank*, 6 Blackf. (Ind.) 312; *Hill v. Varrell*, 3 Me. 233; *Pier v. Heinrichoffen*, 52 Mo. 333; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665; *Shultz v. Depuy*, 3 Abb. Pr. (N. Y. Super. Ct.) 252; *Allen v. Edmundson*, 2 Exch. 719; *Nurse v. Frampton*, 1 Salk. 214; *Burgh v. Legge*, 5 M. & W. 418.

Allegations Necessary Under Code.—An averment of due demand and protest of a note was sustained at common law by proof of facts showing an excuse according to the law merchant, or dispensing with actual demand and showing due diligence, but it is not so by the *Missouri* code. The facts proved must correspond with the averment. Every fact which the plaintiff must prove to maintain his suit is constitutive in the sense of the code, and must be alleged. *Pier v. Heinrichoffen*, 52 Mo. 333.

"The object of the new rules of pleading, which, as established by the judges, have prevailed in England for several years past, is in many respects the same as that of our code, and * * * under these rules, it is now settled that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be

specially alleged in the declaration, and * * * proof of these facts is inadequate to the support of a positive averment of presentment, protest, or notice." *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665.

2. *Firth v. Thrush*, 8 B. & C. 387, 15 E. C. L. 242.

3. *Lawson v. Townes*, 2 Ala. 373; *Rapelye v. Bailey*, 3 Conn. 443, 8 Am. Dec. 199. See in general article LEGAL CONCLUSIONS, vol. 12, p. 1020.

4. *Rapelye v. Bailey*, 3 Conn. 443, 8 Am. Dec. 199; *Lawson v. Townes*, 2 Ala. 373.

"Of All Which the Defendant Had Notice."—Notice must be specially averred, and the general averment, "of all which the defendant had notice," is not sufficient. *Lawson v. Townes*, 2 Ala. 373.

"Whereof the Defendant Had Due and Legal Notice."—The general averment, "whereof the defendant had due and legal notice," is not sufficient. *Rapelye v. Bailey*, 3 Conn. 438.

Contra.—In *Hill v. Planters' Bank*, 3 Humph. (Tenn.) 670, a general averment that the defendant had due notice of the premises mentioned in the declaration was held sufficiently to allege notice. See also *Boot v. Franklin*, 3 Johns. (N. Y.) 207, as holding that a general averment of demand and refusal would be sufficient in a suit in a bill against an indorser.

5. *Pottkamp v. Buss*, (Cal. 1896) 46 Pac. Rep. 169.

6. *Rapelye v. Bailey*, 3 Conn. 443; *Wallis v. Scott*, 1 Stra. 88.

that such notice was given in due time.¹

3. Notice to Proper Person. — So, also, it should be alleged that the notice was given to the proper individual in person.²

4. Constructive Notice. — Wherever constructive notice is relied upon, sufficient should be alleged to show a strict compliance with the statutory requirements as to such notice.³

IV. PLEA OR ANSWER DENYING NOTICE — 1. In General. — Where a defendant is not bound to notice a certain fact, notice of which must be averred and proved to authorize a recovery, a plea denying such notice is good.⁴

2. Requisite Allegations — Necessity to Allege Facts. — A plea or answer denying notice should aver facts, and not conclusions of law. Thus an answer denying that notice was served as required by law does not put in issue the actual fact of notice.⁵

1. Com. Dig., tit. Pleader, C, 74; *Rogers v. Mutton*, 7 H. & N. 733.

Illustration. — "When notice is necessary, it ought to appear that it was given in due time; as, if a man promises to pay as much as he disburses at such a fair before the end of the fair, he ought to allege notice of his disbursements given before the end of the fair, otherwise it will be too late." Com. Dig., tit. Pleader, C, 74.

Allegation as to Precise Day. — It is not necessary to allege in the declaration the precise day of demand and notice, as it is sufficient to make out the proper time in proof. *Norton v. Lewis*, 2 Conn. 478.

2. Com. Dig., tit. Pleader, C, 74. *Stweton v. Cushe*, Yelv. 36; *Watson v. Walker*, 23 N. H. 471.

"So it ought to appear that it was given to a proper person, as, if a condition be to repair upon notice, notice ought to be alleged to him who had the entire interest, and not to an underlessee." Com. Dig., tit. Pleader, C, 74. See also *Stweton v. Cushe*, Yelv. 36.

3. *Clark v. Adams*, 33 Mich. 159.

Allegation of Service of Notice by Mail. — An allegation in a declaration under a statute authorizing notice to be given by mail, that the plaintiffs, on a day named, "caused to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," is not an explicit statement of the service of such notice "by depositing the same in the post-office, directed to the owner * * * his agent or attorney, at his or their place of residence, and paying the full postage thereon," which is the mode of service by mail expressly specified by

the statute. *Clark v. Adams*, 33 Mich. 159. In this case the court said: "It is a general rule that when service is sought to be made by mail it should appear that the conditions on which the validity of such service must depend had existence, otherwise the evidence must be deemed insufficient to establish the fact of service."

4. *Rountree v. Hendrick*, 1 B. Mon. (Ky.) 189.

5. *Soeding v. Bartlett*, 35 Mo. 90. In this case the court said: "There was no issue in the case making any proof on the subject of the notice necessary; the allegation of the petition, that the respondents had given such notice, was not denied by the answer, and it therefore stood confessed. The answer denied 'any knowledge or information sufficient to form a belief whether or not a notice was served on them as required by law.' This averment proposed to make an issue as to the lawfulness merely of the notice, and not as to the fact of notice. The fact being admitted, there was no issue for the jury; and, as a consequence, no testimony needed."

Denial of Notice "Directly or Indirectly." — In *Black v. Childs*, 14 S. Car. 312, it was held that a denial of notice "directly or indirectly" is a denial of notice to the defendant through an agent.

Plea Unnecessarily Denying Demand. — Where notice before suit is necessary, but a special demand is unnecessary, and a plea alleges that notice was not given and a demand not made, that part of the plea stating that a demand was not made is superfluous and may, upon general demurrer, be rejected as

Denial of Notice to Either of Joint Parties. — When notice is necessary to be given before suit brought, and the contract upon which it is founded is entered into by two jointly, a plea alleging that notice was not given to them is sufficient on general demurrer. It is not necessary that it should also allege that it was not given to either of them. *Aliter*, if the contract is joint and several.¹

3. By Bona Fide Purchaser. — It is a general rule of equity pleading that to entitle a defendant to protection as a *bona fide* purchaser without notice, he must deny such notice fully and particularly,² even though such notice is not distinctly charged in the bill.³

surplusage. *Watson v. Walker*, 23 N. H. 471.

An Answer Admitting Notice is conclusive upon the defendant, and on the trial it cannot be argued to the jury that the defendant did not admit "reasonable notice." In such case, notice and reasonable notice must be taken to mean one and the same thing. *Larrabee v. Searsport*, 42 Me. 202. See also *Soeding v. Bartlett*, 35 Mo. 90, in which case the answer denied "any knowledge or information sufficient to form a belief whether or not a notice was served on them as required by law." On this averment it was proposed to make an issue, not as to the fact of notice itself, but merely as to its lawfulness. It was held that since notice was admitted there was no issue left for the jury.

1. *Watson v. Walker*, 23 N. H. 471. In this case the court said: "The further objection that the plea does not state that notice was not given to the defendants, or either of them, cannot prevail. The defendants were jointly interested, and the contract on their part was joint. A general allegation of no notice to them is all that is neces-

sary, especially on general demurrer, inasmuch as the undertaking was a joint one by them. A notice to one is a notice to both. Had the obligation been joint and several, the objection might perhaps have been good."

2. *Stanton v. Green*, 34 Miss. 578; *Servis v. Beauty*, 32 Miss. 52; *Wyse v. Dandridge*, 35 Miss. 672; *Gallatian v. Cunningham*, 8 Cow. (N. Y.) 361; *Lowry v. Tew*, 3 Barb. Ch. (N. Y.) 407.

Whether Defense Be by Plea or Answer. — To entitle a party to protection as a purchaser without notice, he must deny notice fully and particularly, whether the defense be set up by plea or answer. *Stanton v. Green*, 34 Miss. 578.

3. *Lowry v. Tew*, 3 Barb. Ch. (N. Y.) 407. See also *Stanton v. Green*, 34 Miss. 576.

Answer Sufficiently Denying Notice. — An answer that the defendant purchased and paid for the property in good faith without any notice, in fact or in law, of the complainant's claim, or of any claim or interest in conflict with the absolute ownership of his vendor, is sufficiently explicit. *Wyse v. Dandridge*, 35 Miss. 672.

NOTICE OR BRIEF STATEMENT OF DEFENSE.

By ALFRED PIZEY.

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CROSS-REFERENCES.

See articles *GENERAL ISSUE*, vol. 9, p. 881; *PLEAS*; also the various titles of actions and defenses at law in this work, and particularly *LIBEL AND SLANDER*, vol. 13, p. 26; *LIMITATIONS*, vol. 13, p. 176; *SET-OFF AND COUNTER-CLAIM*; *USURY*.

I. SCOPE OF THE ARTICLE. — It is intended in this article to treat of the general principles applicable to notices of defense. Their sufficiency in special cases will depend on the allegations necessary to raise particular issues, and as to such the principal titles of actions and defenses at law in this work should be consulted. In the notes also will be found a reference to many cases which have discussed notices of defense in particular proceedings.¹

II. ORIGIN OF NOTICE OF DEFENSE — *Reform in Pleading.* — Of the

1. Coverture of Plaintiff. — *Story v. Baird*, 14 N. J. L. 262.

Disclaimer of Title. — In ejectment, *Chaplin v. Barker*, 53 Me. 275; in writ of entry, *Colburn v. Grover*, 44 Me. 47; *Williams College v. Mallett*, 16 Me. 84.

Duress. — *Chase v. Fish*, 16 Me. 132.

Estoppel. — The facts constituting an estoppel must be alleged in the notice. *Wessels v. Beeman*, 87 Mich. 481.

Failure of Consideration. — *Porter v. Kimball*, 1 Mich. 240; *Pike v. Taylor*, 49 N. H. 124; *Lake Superior Mineral Land Development Co. v. Clapp*, 50 Ill. App. 301.

Forbearance to Sue. — *Williams v. Taylor*, 35 Conn. 592.

Former Adjudication. — *Vaughan v. Morrison*, 55 N. H. 580; *Cade v. McFarland*, 48 Vt. 47; *Lawton v. Tarratt*, 9 New Bruns. 1; *Lawton v. Adams*, 10 New Bruns. 274. Notice of defense of submission to arbitration and an award thereon, *Edwards v. Harrington*, 45 Vt. 63.

Fraud. — *Alpena Nat. Bank v. Greenbaum*, 80 Mich. 1, 74 Mich. 157; *Downer v. Rowell*, 26 Vt. 397; and see *McLeod v. Carman*, 12 New Bruns. 602. Notice of defense of fraudulent statements and representations of the deceased in assumpsit on insurance policies, *Hann v. National Union*, 97 Mich. 513; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525, 19 Ins. L. J. 889; *Pangborn v. Continental Ins. Co.*, 62 Mich. 638; *Residence F. Ins. Co. v. Hannawold*, 37 Mich. 103; *Metropolitan L. Ins. Co. v. Ethier*, 34 Mich. 277; *Home Ins. Co. v. Curtis*, 32 Mich. 402.

Illegal Consideration. — *Myers v. Carr*, 12 Mich. 63.

Justification. — In trespass for personal injuries, *Hanchett v. Bassett*, 35 Conn. 27; *Fullerton v. Mack*, 2 Aik. (Vt.) 415. In trespass on property, *Cook v. Miller*, 11 Ill. 610; *Sherman v. Dutch*, 16 Ill. 283; *Corthell v. Holmes*, 87 Me. 24, 88 Me. 376; *Daggett v. Adams*, 1 Me. 198; *Arrington v. Larabee*, 10 Cush. (Mass.) 512; *Waldo v.*

Waldo, 52 Mich. 94; *Rosenbury v. Angell*, 6 Mich. 508; *Linsley v. Keys*, 5 Johns. (N. Y.) 123; *Hart v. Reynolds*, 1 Heisk. (Tenn.) 214; *Randall v. Preston*, 52 Vt. 198.

Replevin. — *Edwards v. Clemons*, 24 Wend. (N. Y.) 480.

Libel and Slander. — See article LIBEL AND SLANDER, vol. 13, p. 26.

Recoupment. — *Darrah v. Gow*, 77 Mich. 16; *Delaware, etc., Canal Co. v. Roberts*, 72 Mich. 49; *Maltby v. Plummer*, 71 Mich. 578; *Watkins v. Ford*, 69 Mich. 357; *McKevitte v. Feige*, 57 Mich. 374; *Bolt v. Friederick*, 56 Mich. 20; *Ritter v. Daniels*, 47 Mich. 617; *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340; *McHardy v. Wadsworth*, 8 Mich. 349; *Sinker v. Diggins*, 76 Mich. 557.

"The plea of recoupment is in the nature of a declaration in a cross-action for damages arising from a breach of the contract under which the plaintiff's claim for damages arises, and while it need not be as formal as a declaration, it must be so specific as to inform the plaintiff of the nature of the damages, and must specify the breaches of the contract complained of." *Watkins v. Ford*, 69 Mich. 357. To the same effect, see *Sinker v. Diggins*, 76 Mich. 557.

Set-off. — See article SET-OFF AND COUNTERCLAIM.

Tender. — *Clough v. Clough*, 26 N. H. 24.

Title. — In writs of entry, *Creighton v. Proctor*, 12 Cush. (Mass.) 433; *Washington Bank v. Brown*, 2 Met. (Mass.) 293; *Cunningham v. Webb*, 69 Me. 92.

Trespass Qu. Cl. — *Walters v. Tefft*, 57 Mich. 390; *Druse v. Wheeler*, 22 Mich. 439; *McFarlane v. Ray*, 14 Mich. 465; *Manny v. Smith*, 10 Wis. 510. And see *Rogan v. Perry*, 6 Wis. 194.

Replevin. — *Martin v. Watson*, 8 Wis. 315.

Trover Before Justice of the Peace. — *Verbeck v. Verbeck*, 6 Wis. 159.

Usury. — See article USURY.

several steps taken to rid common-law pleading of the technicalities that hampered its usefulness, the first permitted matter to be given in evidence under a plea of the general issue, which theretofore must have been specially pleaded.¹ This, however, proved no more satisfactory than the earlier method of raising an issue. With everything going in under a general plea, it was impossible in many cases to foresee the defense actually made and prepare to meet it.

England.—In England the remedy was sought in a return to special pleading, with provision for new forms to supersede the old technical pleas.²

In the United States the remedy adopted in most common-law states is apparently just the opposite from the English. The difference, however, is more apparent than real. True, the widened scope of the general issue is retained, but the notice or brief statement of defense designates what special matter in bar it shall represent at the trial.³

1. 1 Chit. Pl. (16th Am. ed.) 491; Potter v. Titcomb, 13 Me. 36; 3 Black. Com. 305, where it is said: "Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defense, and to keep the law and the fact distinct. And it is an invariable rule that every defense which cannot be thus specially pleaded may be given in evidence upon the general issue at the trial. But the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other."

2. Modern Reform in Pleading, 1 Am. Law Rev. 631; *Regula Generales*, Hil. Term, 4 Wm. IV., 2 Crompt. & M. 1; 1 Chit. Pl. (16th Am. ed.) 745; *Regula*

Generales, Hil. T. 1853, 1 El. & B., Appendix; Hepburn on Development of Code Pleading 76, 77.

3. "Such notices are not known to the common law. They have been rendered necessary by an extension of the scope of the general issue, and introduced by statute or rule of court." Merrill v. Everett, 38 Conn. 40.

The Ohio Supreme Court, in an early case, speaking of the statute which provided for notice of defense, said: "This is no new provision in our statutes. It was introduced at a very early period, and has been continued until the present time, without any material change. The object of all special pleading is to arrive at the matter of fact or of law litigated between the parties, divested of extrinsic circumstances. Special pleading, in its nature, tends to the advancement of justice. Although this is its legitimate effect, yet in consequence of the technicalities by which it is surrounded it is sometimes perverted by a more artful to entrap a less skilful pleader. The intention of the legislature, by this provision of the statute, was undoubtedly to supersede the necessity of this technicality." Braze v. Blake, 5 Ohio 340.

"To divest legal proceedings of all abstruse technicalities has been a favorite object of modern legislation. Hence the abolition of special pleading, and the substitution of the proceeding by brief statement. It was to render simple, plain, and certain that which before, to the common mind at least, was dark, complicated, and uncer-

A Statutory Method — Rules of Court. — This method of raising an issue is sanctioned by statute in those jurisdictions where it exists;¹ but its use within the statutory limits is regulated for the most part by rules of court.²

tain." *Day v. Frye*, 41 Me. 326, *quoted* in *Moore v. Knowles*, 65 Me. 493. To the same effect, see *Trask v. Patterson*, 29 Me. 499.

Similarity of United States and English Remedies. — In the case of *Tittle v. Bonner*, 53 Miss. 578, the court, in making a comparison between the remedy applied in the United States and that in use in the courts of England, said in part: "The framers of our present law of pleading, as regulated by statute, had in view the valuable improvements introduced by the courts of England by the Reg. Gen. Hil. T., 4 Will. IV.; and the statutes on the subject should be so applied as to effectuate the object in view."

1. The states in which notice of defense is provided by law, and the sections of the codes and statutes applicable, are the following:

Illinois. — 3 Starr & Curt. Annot. Stat. 1896, p. 3003, par. 29.

Maine. — Rev. Stat. 1883, p. 697, § 22; p. 17, § 15.

Michigan. — 2 How. Annot. Stat. 1882, §§ 6875, 7363, 7364, 7366.

Mississippi. — Code 1892, § 686.

New Hampshire. — Pub. Stat. 1891, p. 619, §§ 3, 11.

New Jersey. — 2 Gen. Stat., p. 2553, §§ 117, 119; p. 2554, §§ 129, 134.

Pennsylvania. — 2 Bright. Purd. Dig. (12th ed.), p. 1728 (8); 2 Pepper & Lewis Dig., pp. 3602, 3603 (98).

Tennessee. — Code 1896, §§ 4634, 4635, 4636, 4637.

Vermont. — Stat. 1894, §§ 1149, 1150.

Other Jurisdictions Where Notice of Defense Was Formerly Used. — In *Connecticut*, *Massachusetts*, *New York*, *Ohio*, *Wisconsin*, and *New Brunswick* the common-law system of pleading, with notice of defense as a substitute for special pleas in bar, existed at one time, but has been superseded. See generally cases from these states cited in the course of this article.

Terminology. — In *Maine* and *New Hampshire* "notice of defense" is termed "brief statement." "Specification of defense" is also found in many cases decided in *Pennsylvania*, *Massachusetts*, and *Maine*. There is no

distinction in meaning, however, between these different terms. There was formerly a distinction between a "specification of defense" and a "brief statement" as used in the law of Maine, but this has been wiped out by the existing statute. The old distinction is thus drawn in *Camden v. Belgrade*, 75 Me. 126: "The office of a specification of defense differs from that of a brief statement in this, that the former is in part designed to limit the matters that are controvertible under the general issue — the latter to enable the defendant to introduce what he could not properly prove under that plea alone."

Cases Historically Reviewing Different State Statutes. — For cases from different states where statutes providing notice of defense have been historically reviewed, see *Merrill v. Everett*, 38 Conn. 40; *Cresinger v. Reed*, 25 Mich. 450, *Moore v. Knowles*, 65 Me. 493; *Worthen v. Dickey*, 54 Vt. 277.

Application to Proceedings Before a Justice. — In *New Hampshire* it has been held that the statute is not applicable to proceedings in justice courts. *Colby v. Stevens*, 38 N. H. 191; *Foster v. Leavitt*, 8 N. H. 353. It is otherwise in *Michigan* by express provision of the statute. 2 How. Annot. Stat. Mich. 1892, § 6875. *Quare* whether, where the statutes relating to notices of defense do not govern pleadings in the courts of justices of the peace, a notice can be required in a case tried *de novo* on appeal. *Holman v. Sigourney*, 11 Met. (Mass.) 436.

2. In *Pennsylvania* the giving of notice and everything connected therewith are thus regulated. 2 Bright. Purd. Dig. (12th ed.), p. 1728 (8); 2 Pepper & Lewis Dig., pp. 3602, 3603 (98).

Massachusetts. — And so it was in *Massachusetts* before common-law pleading was superseded. *Shirley v. Shattuck*, 13 Met. (Mass.) 256; *Johnson v. Boardman*, 6 Allen (Mass.) 28.

Michigan. — In *Michigan* the law provides that "the Supreme Court may make such rules in relation to notice of matters intended to be given in evidence by either party as shall be necessary to prevent surprise and to afford

Liberal Construction. — Statutes which provide for notices of defense are remedial in character and should be liberally construed.¹

III. NOTICE AND SPECIAL PLEAS IN BAR — 1. Definition of Notice of Defense. — Notice of defense, then, is a method of presenting an issue in a suit at law which in many jurisdictions has taken the place of special pleas in bar. And, except by virtue of express statute, only issues which were thus raised at common law can be noticed.² Or, as otherwise stated, only matter in bar

opportunity for preparation for trial." 2 How. Annot. Stat. 1882, § 7364.

The Court Rules. — For various rules of court which have been passed in this connection, see the following:

Connecticut. — Rules, 18 Conn. 576, § 3; Rule 1, *Regulæ Generales*, 3 Day (Conn.) 278.

Maine. — Rule IX., Supreme Judicial Ct., 72 Me. 569; Rule IX., Supreme Judicial Ct., 37 Me. 571; *Fox v. Conway F. Ins. Co.*, 53 Me. 107.

Massachusetts. — Rules 56, 57, 58, at Common Law, 24 Pick. (Mass.) 401; *Parker v. Green*, 8 Met. (Mass.) 137.

Michigan. — Circuit Court Rules 7 and 9, Stevens's Revised Rules of Practice.

New Hampshire. — Rules 8-11, 38 N. H. 582; Rules 9-13, 56 N. H. 581; *Rangely v. Webster*, 11 N. H. 302.

Pennsylvania. — 2 Brews. (Pa.) Pr. (2d ed.), § 2782; *Lovegrove v. Christman*, 164 Pa. St. 390, 35 W. N. C. (Pa.) 327; *Ogden v. Lukens*, 12 Pa. Co. Ct. Rep. 588; *Thomas v. Mann*, 28 Pa. St. 520; *Daniel v. Wilver*, 24 Pa. St. 516; *Moyer v. Fisher*, 24 Pa. St. 513; *Covely v. Fox*, 11 Pa. St. 171; *Ellmaker v. Franklin F. Ins. Co.*, 5 Pa. St. 183; *Hamilton v. Moore*, 4 W. & S. (Pa.) 570; *Hale v. Fenn*, 3 W. & S. (Pa.) 361.

Rules of County Courts in England. — English County Court rules require a notice of defense in actions where the defendant "relies upon any statutory defense, or any defense of which he is required by any statute to give notice." *Conroy v. Peacock*, (1897) 2 Q. B. 6, note.

1. *Merrill v. Everett*, 38 Conn. 40; *Bangs v. Snow*, 1 Mass. 181; *Johnson v. Kibbee*, 36 Mich. 269; *Fuller v. Rood*, 3 Hill (N. Y.) 258, where the court said: "One object of the statute allowing notices instead of pleas was to avoid the niceties of special pleading. These, with all the liberality of the modern cases in favor of receiving matter of avoidance under the general issue, still presented real difficulties;

many times working the sacrifice of important rights, even in the hands of skilful lawyers. The statute was highly remedial, and ought to be liberally construed. The remedy should as far as possible be advanced, and the mischief suppressed. This may be effected without destroying any of the principles on which special pleading was founded; much better, I apprehend, than by returning to the ancient system in all its rigor, as England has done. Looking at the late reports of that country, one is led to believe that their system of administering justice, even with the power delegated to the judiciary of prescribing rules for special pleading, is losing more by formal and verbal disputes than it gains by narrowing down the point in controversy."

2. **Connecticut.** — *Buell v. Flower*, 39 Conn. 462.

Illinois. — *Sherman v. Dutch*, 16 Ill. 283.

Maine. — *Sturtevant v. Randall*, 53 Me. 149; *Moore v. Rollins*, 45 Me. 493; *Taylor v. Robinson*, 29 Me. 323; *Chase v. Fish*, 16 Me. 132; *Williams College v. Mallett*, 16 Me. 84; *Gordan v. Peirce*, 11 Me. 213.

Michigan. — *Hill v. Carter*, 101 Mich. 158; *Alpena Nat. Bank v. Greenbaum*, 80 Mich. 1, 74 Mich. 157; *Rawlings v. Cole*, 67 Mich. 431; *Proctor v. Houghtaling*, 37 Mich. 41; *Rosenbury v. Angell*, 6 Mich. 508.

Mississippi. — *Tittle v. Bonner*, 53 Miss. 578.

New Hampshire. — *Folsom v. Brawn*, 25 N. H. 114.

New Jersey. — *Little v. Bolles*, 12 N. J. L. 171; *Tillou v. Britton*, 9 N. J. L. 120; *Ackerman v. Shelp*, 8 N. J. L. 125; *Miller v. Halsey*, 14 N. J. L. 48.

New York. — *Wilmarth v. Babcock*, 2 Hill (N. Y.) 194; *Jennings v. Carter*, 2 Wend. (N. Y.) 446.

Ohio. — *Reynolds v. Rogers*, 5 Ohio 169; *McClintock v. Inskip*, 13 Ohio 21.

Pennsylvania. — *Hale v. Fenn*, 3 W.

other than that which would naturally come in under the common-law general issue can be contained in a notice of defense.¹ In the few instances where, at common law, the general issue also stood for some special matters in bar, such defenses are required by statutes to be noticed.²

Nul Tiel Corporation. — The plea of *nul tiel corporation* was permissible at common law in bar as well as in abatement, and therefore the issue made by it can be raised by a notice of defense.³

& S. (Pa.) 361; *Bender v. Fromberger*, 4 Dall. (Pa.) 436.

Vermont. — *Nott v. Stoddard*, 38 Vt. 25; *Lawrence v. Dole*, 11 Vt. 549.

New Brunswick. — *LeGal v. Duffy*, 8 New Bruns. 57; *Whelpley v. Riley*, 7 New Bruns. 275.

"A special plea, introducing new matter, did not deny the plaintiff's cause of action, but set up the defense by way of confession and avoidance. It is manifest that by the provisions of section 28, matters of fact constituting a legal defense to the action, instead of being set forth, as at common law, by special plea, may be stated in a notice under the general issue, and evidence of such facts given on the trial with like effect as if the same had been specially pleaded." *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

Denying Execution of a Written Instrument. — The defense of nonexecution of a note or other written instrument cannot be made by a notice of defense. *Hunt v. Weir*, 29 Ill. 83; *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

Inconsistent Defenses. — It is no objection to a notice that it sets up several grounds of defense that are inconsistent with each other. *Granite State Bank v. Otis*, 53 Me. 133, three justices dissenting. But see *Creighton v. Proctor*, 12 Cush. (Mass.) 433.

1. **Illinois.** — *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

Maine. — *Corthell v. Holmes*, 87 Me. 24, 88 Me. 376; *Day v. Frye*, 41 Me. 326; *Washburn v. Mosely*, 22 Me. 160.

Mississippi. — *Fitch v. Asher*, 56 Miss. 571.

New Hampshire. — *Stow v. Scribner*, 6 N. H. 24.

Pennsylvania. — *Lovegrove v. Christman*, 164 Pa. St. 390, 35 W. N. C. (Pa.) S27; *Thomas v. Mann*, 28 Pa. St. 520; *Steiner v. Erie Dime Sav., etc., Co.*, 98 Pa. St. 591; *Covely v. Fox*, 11 Pa. St. 174.

Vermont. — *Harlow v. Dyer*, 43 Vt. 358.

2. *Pike v. Taylor*, 49 N. H. 124; 2 N. J. Gen. Stat. 1895, p. 2555, § 129.

Tennessee. — In Tennessee, by statute, all matters of defense, whether by way of denial or avoidance, must be noticed. Code 1896, § 4636.

Partial Defense. — A defense which does not go in bar to the whole of the plaintiff's cause of action, but only to a part thereof, is not usually proper matter to be raised by notice, but may be given in evidence under the general issue. *Wilmarth v. Babcock*, 2 Hill (N. Y.) 194; *Coulam v. Campbell*, 8 New Bruns. 348. *Contra*, *Norton v. Rooker*, 1 Pin. (Wis.) 195; *Brown v. Herron*, 4 Yeates (Pa.) 561.

Matter in mitigation of damages cannot be contained in a notice of defense, since it does not go in bar of the cause of action. *Pallet v. Sargent*, 36 N. H. 496; *Swift v. Dickerman*, 31 Conn. 285. *Contra*, *Van Epps v. Harrison*, 1 Den. (N. Y.) 246.

Where it is doubtful whether an issue may be proved by evidence introduced under the plea of the general issue, it may be raised by a notice of defense. *Farr v. Payne*, 40 Vt. 615; *Ladds v. Vernon*, 14 New Bruns. 350.

Infancy. — The defense of infancy may be introduced under the general issue at common law, and is not proper matter to be contained in a notice of defense. *Thrall v. Wright*, 38 Vt. 494. See also article INFANTS, vol. 10, p. 692.

Partial Payment. — Under Vt. Stat. 1894, § 1150, a defense of partial payment may be proved under the general issue, and need not be noticed. *Worthen v. Dickey*, 54 Vt. 277; *Shaw v. Moon*, 49 Vt. 68. See also *Britton v. Bishop*, 11 Vt. 70.

3. *Townsend v. First Freewill Baptist Church*, 6 Cush. (Mass.) 279; *Christian Soc. v. Maconber*, 3 Met. (Mass.) 235; *Insurance Co. v. Reinoehl*, 4 Pa. Co. Ct. Rep. 161, 4 C. Pl. Rep. (Pa.) 185. *Contra*, because it is of the character of

2. Equitable Defenses. — Under the practice peculiar to *Pennsylvania*, which permits every defense to be made in an action at law, equitable defenses in bar as well as legal defenses can be raised by notice.¹ And in *Maine*, by statute enacted in 1893, such defenses are properly made at law by the general issue with notice.²

3. Place of Each in Pleading. — Notice of defense is the only mode which exists in *Michigan* and *Pennsylvania* for setting up special matter in bar.³ In other states it is provided merely as an alternative method with special pleading in bar.⁴ But in this event the same matter cannot be both specially pleaded and set up in a notice of defense filed with the general issue.⁵

a general issue and not of a special plea in bar setting up an affirmative defense, *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

1. "Our courts of law have, by the instrumentality of a jury, long exercised chancery powers, on the plea of payment with leave, etc. This plea and notice enable the party to give evidence of anything which would prove that, in equity and good conscience, the plaintiff was not entitled to recover; this has been a course pursued for more than sixty years. The notice is considered as, in fact, a bill in equity; payment with leave and notice operate substantially as bills of injunction. The verdict of a jury may be when the injunction would be perpetual, absolute, and unconditional, and when it only would be temporary, or until a particular act was required to be done, conditional. This jurisdiction is the province of the court, as a matter now become the law of the land; the jury is the instrument by which it is to be exercised under the directions of the court." *Hawk v. Geddis*, 16 S. & R. (Pa.) 23. To the same effect, see *Lovegrove v. Christman*, 164 Pa. St. 390, 35 W. N. C. (Pa.) 327; *Steiner v. Eric Dime Sav., etc., Co.*, 98 Pa. St. 591; *Uhler v. Sanderson*, 38 Pa. St. 128; *Moyer v. Fisher*, 24 Pa. St. 513; *Covely v. Fox*, 11 Pa. St. 174; *Ellmaker v. Franklin F. Ins. Co.*, 5 Pa. St. 183; *Hale v. Fenn*, 3 W. & S. (Pa.) 361; *Light v. Stoeven*, 12 S. & R. (Pa.) 431; *Robinson v. Eldridge*, 10 S. & R. (Pa.) 140; *Friedly v. Scheetz*, 9 S. & R. (Pa.) 156; *McDowell v. Meredith*, 4 Whart. (Pa.) 311; *Sparks v. Garrigues*, 1 Binn. (Pa.) 152.

2. An equitable defense, when raised in this manner, is subject to the rules applicable to such a pleading, and not

to those which govern a bill in equity. *Miller v. Waldborough Packing Co.*, 88 Me. 605.

3. 2 How. Annot. Stat. Mich. 1882, § 7361; 2 Bright. Purd. Dig. Pa. (12th ed.), p. 1728 (8); 2 Pepper & Lewis Dig. Pa., pp. 3602, 3603 (98).

4. See generally statutory provisions, *supra*, II. *Origin of Notice of Defense*; and see the following cases: *Gilmore v. Nowland*, 26 Ill. 200; *Harris v. Pearce*, 5 Ill. App. 622; *Sturtevant v. Randall*, 53 Me. 149; *Potter v. Titcomb*, 13 Me. 36; *Trumbull v. Tilton*, 21 N. H. 123; *Nashville, etc., R. Co. v. Conk*, 11 Heisk. (Tenn.) 575; *West v. Tylor*, 2 Coldw. (Tenn.) 96; *LeGal v. Duffy*, 8 New Bruns. 57.

"Special Pleading Is Not Expressly interdicted in the body of the act; but its manifest scope, object, and design is to substitute therefor a brief statement of any special matter." *Potter v. Titcomb*, 13 Me. 36.

5. *New Orleans, etc., R. Co. v. Wallace*, 50 Miss. 244; *Wren v. Hoffman*, 41 Miss. 616; *Westervelt v. Marinus*, 3 N. J. L. 266; *Ripley v. Burgess*, 2 Hill (N. Y.) 360; *Beach v. Springer*, 4 Wend. (N. Y.) 520; *Watts v. Ward*, 6 W. N. C. (Pa.) 206; Rule XLIV., Old Circuit Court Rules, 3 Pin. (Wis.) 573; *Wilson v. Street*, 7 New Bruns. 629.

Mode Used Exclusive. — In some states it is held that one mode only can be followed in a particular case, even though the defenses specially pleaded are other and different defenses from those noticed. *Gilmore v. Nowland*, 26 Ill. 201; *Harris v. Pearce*, 5 Ill. App. 622; *Benjamin v. McConnell*, 9 Ill. 536; *Stolley v. Brooks*, 7 W. L. J. (Ohio) 235, 1 Ohio Dec. (Reprint) 316. *Contra*, *State Bank v. Chetwood*, 8 N. J. L. 1. And see *Oulton v. Palmer*, 7 New Bruns. 364.

IV. CHARACTER AS A PLEADING—1. **The Defendant's Notice.**—A notice of defense is not generally considered as taking the place of the plea in the common-law system of successive pleading until an issue is joined. It rather inaugurates a system analogous to that provided for in other states by codes of civil procedure. No replication or answer is permitted to the issues raised by the notice of defense. The only issue in which the adverse party can join on the record is that made by the general plea.¹

2. **Counter Notice in Reply.**—This rule is not universal, how-

1. *Connecticut.*—Curtis v. Gill, 34 Conn. 49; Hawley v. Middlebrook, 28 Conn. 528.

Illinois.—Bailey v. Valley Nat. Bank, 127 Ill. 332, *affirming* 21 Ill. App. 642; Burgwin v. Babcock, 11 Ill. 28.

Michigan.—McFarlane v. Ray, 14 Mich. 465; Rosenbury v. Angell, 6 Mich. 508.

New Hampshire.—Leslie v. Harlow, 18 N. H. 518.

Ohio.—Van Ingen v. Newton, 1 Disney (Ohio) 458.

Pennsylvania.—Bruner v. Gregg, 4 W. N. C. (Pa.) 368; McCutchen v. Nigh, 10 S. & R. (Pa.) 344.

Tennessee.—Hart v. Reynolds, 1 Heisk. (Tenn.) 208; West v. Tylor, 2 Coldw. (Tenn.) 96.

Vermont.—Nott v. Stoddard, 38 Vt. 25.

"Even under our former system of pleading, the defendant, in every action except ejectment, was permitted to plead the general issue and annex his written notice, in which every defense might be embodied that was properly the subject of the plea; and yet there was no mode in which they could be traversed. The party setting up the facts was always compelled to prove them; though if he had filed his plea, instead of the notice, the plaintiff must have replied before the burden of proof could be thrown upon the defendants." Van Ingen v. Newton, 1 Disney (Ohio) 458.

"The only issue in the case is the general issue. The notice is of matters intended to be introduced under that issue." Rosenbury v. Angell, 6 Mich. 508.

Notice with General Issue in Replication, Rejoinder, etc.—Under some statutes the general issue with notice of new matter may not only be pleaded to the declaration but to any matter

specially pleaded, whether in the plea, replication, rejoinder, or at any other stage in the common-law system of successive pleading. Williams v. Coggeshall, 8 Cush. (Mass.) 377; Robinson v. Hitchcock, 8 Met. (Mass.) 64; Robinson v. Wadsworth, 8 Met. (Mass.) 67. *Quare* Holbrook v. Brooks, 33 Conn. 347.

Criticism of This Construction of the Statutes.—This view of the change made by the statutes which provide for a notice of defense in lieu of special pleas in bar rather than that taken by the Maine courts (see *infra*, IV. 2. *Counter Notice in Reply*) seems to be based solely on precedent. It has been criticised as merely transferring the difficulties experienced by the plaintiff, under the widened scope given the general issue, to the defendant. In an Ohio case the court said: "This form of pleading has not, in my opinion, improved the practice. It confers upon defendants nothing but security against the operation of a special demurrer, whose main office is to point out legal defects and afford opportunity for their remedy by amendment. Whereas it exonerates a plaintiff from selecting one of the many matters he may wish to rely upon in his replication, and from exposing on the record the legal objections he intends to make, and leaves him at liberty, on the trial, to introduce proof of as many matters in opposition to the notice as he pleases, and to rely upon one or all of them; or the option of suddenly springing upon his opponent objections to the notice, to the exclusion of all the testimony offered and of the entire defense." Reynolds v. Rogers, 5 Ohio 169. To the same effect, see Hunt v. Weir, 29 Ill. 83; Clough v. Clough, 26 N. H. 24; McCutchen v. Nigh, 10 S. & R. (Pa.) 344; Modern Reform in Pleading, 1 Am. Law Rev. 631.

ever. In some states a counter notice or brief statement in reply may be filed with the formal joinder on the general issue.¹ And in *Maine* the regular course of pleading subsequent to the plea may also be followed.²

3. Replication by Evidence. — Where no counter notice by brief statement is required the plaintiff may generally reply any matter which will go to defeat the issues pointed out by the defendant's notice, by the introduction of evidence, whether it is such as must formerly have been specially pleaded in the replication or not.³

4. Demurrer to Notice — *a.* **MODES OF ATTACKING NOTICE.** — A notice of defense not being a pleading of record, the question of its sufficiency cannot be raised by demurrer, but only by motion to strike from the files, or at the trial, by objection to the introduction of evidence.⁴ It is otherwise in *Maine*, where the regular

1. *Potter v. Titcomb*, 16 Me. 423, 13 Me. 36; *Miss. Annot. Code* 1892, § 686; 2 N. J. Gen. Stat. 1895, p. 2553, § 119, p. 2555, § 134.

Optional Whether Counter Notice Filed or Not. — In the absence of a rule of court requiring it, the filing of a counter notice or brief statement is optional with the plaintiff in *Maine* and *Michigan*. *Pratt v. Knight*, 29 Me. 471; *Trask v. Patterson*, 29 Me. 499; 2 How. Annot. Stat. Mich. 1882, § 7364.

2. *Miller v. Waldoborough Packing Co.*, 88 Me. 605.

Replication by Rule of Court. — It seems that at one time in *Michigan* a rule of court provided for the filing of a replication to the notice of defense. *Craig v. Grant*, 6 Mich. 447.

3. *Parker v. Green*, 8 Met. (Mass.) 137; *Collier v. Moulton*, 7 Johns. (N. Y.) 109; *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208; *West v. Tylor*, 2 Coldw. (Tenn.) 96; *Nott v. Stoddard*, 38 Vt. 25; *Sulis v. Ferguson*, 10 New Bruns. 110.

Trespass Quare Clausum. — In trespass *quare clausum*, where, had the defendant pleaded *liberum tenementum*, the plaintiff might have newly assigned the *locus in quo*, it is held in *Michigan* that he cannot reach the same end by evidence in reply to that defense when noticed with the general issue. He must particularly assign the *locus in quo* in the first instance or amend his declaration before it is too late. *McFarlane v. Ray*, 14 Mich. 465, wherein the court said: "But the plaintiff contends that under our practice he is entitled to present, by his proofs, any matter in reply to the special notice of

defense which might formerly have been replied and proved under replication. This is true, as a general rule; but whether it can be done in a case requiring a new assignment, and where the replication in fact takes the place of the declaration, is a question quite distinct from that presented in other cases."

The rule as stated in the text was, however, applied in *Wisconsin* to actions of trespass *quare clausum*. *Williams v. Holmes*, 2 Wis. 129; *Bardeen v. Smith*, 7 Wis. 439.

4. *Connecticut*. — *Hawley v. Middlebrook*, 28 Conn. 527.

Illinois. — *Burgwin v. Babcock*, 11 Ill. 28; *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

Mississippi. — *Wren v. Hoffman*, 41 Miss. 616; *New Orleans, etc., R. Co. v. Wallace*, 50 Miss. 244.

New Hampshire. — *Leslie v. Harlow*, 18 N. H. 518.

New York. — *Lowry v. Hall*, 1 Hill (N. Y.) 663.

Ohio. — *Sutliff v. Gilbert*, 8 Ohio 405; *Whitton v. Ripley*, 2 W. L. J. (Ohio) 406, 1 Ohio Dec. (Reprint) 133.

Pennsylvania. — *Robinson v. Eldridge*, 10 S. & R. (Pa.) 140.

Tennessee. — *Nashville, etc., R. Co. v. Conk*, 11 Heisk. (Tenn.) 575; *Brady v. Wasson*, 6 Heisk. (Tenn.) 131; *West v. Tylor*, 2 Coldw. (Tenn.) 96.

Vermont. — *Nott v. Stoddard*, 38 Vt. 25.

Wisconsin. — *Fowler v. Colton*, 1 Pin. (Wis.) 331.

New Brunswick. — *Dowling v. Trites*, 7 New Bruns. 520; *Ladds v. Vernon*, 14 New Bruns. 350.

course of pleading may be followed, notice being merely substituted for special pleas in bar in the original common-law system.¹

b. WAIVER OF OBJECTIONS. — Unless the required mode of attack is made at the proper time in the course of the proceedings, objection to the notice will be deemed waived.²

5. Amendments. — The courts are very liberal in permitting amendments to notices of defense to be made at any stage in the proceedings.³ The power to amend is discretionary with the trial

The Practice to Be Preferred. — "If a brief statement is defective and insufficient, the proper practice is to move the court to reject it. The party will then be obliged to put his statements into a substantial and definite form, or the brief statement will be stricken out. Or a party may object to evidence as it is offered, which would be admissible under a sufficient brief statement, as inadmissible under a defective one. The former practice of moving to reject the brief statement is preferable, however, as the parties will then go to trial without any uncertainty as to their position." *Folsom v. Brawn*, 25 N. H. 114. To the same effect, see *Pike v. Taylor*, 49 N. H. 124; *Hunt v. Weir*, 29 Ill. 83; *Wilson v. Street*, 7 New Bruns. 629; *Oulton v. Palmer*, 7 New Bruns. 364.

Defects in the Declaration. — A motion to have the defendant defaulted because of a defective notice will be treated as an informal demurrer, and will not be allowed if the plaintiff's declaration is also defective; on the ground that the court will decide against the party who committed the first error. *Shelden v. Call*, 55 Me. 159.

It is said in *Friedly v. Scheetz*, 9 S. & R. (Pa.) 156, that a notice of special matter may cure a defect in the declaration.

No Objection on the Ground of Delay. — Owing to the fact that a notice of defense depends upon the general issue and raises no issues in and of itself, the main reason for striking out frivolous pleas, delay, does not apply to it. *Lowry v. Hall*, 1 Hill (N. Y.) 663.

Demurrer to Evidence — Motion to Exclude. — A demurrer to evidence introduced under an insufficient notice, or a motion to exclude it, where such practices are allowed, will be effective. *Burgwin v. Babcock*, 11 Ill. 28; *Rice v. Pollard*, 1 Tyler (Vt.) 230.

Notice as Part of the Record. — Copies of the notice of defense and of any

orders made concerning it are sometimes required to be filed with the record of the cause and annexed to it. Gen. Rule, 7 New Bruns. 90; 2 N. J. Gen. Stat. 1895, p. 2553, § 119. But in determining the effect to be given the record such matters have no place in it. *Stevenson v. Schenck*, 3 N. J. L. 27; *Vaughan v. Havens*, 8 Johns. (N. Y.) 109; *Fowler v. Colton*, 1 Pin. (Wis.) 331; *Lawton v. Adams*, 10 New Bruns. 274.

"A verdict or judgment never concludes the parties in respect to matters alleged in a notice of defense." *Curtis v. Gill*, 34 Conn. 49. To the same effect, see *Hawley v. Middlebrook*, 28 Conn. 527. Unless the court can gather from the record what issues were in fact tried. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476.

1. *Miller v. Waldborough Packing Co.*, 88 Me. 605; *Corthell v. Holmes*, 87 Me. 24; *Stevens v. Webster*, 45 Me. 615, where the court, contrasting demurrers to regular pleadings and demurrers when filed to notices of defense, said: "The demurrer to specifications allowed by another section of the statute is in a devious line, and is of modern invention, unknown to the common law, and practically, as yet, unknown to us."

2. *Blaisdell v. Gladwin*, 4 Cush. (Mass.) 373; *Robinson v. Wadsworth*, 8 Met. (Mass.) 67; *Hawk v. Geddis*, 16 S. & R. (Pa.) 23; *Wilbur v. Trites*, 10 New Bruns. 633. And see *Little v. Bolles*, 12 N. J. L. 171.

Instruction of Court to Disregard Notice. — Where no objection is made to a defective notice at the proper time, the court cannot instruct the jury to disregard the defense attempted to be set up by it, *Nashville, etc., R. Co. v. Conk*, 11 Heisk. (Tenn.) 575; unless it states no legal ground of defense, *Whelpley v. Riley*, 7 New Bruns. 275.

3. *Mason v. Peter*, 58 Mich. 554; *Hopkins v. Briggs*, 41 Mich. 175; *John-*

court, and its action will not be reviewed unless it is clear that the power has been abused.¹

V. NOTICE AND THE GENERAL ISSUE — 1. Generally. — The purpose of the notice of defense being to designate special matter in bar which may be proved under a plea of the general issue, the general plea appropriate to the kind of action brought must always be made with it. The notice by itself, or annexed to any other plea, will have no effect.²

2. Pleas Puis Darrein Continuance. — A defense which has arisen *puis darrein continuance* cannot generally be raised by notice. Defenses so made must be filed subsequently in point of time to the general issue or other plea, and are by way of substitution therefor.³

3. Matter in Abatement. — For a similar reason, that it raises a question which must be disposed of before issue can be joined on the merits, a defense which merely goes in abatement of the suit cannot be noticed.⁴

son v. Kibbee, 36 Mich. 269; Story v. Baird, 14 N. J. L. 262.

1. Cook v. Miller, 11 Ill. 610; Fox v. Conway F. Ins. Co., 53 Me. 107; Men-nock v. Eureka F. & M. Ins. Co., 90 Mich. 236; Hann v. National Union, 97 Mich. 513; Browne v. Moore, 32 Mich. 254; Bellows v. Copp, 20 N. H. 492; Fowler v. Colton, 1 Pin. (Wis.) 331. And see Morley v. Liverpool, etc., Ins. Co., 85 Mich. 210.

A defendant who applies for leave to add a new notice of defense to his plea after the opening of the trial must show in some way that he is entitled to such favor, and that it can be granted without injustice; and in the absence of such showing it is not error to refuse the application. Deline v. Michigan F. & M. Ins. Co., 70 Mich. 435.

Pennsylvania. — Several early cases in Pennsylvania seem to be at odds on questions of amendments to notices of defense. But in fact they merely support the general doctrine as stated in the text, the discretion of the trial court having been abused in some of them and rightly exercised in others. Yost v. Eby, 23 Pa. St. 327; Wilson v. Irwin, 14 S. & R. (Pa.) 177; Sharp v. Sharp, 13 S. & R. (Pa.) 444; McCay v. Burr, 6 Pa. St. 147.

2. Bailey v. Valley Nat. Bank, 127 Ill. 332, affirming 21 Ill. App. 642; Maxwell v. Potter, 47 Me. 487; Brickett v. Davis, 21 Pick. (Mass.) 404; McDaniel v. Allen, 64 Miss. 417.

In Justice Courts. — In Michigan the statute which provides for filing a notice of defense with the general issue

is applicable in justice courts. When the defendant pleads orally, the justice should put the plea on his docket in proper form, but if he omits the general issue and inscribes merely the special defense, that will not affect the rights of the defendant. Eddy v. Manshaun, 42 Mich. 532.

3. True v. Huntoon, 54 N. H. 121; Wisheart v. Legro, 33 N. H. 177; Rangely v. Webster, 11 N. H. 299; Cocheco Mfg. Co. v. Whittier, 10 N. H. 305; Snyder v. Quarton, 47 Mich. 211; Johnson v. Kibbee, 36 Mich. 269; Adams v. Filer, 7 Wis. 306; LeGal v. Duffy, 8 New Bruns. 57.

Contra. — Under the Massachusetts statute it was held that matters *puis darrein continuance* might be set up in a second specification of defense, and former specifications would not be waived thereby. Shirley v. Shattuck, 13 Met. (Mass.) 256. And this practice is now provided in Michigan by rule 9 (former rule 106), Circuit Court Rules. Stevens's Mich. Rev. Rules of Practice; Burt v. Wayne Circuit Judges, 90 Mich. 520, 82 Mich. 251; Grosslight v. Crisup, 58 Mich. 531.

Defense in Bar, Actionem Ulterius Non. — A defense which has arisen after action brought, but before issue joined in bar, pleaded at common law with the allegation *actionem ulterius non* (Gould's Pl. (5th ed.) 547, 1 Chitty's Pl. (16th Am. ed.) 579), may be raised by a notice of defense. Buell v. Flower, 39 Conn. 462; Wisheart v. Legro, 33 N. H. 177; True v. Huntoon, 54 N. H. 121.

4. Strang v. Hirst, 61 Me. 9; Gordan

4. With What Pleas Notice May Be Given — a. COMMON-LAW PLEAS. — A notice of defense can generally be given with every plea which was recognized at common law as a general issue.¹

Nul Tiel Record. — The general issue, however, must be one which raises a question of fact. Hence notice cannot be given with the plea of *nul tiel record*, upon which the issue is a question of law for the court.²

b. STATUTORY AND OTHER CHANGES — (1) Common Form of General Issue. — In some states the general issue may be pleaded in all cases, and a common form is frequently provided either by statute or rule of court.³

(2) Non Est Factum. — The plea of *non est factum*, while not, strictly speaking, a general issue, has been so considered in the practice of most states for purposes of annexing a notice of defense.⁴ In *Pennsylvania*, however, a general issue was early invented for all actions of debt. For those other than debt on covenant it consisted of the plea of payment with leave to give

v. Peirce, 11 Me. 213; *Alexander v. Pitts*, 7 Cush. (Mass.) 503; *Holdridge v. Holdridge*, 53 Vt. 546; *Thomson v. Keith*, 11 N. Bruns. 133.

Non-tenure — Disclaimer. — In *Maine*, by statute, the defense of non-tenure in an action of dower must be specially pleaded in abatement and cannot be raised by a notice. *Manning v. Laboree*, 33 Me. 343.

Disclaimer of title in writ of entry actions is also made matter of abatement by law, but the plea may be in the form of a brief statement. *Chaplin v. Barker*, 53 Me. 275; *Colburn v. Grover*, 44 Me. 47.

1. "If there be a general issue, the party has a right secured to him by statute to annex such notice." *Beach v. Springer*, 4 Wend. (N. Y.) 519. And see the *Wisconsin* statute. *Williams v. Holmes*, 2 Wis. 129.

"It is believed the practice has been to suffer special matter to be given in evidence by way of notice, in all actions and under every general issue." *Lawrence v. Dole*, 11 Vt. 549.

Scire Facias. — The plea of the general issue with notice of special matter is proper in an action of *scire facias*. It is an action at law within the meaning of the statute. "Though a judicial writ it is still an action, may be pleaded to as such, and is released or discharged by a release of all actions." *Smyth v. Ripley*, 33 Conn. 306. And see *Brazee v. Blake*, 5 Ohio 340; *Robinson v. Eldridge*, 10 S. & R. (Pa.) 140; *Potter v. Titcomb*, 16 Me. 423; *Calais*

v. Bradford, 51 Me. 414. *Quare*, *LeGal v. Duffy*, 8 New Bruns. 57.

2. *Tappan v. Heath*, 16 N. H. 34; *Barheydt v. Haverly*, 1 Wend. (N. Y.) 70; *Raymond v. Smith*, 13 Johns. (N. Y.) 329; *Bullis v. Giddens*, 8 Johns. (N. Y.) 82; *Whiton v. Ripley*, 2 W. L. J. (Ohio) 406, 1 Ohio Dec. (Reprint) 133.

Debt on Foreign Judgments. — In *Beale v. Berryman*, 30 N. J. L. 216, it was held, *Brown, J.*, dissenting, that while *nil debet* standing alone was not a good plea to an action of debt on a sister state judgment, it was the general issue for the purpose of annexing notice of defense containing special matter in bar. It is stated in the course of the dissenting opinion, after a review of *Bullis v. Giddens*, 8 Johns. (N. Y.) 82, *supra*, that by statute in New York it was subsequently made possible to give notice with a plea of *nul tiel record*.

3. *Smyth v. Ripley*, 33 Conn. 306; *Goodridge v. Ross*, 6 Met. (Mass.) 487; Rules 54, 55, at Common Law. 24 Pick. (Mass.) 400; 2 How. Annot. Stat. Mich. 1882, § 7362; Annot. Code Miss. 1892, § 686; 2 Bright. Purd. Dig. Pa. (12th ed.), p. 1727 (1). (2); 2 Pepper & Lewis Dig. Pa., pp. 3601, 3602 (96), (97); Tenn. Code 1896, §§ 4634, 4635. And see Pub. Stat. N. H. 1891, p. 619, § 3.

4. *Beach v. Springer*, 4 Wend. (N. Y.) 520; *Provost v. Calder*, 2 Wend. (N. Y.) 517; *Lawrence v. Dole*, 11 Vt. 549. And see *Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642; *Covely v. Fox*, 11 Pa. St. 174.

special matters in evidence. And such special matter must generally be pointed out by a notice of defense.¹ In debt on covenant the practice is the same, the plea being covenants performed with leave, etc.² And while by the existing statute a common form of general issue is provided for all cases, with which notice may be given, this kind of plea is also retained.³

5. Place of Each in Pleading—*a. THE GENERAL ISSUE.*—It may be stated as a general principle that the office of the general issue at common law is not changed in the least by the statutory provisions concerning notice. It is the only plea on the record, and the plaintiff must sustain the issues it raises by proof. The defendant in his turn may rely either upon it or upon the notice raising new matter in bar.⁴

b. ADMISSIONS MADE BY NOTICE AND PLEA—*Notice of Defense.*—As a consequence of this relation of notice and plea the facts

1. "Technically speaking, there is no general issue in debt upon a specialty. The common-law plea of payment is special, as is also its usual companion, *non est factum*. But yet, it is not to be doubted, the present instance is within the spirit of the rule. So far as I am informed, a like rule, or one very similar, exists in all our courts of common pleas. These were instituted for the avowed purpose of regulating the time and manner of notice, rendered necessary by our short method of pleading, and particularly in reference to our peculiar equitable plea of payment. Some of them expressly speak of this plea, while others, as in the instance before us, use the phrase 'general issue.' But however worded, each has the same object in view, and accordingly everywhere the construction has been the same. Indeed, it very seldom occurs that a general issue plea, properly so denominated, requires the aid of special notice to give it full effect. This is only requisite where otherwise there must be a special plea. But under our practice the plea of payment, with leave, etc., from its almost universal use in actions of debt, has come to be regarded as a species of general plea, capable, with its concomitant notice, of adaptation to every variety and complication of fact. It is consequently under this plea that notice is most frequently required. In view of this, the end principally proposed by the rule is the regulation of this notice, though doubtless it extends to all other cases where, under any state of pleading, notice may be found necessary.

This, I repeat, has been the general exposition by the tribunals, who are the best exponents of their own rules and methods of procedure; an exposition it would be mischievous to overturn upon a mere verbal criticism." *Covely v. Fox*, 11 Pa. St. 171. To the same effect, see *Uhler v. Sanderson*, 38 Pa. St. 128; *McCay v. Burr*, 6 Pa. St. 147; *McCutchen v. Nigh*, 10 S. & R. (Pa.) 344; *Hollingsworth v. Ogle*, 1 Dall. (Pa.) 257; and cases *supra*, III. 2. *Equitable Defenses*.

2. *Webster v. Warren*, 2 Wash. (U. S.) 456; *Ellmaker v. Franklin F. Ins. Co.*, 5 Pa. St. 183; *Roth v. Miller*, 15 S. & R. (Pa.) 100; *Roop v. Brubacker*, 1 Rawle (Pa.) 305; *Bender v. Fromberger*, 4 Dall. (Pa.) 436.

3. 2 Bright. *Purd. Dig. Pa.* (12th ed.), p. 1727 (1), (2); 2 Pepper & Lewis *Dig. Pa.*, pp. 3601, 3602 (96), (97); 2 Brews. (Pa.) *Pr.* (2d ed.), § 2782; *Lovegrove v. Christman*, 164 Pa. St. 390, 35 W. N. C. (Pa.) 327; *Mershon v. Anderson*, 40 W. N. C. (Pa.) 192.

4. *Connecticut*.—*Curtis v. Gill*, 34 Conn. 49.

Illinois.—*Bailey v. Valley Nat. Bank*, 127 Ill. 332, *affirming* 21 Ill. App. 642.

Maine.—*Corthell v. Holmes*, 87 Me. 24, 88 Me. 376; *Moore v. Knowles*, 65 Me. 493; *Day v. Frye*, 41 Me. 326; *Washburn v. Mosely*, 22 Me. 160.

Massachusetts.—*Shirley v. Shattuck*, 13 Met. (Mass.) 256; Rule 58, at Common Law, 24 Pick. (Mass.) 401.

New Hampshire.—*Bump v. Smith*, 11 N. H. 48.

New York.—*Norman v. Wells*, 17 Wend. (N. Y.) 136; *Kane v. Sanger*, 14

set up in a notice of defense, though usually in confession and avoidance of the cause of action, and therefore inconsistent with the general issue pleaded, do not constitute admissions of which advantage can be taken by the adverse party, either as matter of evidence or otherwise.¹

General Issue. — Nor is the burden of proving facts which were considered at common law as having been admitted by the plea of the general issue placed on the adverse party by a notice which contradicts such admissions.²

c. MODERN TENDENCY. — The modern tendency, however, is to construe the general issue and the notice of defense together, placing on the adverse party the burden of proving only those issues raised by the general plea which are not admitted in the notice.³ But this does not go to the extent of giving effect to

Johns. (N. Y.) 89; Smith v. Gregory, 8 Cow. (N. Y.) 114. And see Dale v. Roosevelt, 9 Cow. (N. Y.) 307.

Tennessee. — West v. Tylor, 2 Coldw. (Tenn.) 96.

Wisconsin. — Fowler v. Colton, 1 Pin. (Wis.) 331.

"The party who has filed a brief statement is not bound to prove or rely upon anything contained in it, but may resort to any proof, in defense, which he could have offered under the general issue alone; and the action may be tried as if the brief statement had never existed." *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305.

In Case Notice or Plea Is Defective. — Where the plea of the general issue is defective, it will not prevent the issues raised in a good notice of defense from being tried, and *vice versa*. *Moore v. Knowles*, 65 Me. 493; *Corthell v. Holmes*, 87 Me. 24.

Withdrawing Notice of Defense. — The notice of defense not being a distinct pleading, but merely annexed to the plea of the general issue, may be withdrawn at the option of the party giving it. *Barden v. Douglass*, 71 Me. 401; *Donovan v. Halsey F. Engine Co.*, 58 Mich. 38; *Blaisdell v. Roberts*, 37 Me. 239.

1. *Gordan v. Peirce*, 11 Me. 213; *Solomons v. Chesley*, 58 N. H. 238; *True v. Huntoon*, 54 N. H. 121; *Vaughan v. Havens*, 8 Johns. (N. Y.) 109; *Sutliff v. Gilbert*, 8 Ohio 405; *Smith v. Shumway*, 2 Tyler (Vt.) 74; *Vliet v. Rowe*, 1 Pin. (Wis.) 413.

"The effect of the plea, and whether it admits the defendant to be in possession claiming a freehold, is certainly not to be determined by the shape

which the defendant finally concludes to give to his defense, upon the trial, nor upon the question whether he has offered anything in evidence under his brief statement, or which he could not have offered under the general issue alone." *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305.

Libel and Slander. — A notice of defense in an action for libel or slander which sets up the truth in justification cannot be used by the plaintiff as evidence of malice. *Wheaton v. Beecher*, 79 Mich. 443; 2 How. Annot. Stat. Mich. 1882, § 7776. See also article LIBEL AND SLANDER, vol. 13, p. 26.

Issue Formed by Counter Notice or Brief Statement. — The omission of a denial in a counter brief statement of some matter alleged in the brief statement cannot control or destroy the effect of testimony properly received under the general issue. *Trask v. Patterson*, 29 Me. 499.

2. *Colburn v. Grover*, 44 Me. 47; *Treat v. Strickland*, 23 Me. 234; *Johnson v. Boardman*, 6 Allen (Mass.) 28. And see *supra*, III. 1. *Definition of Notice of Defense*, paragraph Nul Tiel Corporation. But compare *Wheelewright v. Freeman*, 12 Met. (Mass.) 154.

3. *Miller v. Waldoborough Packing Co.*, 88 Me. 605; *Cutler v. Currier*, 54 Me. 81; *Fox v. Conway F. Ins. Co.*, 53 Me. 107; *Skillings v. Norris*, 50 Me. 72; *Stevens v. Adams*, 45 Me. 611; Rule 9, Supreme Judicial Ct., 72 Me. 569; Rule 9, Supreme Judicial Ct., 37 Me. 570; Circuit Court Rule VII., *Stevens's Mich. Rev. Rules of Practice*.

Replevin. — In *Maine*, in an action of replevin *in cepit*, the admission made by the plea of the general issue alone,

allegations in a notice which are unnecessary to the case of the party making them.¹

VI. FORM AND SUBSTANCE—1. Early View.—As regards form, the object of statutes which provide notices of defense in the stead of special pleas in bar is to rid pleading of the technicalities of the latter. The form of the notice is therefore immaterial and not open to objection by the adverse party. As to the substance of the notice the early view taken by the courts was that the allegations should be as full and particular as if contained in a special plea.² The test usually put forth is, Would the facts as alleged in the notice have been good upon general demurrer, had they been specially pleaded?³

2. Prevailing Doctrine.—There is no difference of opinion among the authorities as regards the form of the notice, but the prevailing doctrine as to substance is more liberal than that entertained by the early cases. All comparisons between notices and special pleas, and tests by general demurrer or motion for judgment *non obstante veredicto*, have been abandoned. Instead the rule is that the notice must state sufficient fairly to apprise the adverse party

of title to the property in the plaintiff, is taken away by a brief statement which alleges title in the defendant or in a third person, filed with the general plea. *Pope v. Jackson*, 65 Me. 162; *Cooper v. Bakeman*, 32 Me. 192; *Moulton v. Bird*, 31 Me. 296; *Dillingham v. Smith*, 30 Me. 370; *Greene v. Dingley*, 24 Me. 135; *Vickery v. Sherburne*, 20 Me. 34; *Gordan v. Peirce*, 11 Me. 213.

1. "The statute allowing a written notice of the special facts relied upon in the defense as a substitute for special pleas was not intended to change the burden and the order of proof." *Capen v. Woodrow*, 51 Vt. 106.

2. *Maine*.—*Taylor v. Robinson*, 29 Me. 323; *Daggett v. Adams*, 1 Me. 198. *Massachusetts*.—*Brickett v. Davis*, 21 Pick. (Mass.) 404.

Mississippi.—*Tittle v. Bonner*, 53 Miss. 578; *Powers v. Presgroves*, 38 Miss. 227.

New Hampshire.—*Folsom v. Brawn*, 25 N. H. 114; *Clough v. Clough*, 26 N. H. 24.

New York.—*Van Epps v. Harrison*, 1 Den. (N. Y.) 246; *Jennings v. Carter*, 2 Wend. (N. Y.) 446.

Ohio.—*McClintock v. Inskip*, 13 Ohio 21. And see *Van Derveer v. Sutphin*, 5 Ohio St. 293.

Pennsylvania.—*Thomas v. Mann*, 28 Pa. St. 520; *Moatz v. Knox*, 11 Pa. St. 268.

Tennessee.—*Nashville, etc., R. Co. v. Conk*, 11 Heisk. (Tenn.) 575; *Hart v. Reynolds*, 1 Heisk. (Tenn.) 208; *West v. Tylor*, 2 Coldw. (Tenn.) 96.

Vermont.—*Randall v. Preston*, 52 Vt. 198; *Edwards v. Harrington*, 45 Vt. 63; *Nott v. Stoddard*, 38 Vt. 25; *Fullerton v. Mack*, 2 Aik. (Vt.) 415; *Herring v. Selding*, 2 Aik. (Vt.) 12; *Barney v. Goff*, 1 D. Chip. (Vt.) 304; *Bowdish v. Peckham*, 1 D. Chip. (Vt.) 144.

New Brunswick.—*Wilson v. Street*, 7 New Bruns. 629.

The Fact that Several Parties Join in a notice of defense, some of whom cannot avail themselves of the matter raised therein, will not prevent those entitled from introducing evidence under the notice. *Jennings v. Carter*, 2 Wend. (N. Y.) 446.

3. *Shepard v. Merrill*, 13 Johns. (N. Y.) 475; *Thompson v. Bowers*, 1 Dougl. (Mich.) 321; *McClintock v. Inskip*, 13 Ohio 21; *Reynolds v. Rogers*, 5 Ohio 169; *Brazee v. Blake*, 5 Ohio 340; *Norton v. Rooker*, 1 Pin. (Wis.) 195; *Ladds v. Vernon*, 14 New Bruns. 350.

Motion for Judgment Non Obstante Veredicto.—"The general rule undoubtedly is that the notice should contain all the facts necessary to sustain a plea against a general demurrer, or, at least, a motion for judgment *non obstante veredicto*." *Bishop v. Earl*, 17 Wend. (N. Y.) 316, quoted in *Fowler v. Colton*, 1 Pin. (Wis.) 331.

of the true ground and substance of the issues which will be raised, that he may prepare to meet them and avoid surprise at the trial.¹ This may be done in some instances by merely giving

1. *Connecticut*. — *Williams v. Taylor*, 35 Conn. 592; *Merrill v. Everett*, 38 Conn. 40.

Illinois. — *Cook v. Miller*, 11 Ill. 610.

Maine. — *Clement v. Garland*, 53 Me. 427; *Ministerial, etc.*, *Fund v. Rowell*, 49 Me. 330.

Massachusetts. — *Bangs v. Snow*, 1 Mass. 181.

Michigan. — *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525, 19 Ins. L. J. 889; *Farmers' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251; *Browne v. Moore*, 32 Mich. 254; *Cresinger v. Reed*, 25 Mich. 450; *Myers v. Carr*, 12 Mich. 63; *McHardy v. Wadsworth*, 8 Mich. 349; *Rosenbury v. Angell*, 6 Mich. 508; *Porter v. Kimball*, 1 Mich. 240.

New York. — *Edwards v. Clemons*, 24 Wend. (N. Y.) 480; *Bissell v. Cornell*, 24 Wend. (N. Y.) 354; *Mitchell v. Borden*, 8 Wend. (N. Y.) 570; *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 746, reversing 20 Johns. (N. Y.) 144; *Shepard v. Merrill*, 13 Johns. (N. Y.) 475.

Pennsylvania. — *Alexander v. Pusey*, 13 S. & R. (Pa.) 453; *Robinson v. Eldridge*, 10 S. & R. (Pa.) 140; *McDowell v. Meredith*, 4 Whart. (Pa.) 311; *Brown v. Herron*, 4 Yeates (Pa.) 561; *Greenwalt v. Born*, 3 Yeates (Pa.) 6; *Bender v. Fromberger*, 4 Dall. (Pa.) 436.

Wisconsin. — *Fowler v. Colton*, 1 Pin. (Wis.) 331.

New Brunswick. — *LeGal v. Duffy*, 8 New Bruns. 57.

"The notice is not required to contain all the requisites of a special plea under the former practice, nor is it required to contain the substance of a special plea, or be good on general demurrer." *Liggett Spring, etc., Co. v. Michigan Buggy Co.*, 106 Mich. 445.

"It is not necessary that specifications of defense should be equivalent in terms to a technical plea, though they state the grounds of defense more particularly. What would be sufficient for a plea might be insufficient for specifications of defense. *Hart v. Hardy*, 42 Me. 196. And it is equally true that what would be bad as a plea might be good as a specification of the defense." *Fenlason v. Rackliff*, 50 Me. 362.

"Looking then to the current of decisions in adjoining states and the progress of legislation and professional sentiment in this, we must hold that the statute is remedial and must be liberally construed; that the question in all cases in relation to a notice is one of sufficiency in order to let in the evidence offered, and the rules in relation to variance cannot be applied to it; that it must state the ground and substance of the defense, but need not state matters of mere form; that it is sufficient if it fairly apprise the plaintiff of the true ground and substance of the defense; that the relation of the parties to the subject-matter of it may be considered in determining its sufficiency; that it cannot be treated as a nullity by reason of any omission, and the defendant can give in evidence the matter actually stated; and that the plaintiff, if not satisfied with it, may apply to the court to have it made more specific." *Merrill v. Everett*, 38 Conn. 40.

In Justices' Courts. — The same rule is applicable to pleadings of this character when they are extended by the statute to the courts of justices of the peace. *Watkins v. Ford*, 69 Mich. 357.

Special Plea as Notice. — In those jurisdictions where special pleas have been abolished, if one is filed with the general issue it will be construed as a notice of defense. *Benedict v. Smith*, 48 Mich. 593. But where special pleas are allowed as alternative pleadings with the general issue and notice, they will not be so considered. *Robinson v. Palmer*, 7 New Bruns. 223.

Certainty to a Common Intent. — The test applied in some cases is whether the new matter raised by the notice is alleged with certainty to a common intent. *Corthell v. Holmes*, 87 Me. 24, 88 Me. 376; *Day v. Frye*, 41 Me. 326; *Washburn v. Mosely*, 22 Me. 160; *Applenton v. Donaldson*, 3 Pa. St. 381.

Variance. — The rules which govern variance between the allegation and the proof are not applicable to notices of defense, unless in consequence thereof the notices fail to convey to the adverse party the information to which he is entitled. *Manion v. Creigh*, 37 Conn. 462; *Merrill v. Everett*, 38 Conn. 40; *Kane v. Sanger*, 14 Johns. (N. Y.)

such information that by the exercise of reasonable diligence the adverse party may ascertain for himself what defenses are relied upon.¹ Even if the notice should not be thus specific, no objection to its sufficiency will be considered if it is apparent that the adverse party was not in fact misled by its defects.²

89. But see *Bangs v. Snow*, 1 Mass. 181; *Lawrence v. Knies*, 10 Johns. (N. Y.) 141; *Thomas v. Mann*, 28 Pa. St. 520.

Illustrations.—A notice containing mere statements, as that the plaintiff has no claim, or that the cause of action was without legal and sufficient consideration, or was obtained through fraud and misrepresentations, without alleging facts to substantiate them, is insufficient. *Clough v. Crossman*, 47 Me. 349; *Ames v. Palmer*, 42 Me. 197; *Tittle v. Bonner*, 53 Miss. 578; *Hale v. Fenn*, 3 W. & S. (Pa.) 361. And see *Greenwalt v. Born*, 3 Yeates (Pa.) 6.

Facts, and not the evidence in proof of them, must be alleged in a notice. *Hartmann v. Keystone Ins. Co.*, 21 Pa. St. 466; *Appleton v. Donaldson*, 3 Pa. St. 381.

It is no objection to the notice that the defense is alleged hypothetically. *Morris Canal, etc., Co. v. Van Vorst*, 21 N. J. L. 121; *LeGal v. Duffy*, 8 New Bruns. 57.

Notice of defense setting up the statute of limitations in an action in a justice court which alleges non assumption within six years, instead of *actio non accrevit*, is sufficient. *Snyder v. Windsor*, 44 Mich. 140.

1. *Cook v. Miller*, 11 Ill. 610; *Fuller v. Rood*, 3 Hill (N. Y.) 258; *Bishop v. Earl*, 17 Wend. (N. Y.) 316; *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 144; *Norton v. Rooker*, 1 Pin. (Wis.) 195. And see *Pike v. Taylor*, 49 N. H. 124; *Moatz v. Knox*, 11 Pa. St. 268.

"Much may be left to implication, to a general and comprehensive mode of expression, and to the compass and force of certain words, which would not be admissible in a plea. That the

justice rendered judgment, for instance, imports that he rendered a valid judgment; viz., after notice to the party, and in a case where he had jurisdiction of the subject-matter. Otherwise there could be no judgment, properly so called." *Fuller v. Rood*, 3 Hill (N. Y.) 258.

Illustrations.—Sufficient must be contained in the notice to point out the defense which will be raised and the sources where the adverse party may obtain other necessary information. Thus the fact that issues have been raised on a former trial will not entirely dispense with the giving of notice. *Rentzheimer v. Bush*, 2 Pa. St. 88; *Beyer v. Fenstermacher*, 2 Whart. (Pa.) 95; *McClurg v. Willard*, 5 Watts. (Pa.) 275. *Contra*, *Goodwin v. White*, 1 Brown (Pa.) 272.

Neither will the giving of an affidavit of defense which is required by a statute take the place of a notice. *Sullivan v. Johns*, 5 Whart. (Pa.) 367; *Simmons v. West*, 2 Miles (Pa.) 196. *Contra*, *Lycoming Ins. Co. v. Hakes*, 12 Leg. Int. (Pa.) 270.

But where an affidavit filed in a cause is as specific as a notice should be, a notice which refers to it for the issues which will be raised at the trial, and attaches a copy, will be sufficient. *Arnold v. Blabon*, 147 Pa. St. 372; *Rodgers v. Kichline*, 28 Pa. St. 231. *Contra*, *Erwin v. Leibert*, 5 W. & S. (Pa.) 103.

An agreement by counsel to give special matter in evidence will not dispense with notice. *Wilson v. Crosby*, *Wright* (Ohio) 288.

2. *Merrill v. Everett*, 38 Conn. 40; *Davis v. Maxwell*, 12 Met. (Mass.) 286; *Brooks v. Bemiss*, 8 Johns. (N. Y.) 455; *Lang v. Gilbert*, 9 New Bruns. 359.

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By A. C. BOYD AND E. A. CRAIGHILL, JR.

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CROSS-REFERENCES.

As to *Obstruction of Streets and Highways*, see the article *STREETS AND HIGHWAYS*.

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For the *Substantive Law relating to Nuisances*, see Am. and Eng. Encyc. of Law (2d ed.), titles *ABATEMENT OF NUISANCES*, vol. 1, p. 63; *NUISANCES*.

I. NATURE, FORM, AND ELECTION OF REMEDIES—1. Remedy by Summary Abatement.—The first and most primitive remedy for a nuisance is that of summary abatement. The common law has always recognized the right of a private individual to abate, at his own peril, a nuisance whereby he is injured.¹

2. Remedy by Indictment.—The proper and usual remedy for a nuisance which is purely public in its character is by indictment brought on behalf of the public by the proper officer.² However, in proper cases equity will take jurisdiction of suits to suppress public nuisances.³

1. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Abatement of Nuisances*, vol. 1, p. 63.

2. *Arkansas*.—Wellborn v. Davies, 45 Ark. 83; Harvey v. De Woody, 18 Ark. 252.

California.—Yolo County v. Sacramento, 36 Cal. 193.

Delaware.—Bailey v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 389.

Illinois.—Dunning v. Aurora, 40 Ill. 481.

Iowa.—Ewell v. Greenwood, 26 Iowa 377.

Kentucky.—Seifried v. Hays, 81 Ky. 377; Gates v. Blincoc, 2 Dana (Ky.) 159; Com. v. Clarke, 1 A. K. Marsh. (Ky.) 323.

Maine.—Gerrish v. Brown, 51 Me. 256.

Massachusetts.—Hartshorn v. South Reading, 3 Allen (Mass.) 501; Com. v. New Bedford Bridge, 2 Gray (Mass.) 339; Com. v. Nashau, etc., R. Corp., 2 Gray (Mass.) 54; Com. v. Vermont, etc., R. Corp., 4 Gray (Mass.) 22; Com. v. Old Colony, etc., R. Co., 14 Gray (Mass.) 93.

New Jersey.—Morris Canal, etc., Co.

v. Fagin, 22 N. J. Eq. 430; Waters v. Newark, 56 N. J. L. 361.

New York.—Hudson River R. Co. v. Loeb, 7 Robt. (N. Y.) 418.

South Carolina.—Hellams v. Switzer, 24 S. Car. 39.

Virginia.—Taylor v. Com., 29 Gratt. (Va.) 780.

For the Procedure in Criminal Prosecutions for public nuisances, see *infra*, II. *Criminal Prosecutions*.

Mandamus Is Not an Adequate Remedy to restrain a county from maintaining a nuisance. Lefrois v. Monroe County, 24 N. Y. App. Div. 421.

Refusal of Continuance Pending Equity Suit.—For a public nuisance by obstructing a street the proper remedy is by indictment; therefore, where, in a prosecution for such nuisance, the defendants moved for a continuance until the decision of an equity suit brought by the said defendants to restrain the abatement of the alleged nuisance, it was held that the continuance was properly refused. Taylor v. Com., 29 Gratt. (Va.) 780.

3. See *infra*, IV. *Suits in Equity*.

3. Remedy by Action at Law — a. EARLY REMEDIES. — The ancient common-law remedies for a nuisance were an assize of nuisance and a quod permittat.¹ An assize of nuisance was a common-law writ issued at the instance of the tenant of the freehold complaining of some act done *ad nocumentum liberi tenementi sui*, and commanding the sheriff to summon an assize or jury to view the premises, and have them at the next commission of assizes, that justice might be done. If they found for the plaintiff he was entitled to a judgment abating the nuisance and for damages.² A quod permittat was a writ in the nature of a writ of right commanding the defendant to permit the plaintiff to abate the nuisance or to show cause why he should not.³ Both of these writs have long been obsolete in England,⁴ and were finally abolished by statute.⁵

In the United States the remedy by quod permittat does not appear to have ever been recognized.⁶ The assize of nuisance has been sometimes employed, but is now either abolished or obsolete.⁷

b. MODERN REMEDY. — The modern common-law remedy for a nuisance is by an action on the case, either for a private nuisance,⁸ or for a public nuisance where special injuries result

1. *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

2. 3 Black. Com. 221; 1 Com. Dig. 422; Fitz. Natura Brev. 124; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

Assize of Nuisance. — "At the common law this writ did not lie against the alienee of a wrongdoer, for the purchaser was to take the land in the same condition it was conveyed to him, but it lay against the wrongdoer himself who levied or did the nuisance. This was remedied by the statute of Westminster 2, 13 Edw. I., c. 24. It gave the form of a new writ in such case, differing from the old writ in this: it stated that the wrongdoer and the alienee both raised the nuisance, and damages were recoverable against the person who sold the land, if the nuisance were not abated on request made to him, or against the person to whom he sold it. Before this statute the party injured, upon any alienation of the land whereon the nuisance was set up, was driven to his *quod permittat prosternere*." Jewett, J., in *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306. See also *Hess v. Buffalo*, etc., R. Co., 29 Barb. (N. Y.) 391; *Great Falls Co. v. Worster*, 15 N. H. 412.

3. 3 Black. Com. 221; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

— "This writ lay as well for the alienee

of the party first injured as against the alienee of the party first injuring." Jewett, J., in *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

4. *Kuitz v. McNeal*, 1 Den. (N. Y.) 436; *Clark v. Storrs*, 4 Barb. (N. Y.) 562; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306.

5. 3 & 4 William IV., c. 27, § 36.

6. *Clark v. Storrs*, 4 Barb. (N. Y.) 562.

7. *Kentucky*. — *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 325.

New York. — *Kintz v. McNeal*, 1 Den. (N. Y.) 436; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Ellsworth v. Putnam*, 16 Barb. (N. Y.) 565; *Clark v. Storrs*, 4 Barb. (N. Y.) 562; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Cogswell v. New York*, etc., R. Co., 105 N. Y. 319; *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306; *Hess v. Buffalo*, etc., R. Co., 29 Barb. (N. Y.) 391.

Pennsylvania. — *Barnet v. Ihrie*, 17 S. & R. (Pa.) 174; *Livezey v. Gorgas*, 1 Binn. (Pa.) 251, 2 Binn. (Pa.) 192; *Maris v. Parry*, 3 Rawle (Pa.) 413; *Witherow v. Keller*, 11 S. & R. (Pa.) 271.

8. *Harvey v. De Woody*, 18 Ark. 252; *Crommelin v. Cox*, 30 Ala. 318; *Hieskell v. Gross*, 3 Brewst. (Pa.) 430; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

therefrom to the individual.¹ But in actions of the latter class the plaintiff must show that he has sustained a special injury, differing not merely in degree but likewise in kind from that sustained by the general public.²

4. Remedy by Suit in Equity. — As will be seen hereafter, equity has jurisdiction to prevent or suppress nuisances, both public and private, wherever the nature of the case is such that ample redress cannot be afforded by the ordinary tribunals.³

5. Effect of Statutes on Common-law Remedies. — It is generally held that statutes prescribing remedies for nuisances are not exclusive of the common-law remedies.⁴ Thus a statute or ordinance providing a remedy for a public nuisance is held not to

For the procedure in such actions, see *infra*, III. *Actions at Law*.

Action Styled "in Tort." — Under rule 15 of the New Jersey Supreme Court, an action for damages for maintaining a nuisance being an action for an injury to a right incidental to the use of personal property is properly styled "in tort." *Mehrhof Bros. Brick Mfg. Co. v. Delaware, etc., R. Co.*, 51 N. J. L. 56.

1. *Crommelin v. Cox*, 30 Ala. 318; *Pettis v. Johnson*, 56 Ind. 139; *Gerrish v. Brown*, 51 Me. 256; *Mehrhof Bros. Brick Mfg. Co. v. Delaware, etc., R. Co.*, 51 N. J. L. 56; *Hart v. Chosen Freeholders*, 57 N. J. L. 90; *Hudson River R. Co. v. Loeb*, 7 Robt. (N. Y.) 418; *Adams v. Popham*, 76 N. Y. 410; *Story v. Hammond*, 4 Ohio 376; *Abbott v. Mills*, 3 Vt. 521.

Remedy Not Merged by Indictment. — The simple remedy for special damages sustained by a private person by reason of a public nuisance is not merged by an indictment and conviction. *Story v. Hammond*, 4 Ohio 376.

2. *Waters v. Newark*, 56 N. J. L. 361; *Green v. Lake*, 54 Miss. 540; *Carpenter v. Mann*, 17 Wis. 155; *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Benjamin v. Storr*, L. R. 9 C. P. 400. And see, in general, Am. and Eng. Encyc. of Law, tit. *Nuisances*.

In *Alden v. Pinney*, 12 Fla. 348, it was held that an obstruction to navigation, which is a public nuisance, being the subject of a proceeding at the instance and in behalf of the state, by which it may be abated and the person guilty of its erection punished, an individual cannot maintain an action, either at law or in equity, to have it abated, or to prevent the creation of other like nuisances, unless he sustains damage beyond and in addition to that

which falls alike upon the public, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate.

Iowa—Special Injury Unnecessary. — Under the Iowa Code, § 3331, a private citizen may bring a suit to abate a public nuisance, and to recover for damages, notwithstanding the fact that the injury sustained by him is similar to that suffered by the general public. *Harley v. Merrill Brick Co.*, 83 Iowa 73.

3. See *infra*, IV. *Suits in Equity*.

4. In California it has been held that the statute of that state defining nuisances and prescribing a remedy by action, did not take away any common-law remedy in the abatement of nuisances which the statute did not embrace. *Stiles v. Laird*, 5 Cal. 120.

Proceedings by Corporation. — If the state of facts necessary to support an action of nuisance exists, a corporation can institute such action, notwithstanding its charter and laws amendatory thereof provide special and peculiar remedies for such injuries to its property as constitute the acts of nuisance declared upon, and give authority for special proceedings relative thereto. These remedies and proceedings are not exclusive of the ordinary common-law processes, or those authorized by general statutes. *Cumberland, etc., Canal Corp. v. Portland*, 62 Me. 504.

Proceedings by Town. — Where a statute confers upon an incorporated town the right to declare and abate nuisances, it does not exclude a resort to the courts for such purposes. *American Furniture Co. v. Batesville*, 139 Ind. 77. And see *Davis v. Davis*, 40 W. Va. 464.

supersede the common-law proceeding by indictment.¹

II. CRIMINAL PROSECUTIONS — 1. Jurisdiction. — As has been stated hitherto, the proper method of redressing a public nuisance is ordinarily by indictment, and statutes imposing penalties for maintaining public nuisances are generally held not to supersede this common-law remedy.²

Injury in Other Jurisdiction. — Where a nuisance in one county or state inflicts injury in another county or state, the courts of the latter have jurisdiction of a prosecution for the erection or maintenance of such nuisance.³

2. Indictment — a. DESCRIPTION OF NUISANCE — (1) In General. — An indictment for the erection or maintenance of a public nuisance should describe the alleged nuisance with certainty,⁴ and

1. *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *State v. Wilson*, 43 N. H. 415; *State v. Woodbury*, 67 Vt. 602, wherein it was held that the Vermont Laws, § 3923, providing that the butchering business shall not be carried on without the written approval of the board of civil authority, and the Vermont Acts of 1892, No. 82, empowering local boards of health to abate nuisances, have not superseded the common-law remedy by indictment for nuisances in the maintaining of a slaughter house.

Private Statute. — Where by the terms of a private statute a privilege was granted to certain persons to erect mills upon a river, which privilege in a certain event was subject to revocation, and the judge of the county court was vested with power on the happening of a contingency to abate the mills as a nuisance, such statute does not divest the circuit court of its ordinary jurisdiction in the abatement of the nuisance by indictment. *State v. Bell*, 5 Port. (Ala.) 365.

Municipal Ordinance. — The fact that a city ordinance gives jurisdiction of the punishment of acts prescribed by it to be nuisances to the police court of the city does not deprive the circuit court of jurisdiction to try persons for the same acts made punishable by a state law. *State v. Bergman*, 6 Oregon 341.

2. See *supra*, 1. 2. *Remedy by Indictment*; 1. 5. *Effect of Statutes on Common-law Remedies*.

3. **Different States.** — *State v. Lord*, 16 N. H. 357, wherein it was held that in the case of a dam erected in a stream in the state of Maine, the back-water from which obstructed a public highway in New Hampshire, an indictment

for nuisance would lie in the last named state.

Different Counties. — *State v. Smith*, 82 Iowa 423, wherein it was held that where the acts constituting the nuisance were committed in one county and injury resulted in another county, the prosecution was properly brought in the latter county.

4. *State v. Close*, 35 Iowa 570; *State v. Kaster*, 35 Iowa 221; *McLaughlin v. State*, 45 Ind. 338; *Philadelphia, etc., R. Co. v. State*, 20 Md. 157; *Horner v. State*, 49 Md. 277; *Matthews v. State*, 25 Ohio St. 536.

As to Charging the Keeping of a Disorderly House as a common nuisance, see the article DISORDERLY HOUSES, vol. 7, p. 11.

The Nuisance Should Be So Described that it can be abated without doing violence unreasonably to the rights of others. *State v. Sturdivant*, 21 Me. 9.

Names of Persons Frequenting Nuisance. — An indictment for keeping and maintaining a nuisance frequented by "intemperate, idle, dissolute, noisy," etc., persons, need not set forth the names of the persons frequenting the place. *State v. Doyle*, 15 R. I. 527. See also article DISORDERLY HOUSES, vol. 7, p. 9.

Bill of Particulars. — If the indictment be so general that it fails to give the defendant sufficient information to enable him to procure his defense, the court will order the furnishing of a bill of particulars of the several acts of nuisance intended to be proved. *Rex v. Curwood*, 3 Ad. & El. 815, 30 E. C. L. 228. See also *State v. Reno*, 41 Kan. 674.

Surplusage. — An indictment charging the defendant with wilfully and continuously suffering and permitting

set forth sufficient facts to make out a *prima facie* case against the defendant.¹ As to what matters of description need be alleged, this is, of course, largely dependent upon the circumstances of the particular case.²

Setting Out Constituent Acts. — The acts constituting the nuisance should be set out with the detail and fulness usual in indictments.³

its freight trains to stand for long and unreasonable periods of time across a public street, is good, and further allegations that the trains were permitted to remain across the street for periods of time longer than five minutes, are surplusage. *Illinois Cent. R. Co. v. Com.*, (Ky. 1898) 45 S. W. Rep. 367.

1. *Messersmidt v. People*, 46 Mich. 437; *Shepard v. People*, 40 Mich. 487; *Wabash, etc., R. Co. v. People*, 12 Ill. App. 448; *Mains v. State*, 42 Ind. 327; *State v. Davis*, 80 Me. 488; *State v. Noyes*, 30 N. H. 279; *People v. Monteverde*, 43 Hun (N. Y.) 447, *Com. v. Linn*, 158 Pa. St. 22.

Surplusage. — In an indictment for keeping a nuisance in a certain building, an allegation that the building was under the defendant's control is surplusage. *State v. Schilling*, 14 Iowa 455.

2. **Corrupting Air.** — An indictment for a nuisance at common law which alleges that the defendants on a certain day set up, erected, and maintained certain buildings and on divers days and times between that day and the day of the finding of the indictment did, in said buildings, unlawfully use and employ, decompose and combine, large quantities of acid, guano, tar, oil, bone, and dead bodies, and other noxious and offensive substances, in the manufacture of acids, colors, chemicals, and chemical products, by means whereof divers noxious, offensive, and unwholesome smokes, gases, smells, and stenches were issued and emitted from said buildings, during all the time aforesaid, so that the air then and there was thereby filled and impregnated therewith, and rendered corrupt, offensive, and unwholesome, to the great damage and common nuisance of all persons then and there being, sufficiently describes the nuisance and is not bad for duplicity. *Coth. v. Rumford Chemical Works*, 16 Gray (Mass.) 231.

An indictment is sufficient which charges that the defendant at certain times and at a place named, "near the dwelling houses of divers good citizens

of the said commonwealth and also near divers public streets and common highways there situate," did keep and maintain five hundred swine, "by reason whereof divers large quantities of noisome, noxious, and unwholesome smokes, smells, and stenches on the days and times aforesaid, then and there were emitted, * * * and the air thereabouts * * * greatly filled and impregnated with many noisome * * * smells, stinks, and stenches, and has been corrupted and rendered very unsalubrious, to the great damage," etc. *Com. v. Perry*, 139 Mass. 198.

Fouling Stream. — An indictment alleging that the defendant unlawfully placed in a certain stream manure, filth, offal, glucose, acids, sulphur, and other poisonous substances, to the injury and prejudice of certain named persons and others, charged a public nuisance. *State v. Smith*, 82 Iowa 423.

Maintaining Bowling Alley. — An indictment charging that the respondent "did open and let to use and for use a bowling alley," is good. *State v. Noyes*, 30 N. H. 279.

An Indictment for Maintaining a Stationary Steam Engine as a common nuisance must allege its erection without the prescribed license and its use. *State v. Davis*, 80 Me. 488.

Overflowing Highway — Dimensions of Overflow. — In an indictment for a nuisance in obstructing an ancient watercourse so as to overflow a highway, the length and breadth of the overflow need not be averred. *Respublica v. Arnold*, 3 Yeates (Pa.) 417.

3. *Seacord v. People*, 121 Ill. 623, *State v. Reno*, 41 Kan. 674; *Wilson v. Com.*, 12 B. Mon. (Ky.) 4; *State v. Hart*, 34 Me. 36; *Horner v. State*, 49 Md. 277; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *Territory v. Ashby*, 2 Mont. 89; *State v. Frieburg*, 49 Ohio St. 585; *Matthews v. State*, 25 Ohio St. 536; *State v. Purse*, 4 McCord L. (S. Car.) 472; *Allen v. State*, 34 Tex. 230.

In *State v. Purse*, 4 McCord L. (S. Car.) 472, it is said: "Two things only

Special Circumstances. — And where a thing is not a nuisance in itself, but becomes so by reason of special circumstances, the special circumstances must be alleged.¹

Must Be Proved as Charged. — Matters of description, though unnecessarily alleged, must be proved as charged.²

(2) **Statutory Nuisance.** — An indictment for a statutory nuisance should allege sufficient to show a nuisance within the contemplation of the statute.³ It is sufficient if the offense is charged substantially in the language of the statute.⁴

b. **LOCATION.** — The venue of the nuisance must, of course, be laid in the county where the indictment is found,⁵ but the exact location of the nuisance need not be set out unless there is a

are necessary to constitute the offense. First, that from the nature of the establishment it may be an annoyance; and, secondly, that from its situation it has actually become so. Those two things, therefore, are all that are necessary to set out in the indictment."

1. *Mains v. State*, 42 Ind. 327; *State v. Haines*, 30 Me. 65; *State v. Mott*, 61 Md. 297; *State v. Noyes*, 30 N. H. 279; *People v. Sands*, 1 Johns. (N. Y.) 78.

Offensive Trade. — An indictment alleging that the defendant carried on an offensive trade "near unto divers roads and streets, and also near unto the dwelling houses of divers illege inhabitants of the state of Maryland, there situate and being," sufficiently charges a public nuisance. *Horner v. State*, 49 Md. 277, citing *Rex v. White*, 1 Burr. 333.

2. *Fulk v. State*, (Ind. App. 1898) 49 N. E. Rep. 465. And see in general article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

3. **Injury or Annoyance.** — A complaint under a statute making it an offense to put the carcass of any dead animal into a river, etc., "to the injury of the health or to the annoyance of the citizens," etc., must allege such injury or annoyance. *State v. Wahl*, 35 Kan. 608.

Building "Unsafe So as to Endanger Life." — Under a statute providing for the prosecution of one who maintains a building "unsafe so as to endanger life," a complaint alleging a building to be "dangerous, having been heretofore damaged by fire," is insufficient. *St. Paul v. Hennessy*, 38 Minn. 94.

Insufficient Description. — A complaint for the violation of a municipal ordinance forbidding the maintenance of

public nuisances, which alleged that the defendant "kept a large quantity of hides, tallow, and other substances, which emitted a disagreeable odor," is bad. *Lippman v. South Bend*, 84 Ind. 276.

Injury to Public Morals. — An indictment drawn under a statute providing a punishment for any person who shall wilfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, need not charge that the act committed was injurious to public morals. *State v. Bergman*, 6 Oregon 341.

4. *Seacord v. People*, 121 Ill. 623. As to charging offenses generally in language of statute, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 483 *et seq.*

5. *State v. Jacobs*, 75 Iowa 247; *State v. Sturdivant*, 21 Me. 9.

And see *State v. Baker*, 74 Mo. 394, where it was held that a complaint by a town before a justice of the peace for maintaining a nuisance, which failed to state that the alleged nuisance was in the town or that it was contrary to the ordinances of the town to maintain a nuisance therein, was bad, and that the fact that the warrant issued on the complaint alleged those matters did not cure these defects.

"County Aforesaid." — Where the county in which the nuisance was alleged to be maintained is charged in the first count of the indictment and no other county is named in the indictment, reference to the county in subsequent counts as "the county aforesaid" is sufficient. *Philadelphia, etc., R. Co. v. State*, 20 Md. 157.

request for its abatement,¹ or unless the offense is local to some particular town or neighborhood.²

Certainty to Common Intent. — It seems to be generally sufficient if the location of the alleged nuisance is described in a manner which is certain to a common intent.³

Proof Must Correspond with Allegations. — Though an allegation as to the particular location of a nuisance may not be necessary, yet, if it is alleged, it must be proved as charged.⁴

c. TIME. — It is not necessary that the exact date of committing the offense should be given. It is sufficient if it is alleged

1. *Illinois*. — *Seacord v. People*, 121 Ill. 623.

Indiana. — *Droneberger v. State*, 112 Ind. 105; *Howard v. State*, 6 Ind. 444; *Wertz v. State*, 42 Ind. 161; *Mergentheim v. State*, 107 Ind. 567.

Iowa. — *State v. Kreig*, 13 Iowa 462; *State v. Schilling*, 14 Iowa 455.

Maine. — *State v. Stevens*, 40 Me. 559.

Massachusetts. — *Com. v. Logan*, 12 Gray (Mass.) 136; *Com. v. Wellington*, 7 Allen (Mass.) 299; *Com. v. Hall*, 15 Mass. 240; *Com. v. Donovan*, 16 Gray (Mass.) 18; *Com. v. Shea*, 150 Mass. 314; *Wells v. Com.*, 12 Gray (Mass.) 326.

Mississippi. — *Handy v. State*, 63 Miss. 207.

Ohio. — *Matthews v. State*, 25 Ohio St. 536.

Tennessee. — *State v. Sneed*, 16 Lea (Tenn.) 450.

Virginia. — *Stephen v. Com.*, 2 Leigh (Va.) 759.

Wisconsin. — *Jenks v. State*, 17 Wis. 665.

England. — *Rex v. Taylor*, 3 B. & C. 502, 10 E. C. L. 166.

2. *Seacord v. People*, 121 Ill. 623; *State v. Stevens*, 40 Me. 559; *Com. v. Logan*, 12 Gray (Mass.) 136; *Com. v. Bacon*, 108 Mass. 26; *Com. v. Heffron*, 102 Mass. 148; *Jenks v. State*, 17 Wis. 665.

3. *State v. Sturdivant*, 21 Me. 9.
Town Lots. — An indictment for keeping a nuisance which does not seek the abatement thereof, describing the place where it is alleged to be maintained as in a certain brick building situated on certain town lots, particularly described, but not specifying any particular location thereon, is sufficient as a description of such premises. *Fletcher v. State*, 54 Ind. 462.

Mistake in Description. — Where an information gives a lengthy and ex-

plicit description of the place where the alleged nuisance was kept, an incorrect statement as to one of the particulars in the description, which could not mislead the defendant, is not fatal. *State v. Reno*, 41 Kan. 674.

Bill of Particulars. — Where on an indictment for keeping a nuisance the prosecuting attorney was ordered to specify the locality, and designated "the place where the defendant lived, the barn on that place, and the shanty near barn on the same place," it was held that the specification was sufficiently definite. *State v. Hill*, 13 R. I. 314.

Neighborhood of Dwellings. — Averring that a nuisance is within a borough is a sufficient averment of its being in the neighborhood of dwellings. *Delaware Div. Canal Co. v. Com.*, 60 Pa. St. 367.

Stream of Water — Insufficient Description. — An indictment alleging that the defendant did maintain "a certain milldam in, about, and across a certain stream of water in said county, called Elkhart river," does not sufficiently locate the nuisance. *Wood v. State*, 5 Ind. 433.

4. *Wertz v. State*, 42 Ind. 161; *Com. v. Wellington*, 7 Allen (Mass.) 299; *Com. v. Bacon*, 108 Mass. 26; *Chute v. State*, 19 Minn. 271; *Rex v. Owen*, 1 Moo. C. C. 118; 3 Stark Ev., § 1574.

Redundance of Proof Not Variance. — An allegation that the nuisance was on lots 1 and 2, and proof that it extended over lots 1 and 2 to lot 3, is not a variance, but mere redundancy of proof. *Chute v. State*, 19 Minn. 271.

The Names of the Persons near whose premises the nuisance is located need not be set out, but if they are set out they must be proved as charged and a variance is fatal. *Droneberger v. State*, 112 Ind. 105; *Dennis v. State*, 91 Ind. 291.

as of "about" a certain date before the finding of the indictment and within the statutory period of limitation.¹

d. INTENT. — An allegation of intent is not necessary if the act complained of is expressly forbidden by statute.²

e. CONTINUANCE. — If an abatement is sought, an averment of the continuance of the nuisance is necessary.³ But if punishment only is sought, such averment may be dispensed with.⁴

f. DUPLICITY. — In charging the offense duplicity should, of course, be avoided.⁵ But as one nuisance may be made up of a

1. *State v. Schilling*, 14 Iowa 455. See in general article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 511 *et seq.*

On a Certain Day "and on Divers Other Days." — Allegations that the defendant on a certain day, "and on divers other days and times between that day and the day of making this complaint," did, etc., are sufficient as to time. *Com. v. Shea*, 150 Mass. 314; *Com. v. Langley*, 14 Gray (Mass.) 21.

Good as to Day Certain. — An indictment for keeping a nuisance on a day certain, and on divers other days not alleged with sufficient certainty, is good as to the day certain. *Wells v. Com.*, 12 Gray (Mass.) 326; *Rex v. Dixon*, 10 Mod. 335.

2. *Com. v. Shea*, 150 Mass. 314, wherein it was held that in a prosecution for keeping a house of ill fame, a complaint was sufficient without any averment of an unlawful or criminal intent. See also *State v. Archibald*, 59 Vt. 548; *State v. Chesapeake*, etc., R. Co., 24 W. Va. 809; *State v. Towler*, 13 R. I. 661. And see generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 491 *et seq.*

An Indictment for Obstructing a Highway need not allege a criminal intention. *State v. Baltimore*, etc., R. Co., 120 Ind. 298.

Supplying Unwholesome Water. — An indictment charging the defendant with committing a nuisance in furnishing unwholesome and poisonous water to the citizens of a city is bad, unless it shows that the defendant knowingly or intentionally supplied water of such unwholesome quality. *Stein v. State*, 37 Ala. 123.

"Unlawfully." — In an indictment for a nuisance it is not indispensable that it should be alleged that it was "unlawfully" maintained; any other words, as "injuriously" or "wrongfully," are sufficient. *State v. Vermont Cent. R. Co.*, 27 Vt. 103. See also

article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 495.

3. *Munson v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 16; *Taylor v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 347; *People v. Branchport*, etc., Plank Road Co., 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 604; *Messersmidt v. People*, 46 Mich. 437; *State v. Noyes*, 30 N. H. 279; *Rex v. Stead*, 8 T. R. 144; *Rex v. Pappineau*, 1 Stra. 688.

Sufficient Averment. — An indictment averring the nuisance as continuing up to the day before the indictment was returned into court, is good. *Ashbrook v. Com.*, 1 Bush (Ky.) 139.

An indictment alleging that the acts complained of "became, and were, and still are" a nuisance, imports a continuing offense. *State v. Holman*, 104 N. Car. 861.

An indictment charging that the defendant on a certain day obstructed a highway, and did "on divers other days and times between that day and the time of taking this inquisition unlawfully and injuriously continue and allow to remain" the said obstruction, "by reason whereof the citizens of this state during the time aforesaid" could not pass over the road, sufficiently charges the continuance of the nuisance at the date of the inquisition. *Wroe v. State*, 8 Md. 416.

An information alleging that the defendant on a certain day erected, and "continually from thence hitherto continued, maintained, and kept," etc., sufficiently charges a continuous nuisance. *Baugh v. State*, 14 Ind. 29.

4. *State v. Hull*, 21 Me. 84; *State v. Barnes*, 20 R. I. (pt. iii.) 126.

5. *Knopf v. State*, 84 Ind. 316; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *Com. v. Hart*, 10 Gray (Mass.) 465; *Reed v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 481; *Chute v. State*, 19 Minn. 271, wherein it was held that an indictment charg-

number of acts, a count is not rendered duplicitous by the fact that it charges all the acts which constitute the nuisance.¹

g. CONCLUSION. — In the case of a common-law nuisance, it is usual to add to the conclusion, "against the peace," etc., the words, "to the great damage and common nuisance of all the people there lawfully being and abiding," or similar words.² But

ing the defendant with maintaining a building which overhung a public street and endangered the safety of people passing thereon, and with permitting large quantities of filth to remain in the building, emitting offensive stenches, dangerous to the public health, was duplicitous. And see in general article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 532.

Creating and Continuing Distinct Offenses. — The offense of creating a nuisance is distinct from the offense of continuing it. The two cannot be joined in the same count. *Burke v. People*, 23 Ill. App. 36; *Hoadley v. People*, 23 Ill. App. 39.

But see *Territory v. Ashby*, 2 Mont. 89, where it was held that an indictment which alleges that the defendant obstructed a public alley by erecting a fence on a certain day, and thereafter continued to maintain the same, does not state two offenses that cannot be joined.

1. *State v. Payson*, 37 Me. 361; *State v. Hart*, 34 Me. 36; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *State v. Frieberg*, 49 Ohio St. 585; *State v. Matthews*, 42 Vt. 542. See also *Nicholson v. People*, 29 Ill. App. 57; *State v. Towler*, 13 R. I. 661.

In *State v. Payson*, 37 Me. 361, it was held that the keeping of swine in a pen near a public way, and the feeding of them there with offal, constituted but one nuisance, and might be charged in one count.

In *State v. Bergman*, 6 Oregon 341, it was held that an indictment which charges that defendants committed an act which grossly injures the persons and property of others, and grossly disturbs the public health, and openly outrages public decency, does not charge more than one crime.

Keeping House of Ill Fame and Illegal Sale of Liquor. — An indictment under Mass. Gen. Stat., c. 87, §§ 6, 7, for keeping and maintaining a place, and time named "a certain building, to wit, a dwelling house, used as a house of ill fame, resorted to for prostitution,

lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, the said building, so used as aforesaid, being then and there a common nuisance," is not bad for duplicity. *Com. v. Ballou*, 124 Mass. 26.

A count for a nuisance at common law by keeping a disorderly house may be joined in the same indictment with a count under a statute for keeping a house used for the illegal sale of intoxicating liquors. *Com. v. Kimball*, 7 Gray (Mass.) 328.

2. 3 Chitty Cr. Law 607a; Anonymous, 12 Mod. 504; *Thorowgood's Case*, 1 Mod. 107; *Rex v. Cooper*, 2 Stra. 1247; *Rex v. Pappineau*, 1 Stra. 686; *Hayward's Case*, Cro. Eliz. 148; Anonymous, 1 Vent. 26; *Com. v. Buxton*, 10 Gray (Mass.) 9; *Com. v. Oaks*, 113 Mass. 8; *Com. v. Harris*, 101 Mass. 29; *Com. v. Smith*, 6 Cush. (Mass.) 80; *State v. Stevens*, 40 Me. 559. See also *Com. v. Parker*, 4 Allen (Mass.) 313; *Com. v. Boon*, 2 Gray (Mass.) 74. See generally as to conclusion of indictments, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 441.

Sufficiency. — In *Com. v. Faris*, 5 Rand. (Va.) 691, it was held that an indictment concluding "to the common nuisance of divers of the commonwealth's citizens" was not sufficient; that it ought to be laid "to the common nuisance of all the citizens of the commonwealth residing in the neighborhood," or "of all the citizens, etc., residing, etc., and passing thereby."

But in *Com. v. Sweeney*, 131 Mass. 579, it was held that where an indictment alleged that the nuisance had been committed near the dwelling houses of divers persons then inhabiting said houses, and near a certain public road and highway, "to the great damage and common nuisance of the inhabitants of the said houses and of all other persons then and there passing upon and along the said public road and highway," it was sufficient.

In Iowa a conclusion, "to the common nuisance of all the people of said

where the facts set out in the indictment constitute a nuisance *per se*, it seems that the conclusion *ad commune nocumentum* is not essential.¹ And in some jurisdictions the omission of such conclusion is made harmless by statute.²

Facts Must Justify Conclusion. — An allegation that the facts charged were *ad commune nocumentum* will not make a good indictment for a common nuisance unless the facts are of such a nature as to justify that conclusion as one of law as well as of fact.³

Statutory Nuisance. — Where the indictment is for a nuisance made such by statute, the conclusion, "to the common injury," etc., is not necessary.⁴ In such case it is sufficient for the indictment to conclude *contra formam*.⁵

h. AGAINST OFFICERS OF MUNICIPAL CORPORATION. — An indictment against the officers of a municipal corporation, for maintaining a nuisance, should allege the official duty required

county, unlawfully," is sufficient under Rev. Stat. 1860, § 4660. *State v. Schilling*, 14 Iowa 455.

1. *State v. Wilson*, 93 N. Car. 608; *State v. Baldwin*, 1 Dev. & B. L. (N. Car.) 195, wherein the court said: "If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words *ad commune nocumentum*, though always proper and safest to be inserted, may be omitted, for they neither describe the crime nor the facts which constitute it. Such facts necessarily show the crime. If the facts charged show an offense inconvenient and troublesome, that may have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum* becomes indispensable. It then involves an actual inquiry as a matter of fact for the jury into the extent of the annoyance. But an allegation in an indictment that certain facts charged were 'to the common nuisance of all the good citizens of the state' will not make it a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact." And see *Com. v. Reynolds*, 14 Gray (Mass.) 87.

An indictment for Indecent Exposure need not conclude *ad commune nocumentum*. *Com. v. Haynes*, 2 Gray (Mass.) 72.

2. **England.** — Under 14 and 15 Vict., c. 100, § 24, providing that an indictment shall not be bad for want of a formal conclusion, an indictment for a

public nuisance is not defective for failure to conclude *ad commune nocumentum*. *Reg. v. Holmes*, 20 Eng. L. & Eq. 597.

Kentucky. — In Kentucky it is held that, under Ky. Crim. Code, § 122, if an indictment for a nuisance states the facts constituting the offense it is not defective because failing to contain the words "to the common nuisance of all good citizens of the commonwealth residing in the neighborhood or passing by," or any others of similar import. *Com. v. Enright*, 98 Ky. 635.

3. 2 Bish. Crim. Proc. (4th ed.), § 864; Whart. Crim. Law, § 2362; *Mains v. State*, 42 Ind. 327; *State v. Haines*, 30 Me. 65; *Horner v. State*, 49 Md. 277; *Com. v. Linn*, 158 Pa. St. 22; *State v. Baldwin*, 1 Dev. & B. L. (N. Car.) 195.

In *State v. Houck*, 73 Ind. 37, it was held that an indictment for maintaining a nuisance must show that it was to the injury of some portion of the citizens of the state, and that a general conclusion that it is "to the great injury, etc., of all the citizens of the state," did not supply such defect in the body of the indictment. To the same effect are *Morris*, etc., R. Co. v. *State*, 36 N. J. L. 553; *Com. v. Webb*, 6 Rand. (Va.) 726.

4. *State v. Stevens*, 40 Me. 559; *Com. v. Parker*, 4 Allen (Mass.) 313; *Com. v. Boon*, 2 Gray (Mass.) 74; *Com. v. Buxton*, 10 Gray (Mass.) 9.

5. *State v. Stevens*, 40 Me. 559; *Ex p. Taylor*, 87 Cal. 91. See also article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 444.

of the defendants in respect to the nuisance, and their failure to perform it.¹

3. Judgment—*a. FINE AND IMPRISONMENT.*—At common law the causing or continuing a nuisance is punishable by fine or imprisonment or both,² and, as a rule, the statutes provide a similar punishment.³

b. ABATEMENT.—An abatement of the nuisance may be required as part of the sentence upon conviction if the indictment alleges, and the proof shows, a continuing nuisance.⁴

1. *State v. Justices, 4 Hawks (N. Car.) 194; State v. Halifax, 4 Dev. L. (N. Car.) 345; State v. Fishplate, 83 N. Car. 654; Com. v. Kinnaird, (Ky. 1896) 37 S. W. Rep. 840; and see State v. Hall, 97 N. Car. 474, wherein it is said: "[The indictment] charges the mayor and aldermen with having permitted and tolerated for a long while a dangerous nuisance in the city; but it does not charge that they had wilfully and negligently failed to exercise their power, authority and means with which they were charged to prevent and suppress such nuisance, and that they so failed to pass 'all needful ordinances, rules, and regulations to secure' the health and safety of the city, and the good people there residing, etc.; nor does it charge how or in what particular respect they were negligent—as that they had failed to appoint or employ proper agents, or supply other proper agencies for the prevention and abatement of such and like nuisances, etc. This is necessary, because it is not the duty of the mayor and aldermen themselves, personally, to execute their ordinances, rules, and regulations; it is their office and duty to make these, and appoint proper agents, and supply necessary means to execute them."*

Violation of Official Duty.—Where an indictment against officers of a city for allowing a nuisance in a highway fails to allege that the defendants violated any official duty, it is insufficient as not charging an offense. *Com. v. Kinnaird, (Ky. 1896) 37 S. W. Rep. 840.*

Corporate Capacity.—If persons named in an indictment for maintaining a nuisance are described as the burgess and councilmen of a borough, naming the borough, the persons so named are indicted in their corporate capacity, and not as individuals. *Com. v. Bredin, 165 Pa. St. 224.*

Both Corporation and Officers Indictable.—Where a corporation maintains a

public nuisance, the officers of the corporation, as well as the corporation itself, may be properly indicted. *People v. Detroit White Lead Works, 82 Mich. 471.*

2. 4 *Black. Com.* 167; *Steph. Cr. Law* 102; *Arch. Cr. Pl.* 362; 1 *Hawk. P. C.* 200; *Campbell v. State, 16 Ala. 144; Bollinger v. Com., 98 Ky. 574; State v. Hull, 21 Me. 84; Slaughter v. People, 2 Dougl. (Mich.) 335, note; State v. Noyes, 30 N. H. 279; Syracuse, etc., Plank Road Co. v. People, 66 Barb. (N. Y.) 25; Munson v. People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 16.*

3. See the statutes of the several states and the following cases: *Matter of Kurtz, 68 Cal. 412; State v. Munzenmaier, 24 Iowa 87; State v. Haines, 30 Me. 65; Crippen v. People, 8 Mich. 117; State v. Paggett, 8 Wash. 579.*

Iowa.—Under the Iowa statute a defendant convicted of nuisance and sentenced to pay a fine can only be ordered to be imprisoned for a term of which the number of days shall be equal to one for every three and one third dollars of the fine; and if sentenced to confinement at hard labor, is entitled to a credit upon the judgment of one dollar and fifty cents for each day's labor. *State v. Jordan, 39 Iowa 387; State v. Anwerda, 40 Iowa 151.*

Montana.—Under the Montana statutes, one convicted of maintaining a common-law nuisance cannot be punished by both fine and imprisonment, but only by fine. *State v. Seventh Judicial Dist. Ct., 14 Mont. 452.*

4. 4 *Black. Com.* 167; 2 *Rolle Abr.* 84, § 15; 3 *Burn's Justice*, 222; 1 *Hawk. P. C.* 365, c. 26, § 14; 1 *Russ. Crim. Law* 331.

Alabama.—*Campbell v. State, 16 Ala. 144.*

Iowa.—*State v. Kaster, 35 Iowa 221.*

Kentucky.—*Bollinger v. Com., 98 Ky. 574; Ashbrook v. Com., 1 Bush (Ky.) 139.*

A judgment, however, directing abatement does not follow as matter of course upon conviction, but is usually vested by statute in the discretion of the court,¹ and will not be ordered if the rights of third persons will be improperly affected.²

New Hampshire. — *State v. Noyes*, 30 N. H. 279.

New York. — *Syracuse, etc., Plank Road Co. v. People*, 66 Barb. (N. Y.) 25; *Munson v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 16.

Pennsylvania. — *Taggart v. Com.*, 21 Pa. St. 527; *Delaware Div. Canal Co. v. Com.*, 60 Pa. St. 367; *Com. v. Oberholtzer*, 3 Montg. Co. Rep. (Pa.) 175.

Rhode Island. — *State v. Paul*, 5 R. I. 185.

England. — *Rex v. Stead*, 8 T. R. 142; *Rex v. Pappineau*, 1 Stra. 686; *Rex v. Justices*, 7 T. R. 463.

In *State v. Morris, etc.*, R. Co., 23 N. J. L. 360, it is said that "the principal object of an indictment for a nuisance is to compel it to be abated; and regularly a part of the judgment upon conviction is that the nuisance be abated." *Citing* 1 Hawk. P. C., c. 75, § 14; *Reg. v. Cluworth*, 1 Salk. 359; 1 Chit. Cr. Law 716; *Rex v. Stead*, 8 T. R. 142.

Abatement by Sheriff. — A judgment upon an indictment for a nuisance, "that the nuisance be abated forthwith at the costs of the defendant, and the sheriff is charged with the execution of this order," is in effect a command to the sheriff to abate the nuisance, and to that extent erroneous, but will be amended in the appellate court so as to command the defendant to abate the same if it has not been already done. *Campbell v. State*, 16 Ala. 144.

So on a conviction for nuisance it is error to order the nuisance to be abated by the sheriff in the first instance, that being a part of the judgment against the defendant; but if he fail to comply with the sentence, the court may command the sheriff to abate it at the defendant's costs. *Barclay v. Com.*, 25 Pa. St. 503. But see *Com. v. Oberholtzer*, 3 Montg. Co. Rep. (Pa.) 175.

Abatement as Cruel and Unusual Punishment. — A judgment commanding the abatement of a nuisance does not violate the constitutional provision forbidding cruel and unusual punishment. *McLaughlin v. State*, 45 Ind. 338.

1. *Crippen v. People*, 8 Mich. 117;

Shepard v. People, 40 Mich. 487; *Howard v. State*, 6 Ind. 444.

In Ohio the sentence and judgment required by statute (Act April 15, 1857), upon conviction for maintaining a nuisance cannot be dispensed with on a showing that the nuisance does not exist at the time such judgment is about to be rendered. In such case, however, an order to remove or abate the nuisance will not be issued to the sheriff as a matter of course; and on the hearing of a motion for such order either party will be heard upon testimony, and if it then appear that such nuisance has ceased to exist, the order should not issue. *Smith v. State*, 22 Ohio St. 539; *Matthews v. State*, 25 Ohio St. 536.

Abatement Before Judgment. — If the court is satisfied that the nuisance for which the defendant is indicted is effectually abated before judgment is prayed upon the indictment, it will not give judgment to abate. 3 Chit. Crim. Law (3d Am. ed.) 607 (a) note; 7 Bacon's Abr. 234 (Bouv. ed.); *Campbell v. State*, 16 Ala. 144; *Rex v. Ingleton*, 13 East 164. And see *Rex v. Commerell*, 4 M. & S. 203.

Where Indictment for Erection Only. — In an indictment for a nuisance in erecting a wall across a road (not for continuing the nuisance), it is not necessary to adjudge that the nuisance be abated. *Rex v. Justices*, 7 T. R. 463.

No Judgment Compelling Servant to Abate Master's Business. — Where an employee of a powder company was indicted and convicted for maintaining a public nuisance, it was held that a judgment ordering the nuisance to be abated was erroneous. The employee had no such control over the business as could render such a judgment effectual, and, on the contrary, an order that he abate the entire business would necessarily be oppressive. *State v. Paggett*, 8 Wash. 579.

2. *State v. Haines*, 30 Me. 65.

Nuisance on Land of Third Person. — But the fact that the nuisance is on the land of a third person is no reason for the refusal of a judgment directing its abatement. *Delaware Div. Canal Co. v. Com.*, 60 Pa. St. 367.

The Judgment Should Require the removal of only so much of the thing as causes the nuisance.¹

Commitment to Enforce Abatement. — It has been held that, where the abatement of the nuisance is ordered, the defendant may be sentenced to stand committed until the judgment of abatement is complied with.²

4. Appeal. — A judgment directing the abatement of a nuisance is a final judgment on which a writ of error lies.³

III. ACTIONS AT LAW — 1. Jurisdiction and Venue — a. IN GENERAL. — Actions at law to abate nuisances are cognizable in courts of general original jurisdiction. Indeed, it is only in such courts that such actions lie in the absence of constitutional or statutory provisions designating other courts into which they may be brought.⁴ And it has been held that a constitutional provision giving cognizance of an action to abate a nuisance to a court of limited jurisdiction does not oust the jurisdiction of a court of general jurisdiction, but makes it concurrent.⁵

Federal Courts. — In an action at law in a federal court to abate a nuisance it is not necessary that the plaintiff's damage should amount to the sum required to give jurisdiction to a federal court. The value of the object to be gained — the removal of the nuisance — is the test of jurisdiction.⁶

1. *Campbell v. State*, 16 Ala. 144; *State v. Kaster*, 35 Iowa 221; *Rex v. Pappineau*, 1 Stra. 686, wherein it was said that "every judgment should be adapted to the nature of the case."

As to requisites and sufficiency of a warrant for the abatement of a brewery as a liquor nuisance, see *Craig v. Werthmueller*, 78 Iowa 598. See, generally, Am. and Eng. Encyc. of Law (2d ed.), vol. 1, p. 76, tit. *Abatement of Nuisances*.

In *Palatka, etc., R. Co. v. State*, 23 Fla. 546, it was held that a judgment which simply ordered a railroad company to remove the constituent elements of its roadbed from a highway was erroneous, as it was possible for the defendant to remedy the nuisance by grading or bridging or in other ways without removing its roadbed.

Wrongful Use of Building. — Where a nuisance consists not of a building itself, but in a wrongful use of it, the remedy is to stop such use, not to remove the building. *Barclay v. Com.*, 25 Pa. St. 503. See also *Brightman v. Bristol*, 65 Me. 426; *Welch v. Stowell*, 2 Dougl. (Mich.) 332.

2. *Taggart v. Com.*, 21 Pa. St. 527.

No Commitment Until Refusal to Obey Order. — In *Bollinger v. Com.*, 98 Ky. 574 it was held that, immediately fol-

lowing a judgment imposing a fine and directing an abatement, the defendant cannot be committed till he has refused to obey the order of abatement.

3. *Crippen v. People*, 8 Mich. 117.

4. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43; *Blood v. Moore*, 29 Cal. 427; *Learned v. Castle*, 67 Cal. 41; *Fitzgerald v. Urton*, 4 Cal. 235.

In California the County Court has no jurisdiction of an action for damages for a nuisance except as an incident to its power to abate the nuisance. Therefore, if the nuisance has been abated prior to the commencement of the action, the County Court has no jurisdiction. *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396. See also *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43.

Title in Issue. — In *Indiana* it was held that where, in an action for a nuisance, the title to the *locus* is put in issue, the common pleas is ousted of jurisdiction. *Cromwell v. Lowe*, 14 Ind. 234. But see *Burton Tp. v. Tuttle*, 30 Ohio St. 62.

5. *Courtwright v. Lear River, etc., Water, etc., Co.*, 30 Cal. 573; *Yolo County v. Sacramento*, 36 Cal. 193; *Learned v. Castle*, 67 Cal. 41.

6. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

Justices of the Peace. — The jurisdiction of justices of the peace in actions to abate nuisances is purely statutory, and such jurisdiction is only to be invoked in cases where it is expressly authorized.¹

b. VENUE OF ACTION. — If an Abatement Is Sought, the action is local and should be brought in the county where the nuisance is located.²

But if Damages Only Are Sought, it has been held in some jurisdictions that an action will lie in the county or state where the injury is inflicted, although the erection or thing from which the injury proceeds is located in another county or state.³

1. See the statutes and codes of the several states. See also *Maeller v. Flowers*, 7 Ohio (pt. II.) 230; and generally article JUSTICES OF THE PEACE, vol. 12, p. 664.

Jurisdiction of Justice. — Under a statute providing that "any nuisance which tends to the immediate annoyance of the citizens in general is manifestly injurious to the public health and safety or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county," justices of the peace have no jurisdiction to abate as a nuisance a bridge over a navigable stream. *Macon, etc., R. Co. v. Pate*, 50 Ga. 156. But the stopping or impeding a private way may be abated by justices. *Salter v. Taylor*, 55 Ga. 310; *Hart v. Taylor*, 61 Ga. 156. So of a dam causing the overflow and destruction of crops. *Wetter v. Campbell*, 60 Ga. 266.

Justices have jurisdiction to abate an obstruction of a private way though the ordinary have concurrent jurisdiction. *Holmes v. Jones*, 80 Ga. 659.

In Ohio it was held in an early case that justices of the peace had no jurisdiction of actions on the case for a nuisance. *Nichol v. Patterson*, 4 Ohio 200.

Ousting Justices of Jurisdiction. — A justice of the peace vested by statute with jurisdiction to try cases for obstructing highways is not ousted of this jurisdiction by the fact that the title to the land at the place of the alleged obstruction may become involved. *Burton Tp. v. Tuttle*, 30 Ohio St. 62.

2. *Alabama.* — *Howard v. Ingersoll*, 17 Ala. 780.

Massachusetts. — *Vermont, etc., R. Co. v. Orcutt*, 16 Gray (Mass.) 116.

New Jersey. — *Deacon v. Shreve*, 23 N. J. L. 204.

New York. — *Watts v. Kinney*, 23

Wend. (N. Y.) 485; *Horne v. Buffalo*, 49 Hun (N. Y.) 76, 15 Civ. Pro. Rep. (N. Y.) 81.

United States. — *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538; *Foot v. Edwards*, 3 Blatchf. (U. S.) 310; *Rundle v. Delaware, etc., Canal*, 1 Wall. Jr. (C. C.) 275.

England. — *Simmons v. Lillystone*, 8 Exch. 441; *Richardson v. Locklin*, 6 B. & S. 777, 118 E. C. L. 777; *Mersey, etc., Nav. Co. v. Douglas*, 2 East 497; *Warren v. Webb*, 1 Taunt. 379. And see, generally, article VENUE.

River Dividing Two States. — The courts of Iowa cannot abate a nuisance in the Mississippi river on the Illinois side of the channel though concurrent jurisdiction is granted to both states of the commerce of the river. *Gilbert v. Moline Water Power, etc., Co.*, 19 Iowa 319, following *Mississippi, etc., R. Co. v. Ward*, 2 Black. (U. S.) 485.

County in Margin Taken as Repeated. — If there is no local description in the body of the declaration, the county in the margin must be taken as repeated in the declaration, and it is a material allegation; and on a plea traversing the existence of the highway, proof that the highway is in another county is a fatal variance and a ground of nonsuit. *Richardson v. Locklin*, 6 B. & S. 777, 118 E. C. L. 777, 34 L. J. Q. B. 225, 11 Jur. N. S. 951; *Warren v. Webb*, 1 Taunt. 379.

3. *Thompson v. Crocker*, 9 Pick. (Mass.) 59, wherein it is said that "the place where the injury was done gives the locality to the action, and not the source from which the mischief came;" *Barden v. Crocker*, 10 Pick. (Mass.) 383, holding that the action could be brought either in the county where the injury was caused, or in the county where it was inflicted; *Ruckman v. Green*, 9 Hun (N. Y.) 225, wherein it was held

2. Parties — a. PLAINTIFF. — In an action to recover for injuries flowing out of a nuisance the proper party plaintiff is usually the person holding the legal possession of the injured premises.¹

Under Statutes. — Where provision is made by statute for an action to abate a nuisance, the proper party plaintiff depends largely upon the terms of the statute.²

that an action could be maintained in New York for an injury to lands situated therein, though the business which occasions the injury and constitutes the nuisance complained of is carried on upon lands situated in New Jersey; *Lohmiller v. Indian Ford Water-Power Co.*, 51 Wis. 683, holding that, under Taylor's Wisconsin Stat., c. 123, § 1, where lands in one county were flowed by a dam in another, an action for the injury might be brought in the former county; *Thayer v. Brooks*, 17 Ohio 489, wherein it was held that an action could be maintained in Ohio to recover damages for an injury to property in Ohio occasioned by the diversion of water, though the act was committed in Pennsylvania. To the same effect, see *Pilgrim v. Mellor*, 1 Ill. App. 448; Ohio, etc., R. Co. v. *Combs*, 43 Ill. App. 119; *Armendiaz v. Stillman*, 54 Tex. 623; *In re Eldred*, 46 Wis. 530.

But see *Oliphant v. Smith*, 3 P. & W. (Pa.) 180, where it was held that an action for a nuisance, created by the erection of a dam in a navigable river, could only be sustained in the county where the dam was erected. See also *Prevost v. Gorrell*, 2 W. N. C. (Pa.) 440; *Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525; *Williams v. Land*, 4 Taunt. 729.

1. Husband and Wife — Sickness of Wife. — Where a railroad company by a private nuisance rendered an adjoining dwelling unwholesome, it was held that the husband being the occupier and in rightful possession was the proper plaintiff, and not the wife, although the sickness resulting from the nuisance was that of the wife. *Ellis v. Kansas City, etc., R. Co.*, 63 Mo. 131.

House Owned by Wife. — A husband who with his family occupies a house owned by his wife cannot sue for damages resulting from a nuisance maintained in the vicinity whereby the house is rendered less comfortable and the complainant's children are made sick. Both the occupation and legal possession being in the legal sense that

of the wife, the husband is not the proper party to bring the action. *Kavanagh v. Barber*, 131 N. Y. 211, reversing 59 Hun (N. Y.) 60.

Sickness of Minor Children. — In an action by a father to recover damages for a nuisance whereby his minor children were rendered sick, it is improper for him to join such minor children as parties plaintiff. *Lockett v. Fort Worth, etc., R. Co.*, 78 Tex. 211.

Tenants in Common Should Join. — In an action by one tenant in common to recover damages for a nuisance, the other tenant in common should be joined as a plaintiff. *Fell v. Bennett*, 110 Pa. St. 181.

Disseizor. — Where it appeared that the grantee of a disseizor was maintaining on the land of which he was wrongfully seized, an embankment so as to flood other land of the disseizor, it was held that the disseizor might maintain an action on the case for the nuisance. *Fifield v. Bailey*, 55 N. H. 380.

2. Iowa — Citizen of County. — Under the Iowa Act of 1884, providing that a suit may be maintained by any citizen of the county for the abatement of a nuisance, it was held that such action could only be maintained by a citizen of the county wherein the nuisance was located. *Applegate v. Winebrenner*, 66 Iowa 67.

City as Plaintiff. — The Iowa Code, § 3331, provides that a civil action by ordinary proceedings may be brought for a nuisance by any person injured thereby, in which action the nuisance may be abated, etc. It was held that this section did not authorize a city to bring a civil action for the abatement of the nuisance on the ground that such nuisance was injurious to the public in general. *Ottumwa v. Chinn*, 75 Iowa 405.

California — Obstruction of Highway. — A suit to abate a public nuisance, caused by the obstruction of a public highway, cannot be brought in the name of the county as the plaintiff; under Cal. Political Code, § 2746, as amended in 1873-4, the suit should be in the

Joinder of Separate Property Owners. — Where the property of several persons is affected by a nuisance, they may join in an action to abate the same, although they own the property in severalty.¹ But they cannot join in an action to recover damages, the injuries to their property being separate and distinct.²

b. DEFENDANT — Person Erecting Nuisance. — An action lies against the person who erects a nuisance, even though he may have afterward transferred the property to another.³ But the persons to whom the property has been transferred may properly be joined as defendants.⁴

Joinder. — Where a nuisance results from the acts of several persons acting separately, they cannot be joined as defendants in an action for damages.⁵ But where the act creating the nuisance is

name of the road overseer. *San Benito County v. Whitesides*, 51 Cal. 416.

1. *Grant v. Schmidt*, 22 Minn. 1; *Bushnell v. Robeson*, 62 Iowa 540.

2. *Palmer v. Waddell*, 22 Kan. 352; *Grant v. Schmidt*, 22 Minn. 1.

Demurrer for Misjoinder. — In *Hellams v. Switzer*, 24 S. Car. 39, where there was such a joinder of parties, it was held that a demurrer interposed orally at the hearing, that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. However, a demurrer for misjoinder of causes of action was held to be improper in such case.

3. *Grady v. Wolsner*, 46 Ala. 381, wherein it was held that an action lies against him who erects a nuisance, and, notwithstanding a recovery for such erection, an action may afterward be maintained against him for the continuance, though he has made a lease of it to another. See also *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Connor v. Hall*, 89 Ga. 257.

May Be Brought Against Erector Alone. — Where a private way is obstructed by one of several persons claiming the land over which the way is situated, a proceeding to remove the obstruction as a nuisance may be brought against the person who erected it without joining the other claimants as codefendants. *Connor v. Hall*, 89 Ga. 257.

One of the Owners of a Dam alleged to be a nuisance, who supports it and derives benefit therefrom, is a proper party defendant to an action for damages and abatement. *Lohmiller v. Indian Ford Water-Power Co.*, 51 Wis. 683.

4. *Cobb v. Smith*, 38 Wis. 21, wherein it was held that in an action brought to

recover damages for injuries to land arising out of a nuisance, persons who, after the creating of the nuisance, acquired title to the land on which it was situated, and by whose authority it had been continued, were properly made defendants.

May Sue Either or Both. — Where one person erects a nuisance and afterwards transfers it to another, a property owner injured thereby may recover damages in a suit against either party or against both at his election. *Hyde Park Thomson-Houston Light Co. v. Porter*, 167 Ill. 276.

But see *Brown v. Woodworth*, 5 Barb. (N. Y.) 550, wherein it was held that both the person who erected the nuisance and the one to whom the property was transferred must be joined as defendants in the writ of nuisance.

Liability Must Be Joint. — In an action to recover damages for a nuisance, the owner of the premises by whom the nuisance was erected, and several persons who severally held and maintained the nuisance as tenants, at different periods under distinct leases, were joined as defendants; and the plaintiff prayed judgment for an abatement of the nuisance and for damages for the whole period of its maintenance. It was held that there was a misjoinder of causes of action. *Greene v. Nunnemacher*, 36 Wis. 50.

5. *Martinowsky v. Hannibal*, 35 Mo. App. 70; *People v. Oakland Water Front Co.*, 118 Cal. 234. See also *Sloggy v. Dilworth*, 38 Minn. 179.

In *Martinowsky v. Hannibal*, 35 Mo. App. 70, the court said "When the act producing the injury is not joint, the party can be held responsible only

joint, such persons may properly be joined as defendants.¹

3. Declaration or Complaint — a. IN GENERAL — Showing Nuisance. — In an action for a nuisance the complaint or declaration should state enough to show that the act complained of is in fact and in law a nuisance.²

to the extent of injuries inflicted by his own wrong, and a joint action against the parties, whose separate acts produced the wrong, cannot be brought."

Each Liable for Proportion of Damages. — For a nuisance resulting from the acts of several persons acting independently, each is liable for his proportion only of the consequent damages. *Sloggy v. Dilworth*, 38 Minn. 179; *Martinowsky v. Hannibal*, 35 Mo. App. 70.

Demurrer for Misjoinder of Parties and Causes. — Where, in a suit to abate a public nuisance, it appears that each of the several defendants acted independently of the others in the maintenance of separate alleged nuisances, a demurrer will lie for misjoinder of causes and of parties defendant. *People v. Oakland Water Front Co.*, 118 Cal. 234.

1. *Rogers v. Stewart*, 5 Vt. 215; *Irvin v. Wood*, 4 Robt. (N. Y.) 138; *Commage v. Stevenson*, 76 Tex. 642. But see *Greene v. Nunnemacher*, 36 Wis. 50.

Each May Be Sued for Entire Damages. — For a nuisance resulting from the joint acts of several persons, each may be sued for the entire damages. *Sloggy v. Dilworth*, 38 Minn. 179.

Insufficient Showing of Joint Liability. — In an action to abate a distillery as a nuisance, and to recover damages, the owner of the premises and several lessees who had at different times severally maintained the nuisance were joined as defendants, the complaint averring "that, notwithstanding the said distillery has at different times been run and operated in the name of one or the other of said defendants, it has nevertheless been run and conducted for the benefit and profit of all of said defendants." It was held that this averment was not sufficient to show a joint liability in the defendants. *Greene v. Nunnemacher*, 36 Wis. 50.

2. *O'Brien v. St. Paul*, 18 Minn. 176, wherein it is said: "In a civil action for a nuisance the complaint must state facts which in law constitute a nuisance from which the plaintiff has suffered special injury." See also *Ohio, etc., R. Co. v. Simon*, 40 Ind. 278; *Jackson v. Castle*, 80 Me. 119.

Sufficient Declaration. — A declaration that the defendant railroad company unlawfully constructed its road along a certain street and obstructed the street adjoining the residence of the plaintiff and thereby prevented a free passage to and from his dwelling house, and that the defendant kept up dangerous fires, generated and deposited about his premises noxious vapors and smoke, jarred and disjoined his house, and made his residence unwholesome and uncomfortable, is good on demurrer. *Parrott v. Cincinnati, etc., R. Co.*, 3 Ohio St. 330.

In an action on the case to recover for depreciation in the value of the plaintiff's premises, caused by a nuisance, the declaration alleged that the defendant "wrongfully and injuriously erected and built" the building, and therein "wrongfully built, located, constructed, and kept and continued" certain electric-light plants, and "wrongfully and injuriously operated" the same to the permanent injury, damage, and depreciation of the plaintiff's premises. This was held to be a sufficient allegation under which to prove not only the damage suffered by the plaintiff from the erection, but also from the operation of the plant, past, present, and prospective. *Hyde Park Thomson-Houston Light Co. v. Porter*, 64 Ill. App. 152.

Cemetery as Nuisance — Statement of Reasons. — A naked averment that a cemetery is a nuisance, without the statement of reasons to render it so, is not sufficient to authorize proceedings to abate or suppress it. *Begein v. Anderson*, 28 Ind. 79.

Immediate Cause of Injury. — In declaring for a nuisance the immediate cause of injury must be stated; and under an averment of the remote cause, and an allegation that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. *Fitzsimons v. Ingalls*, 5 Taunt. 534, 1 E. C. L. 181.

Surplusage. — A complaint stating a good cause of action for maintaining a nuisance is not vitiated by the fact

Pleading and Proof. — The proof should, of course, correspond with the allegations.¹

Use of Word "Nuisance." — It is not necessary, however, to use the word "nuisance" in describing the thing complained of, or to charge that it was a nuisance, if the facts alleged show it to be a nuisance.²

Knowledge of Nuisance. — The complaint in an action for injuries caused by a nuisance need not allege that the nuisance was unknown to the plaintiff when the injury happened.³

Negating Supposable Causes of Injury. — The complaint in an action for damages resulting from the maintenance of a nuisance need not by direct averment negative the supposition that the damages were occasioned by other causes than those constituting the foundation of the action, where it appears by other allegations in the complaint that the acts of the defendant were the direct cause of the damages.⁴

b. ALLEGING NOTICE TO REMOVE. — In an action against the creator of a nuisance the complaint or declaration need not allege

that it contains immaterial allegations. *Scheible v. Law*, 65 Ind. 332; to the same effect, *Panton v. Holland*, 17 Johns. (N. Y.) 92.

1. Fatal Variance. — Where in an action for a nuisance, the complaint alleged that the nuisance was below the plaintiff's land, and the proof was that it was adjoining and on the plaintiff's land, it was held that the variance was fatal. *Brown v. Woodworth*, 5 Barb. (N. Y.) 550.

Sufficient Correspondence of Proof. — Where a declaration alleged that a nuisance had been created and maintained by the discharge through a drain of polluted water upon the land of the plaintiff, it was held that the allegation was sufficiently supported by proof that the waters of a natural stream had been polluted, and by means of a drain placed partly in the watercourse and partly upon the plaintiff's land discharged upon the said land. *McGenness v. Adriatic Mills*, 116 Mass. 177.

Alleging Several Elements of Damage. — The petition, in an action for the abatement of a nuisance and for damages resulting therefrom, alleged that the plaintiff's premises were rendered uninhabitable, that the house and its contents were damaged, and that the vegetation was injured or destroyed. It was held that an instruction that the plaintiff, to recover, must prove every allegation of his petition, was erroneous, as calculated to mislead the jury into believing that the plaintiff

could not recover on any one of the distinct elements of damages without proving all. *Harley v. Merrill Brick Co.*, 83 Iowa 73.

Harmless Variance. — A variance between the complaint and an answer to an interrogatory as to the distance between a certain mill and a dam will be deemed on appeal as harmless. *Scheible v. Law*, 65 Ind. 332.

2. Sullivan v. Waterman, 20 R. I. (pt. ii.) 134, wherein it is said: "It is true that the declaration does not in terms allege that the acts complained of constituted a nuisance; but we do not think this is necessary so long as said acts, as stated, amount to a nuisance in fact and in law; and to allege in the declaration, therefore, that they constituted a nuisance would simply be to state a conclusion of law." See also *Chit. Pl.* (ed. 1821) 429 *et seq.*; *Oliv. Prec.* (3d ed.) 373; *Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322.

3. Morford v. Woodworth, 7 Ind. 83. And see *Kern v. Myll*, 80 Mich. 525.

4. In Fort Worth v. Crawford, 74 Tex. 404, the court said: "It was not necessary for the petition by direct averment to negative the supposition that the sickness and injury to [the plaintiff] and family were occasioned by other causes than those constituting the foundation of the suit. This was necessarily implied from the allegations that his home for a long time prior to 1881 [the erection of the nuisance] had been free from all noxious

that a notice or request to remove it had been given, but if the action is against the mere continuer of it, such an allegation, by the great weight of authority, is necessary.¹

c. ALLEGATIONS AS TO ERECTION OF NUISANCE. — In an action for damages caused by the erection or maintenance of a nuisance, the complaint should allege that the defendant erected the nuisance or that he had actual knowledge that he was maintaining it.² But where the injury results not from the erection itself but from the wrongful use thereof, an allegation that the defendant erected it is not necessary.³

Time of Erection of Nuisance. — In an action for erecting a nuisance, though the exact time of erection need not be averred, yet the fact of the erection on some given time must be distinctly charged.⁴ But in an action for continuing a nuisance the time of its erection or creation need not be set forth.⁵

d. ALLEGATIONS AS TO DAMAGES — (1) *Private Nuisance.* — In an action for a private nuisance a general allegation of damages is, as a rule, sufficient, and under it the plaintiff may recover all damages that are the natural and necessary consequence of the nuisance.⁶

and offensive odors and was a healthy abode. That the acts of the defendant were the direct cause of the injury, is sufficiently stated in the averments to the effect that his 'was a desirous and healthy home for plaintiff and his family prior to the time the defendant committed and permitted the nuisances hereinafter complained of,' etc., coupled with and followed by allegations describing the nuisances."

1. 2 Chitty Pl. 334, note c; 2 Saunders Pl. and Ev. (ed. 1851) 464; Winsmore v. Greenbank, Willes 577; Plerson v. Glean, 14 N. J. L. 36; Salmon v. Bensley, R. & M. 189, 21 E. C. L. 414; Hubbard v. Russell, 24 Barb. (N. Y.) 404; Penruddock's Case, 5 Coke 101; Wabash R. Co. v. Sanders, 47 Ill. App. 436; Slight v. Gutzlaff, 35 Wis. 674. But see Conhocton Stone Co. v. Buffalo, etc., R. Co., 52 Barb. (N. Y.) 390; Morris Canal, etc., Co. v. Ryerson, 27 N. J. L. 457. See also Rippon v. Bowles, 1 Rolfe 222; Lambert v. Bessey, T. Raym. 424, where a different rule in reference to obstructions to ancient lights and private ways would seem to be indicated.

Wrongful Use of Property. — Where the injury results not from the erection itself but from the wrongful use thereof there is no necessity to allege that notice had been given to remove the erection. Beavers v. Trimmer, 25

N. J. L. 97. See also Morris Canal, etc., Co. v. Ryerson, 27 N. J. L. 457.

Variance. — Where in an action for damages arising out of a private nuisance, the petition alleged that the city defendant originated the nuisance, it was held that proof that the city had continued the nuisance would not sustain the allegation, since in the latter case a request to abate was necessary. Rychlicki v. St. Louis, 115 Mo. 662.

Alder by Verdict. — In Tomlin v. Fuller, 1 Mod. 27, the court were unanimously of opinion that an allegation of a request was necessary, and that the declaration without it was bad on demurrer; yet on motion in arrest they gave judgment for the plaintiff because the defect was cured by verdict.

2. Missouri Pac. R. Co. v. Webster, 3 Kan. App. 106; Beavers v. Trimmer, 25 N. J. L. 97; Wabash R. Co. v. Sanders, 47 Ill. App. 436.

3. Beavers v. Trimmer, 25 N. J. L. 97.

4. Hodges v. Hodges, 5 Met. (Mass.) 205.

5. Hodges v. Hodges, 5 Met. (Mass.) 205; Westbourne v. Mordant, Cro. Eliz. 191; 2 Saunders Pl. (3d Am. ed.) 687.

6. Parker v. Griswold, 17 Conn. 288; Smiths v. McConathy, 11 Mo. 517; Hart v. Evans, 8 Pa. St. 13; Sullivan

Stating Facts Causing Damage. — But where the damages are special — that is, such as do not necessarily arise, or are not implied by law, from the act complained of — the facts out of which they arise must be averred in the complaint.¹

(2) *Private Action for Public Nuisance.* — In an action by a private individual for a public nuisance the declaration or complaint, to be sufficient, must allege sufficient facts to show that the plaintiff has sustained a special injury differing in kind, and not in degree only, from that sustained by the general public.²

v. Waterman, 20 R. I. (pt. ii.) 134; *Codman v. Evans*, 7 Allen (Mass.) 431; *Baten's Case*, 9 Coke 536; *Comminge v. Stevenson*, 76 Tex. 645; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Bollvar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

In *Hutchinson v. Granger*, 13 Vt. 386, it was held that, in an action on the case for backing water upon the plaintiff's land by means of a dam, the declaration must substantially allege the flowing of the land, and the means by which it is done; but, in general, damage such as rendering the land wet and unproductive and destroying crops need not be alleged.

No Allegation of Special Damages. — In an action on the case for a nuisance, if in judgment of law it appears that some injury will necessarily result to the plaintiff therefrom, the declaration will be sustained on motion in arrest of judgment without any allegation of special damages. *Troy v. Cheshire R. Co.*, 23 N. H. 83. See also *Sullivan v. Waterman*, 20 R. I. (pt. ii.) 134.

Pleading and Proof of Damage. — An allegation that the defendant "wrongfully and injuriously erected and built" the building complained of, and therein "wrongfully built, located, constructed, kept and continued" certain electric plants and "wrongfully and injuriously operated" the same to the permanent injury, damage, and depreciation of the plaintiff's premises, is sufficient to admit proof not only of the damage suffered by the plaintiff from the erection but also from the operation of the plant, past, present, and prospective. *Hyde Park Thomson-Houston Light Co. v. Porter*, 64 Ill. App. 152.

1. *Lewiston Turnpike Co. v. Shasta, etc.*, *Wagon Road Co.*, 41 Cal. 562; *Russell v. Bancroft*, 79 Tex. 377; *Sculer v. Gould*, 14 Wend. (N. Y.) 159. And see *Potter v. Froment*, 47 Cal. 165.

2. *California.* — *Lewiston Turnpike*

Co. v. Shasta, etc., *Wagon Road Co.*, 41 Cal. 562; *Tibbets v. Blade*, 60 Cal. 428; *Hargro v. Hodgdon*, 89 Cal. 623; *Bigley v. Nunan*, 53 Cal. 403.

Colorado. — *Platte, etc., Ditch Co. v. Anderson*, 8 Colo. 131; *Walley v. Platte, etc., Ditch Co.*, 15 Colo. 579.

Georgia. — *East Tennessee, etc., R. Co. v. Boardman*, 96 Ga. 356.

Idaho. — *Stufflebeam v. Montgomery*, 2 Idaho 763.

Indiana. — *Pettis v. Johnson*, 56 Ind. 139.

Kentucky. — *Shields v. Louisville, etc., R. Co.*, 16 Ky. L. Rep. 849.

Maine. — *Holmes v. Corthell*, 80 Me. 31.

Massachusetts. — *Baker v. Boston*, 12 Pick. (Mass.) 184.

Minnesota. — *Lakkie v. Chicago, etc., R. Co.*, 44 Minn. 438.

Missouri. — *Smiths v. McConathy*, 11 Mo. 517.

Nevada. — *Fogg v. Nevada-California-Oregon R. Co.*, 20 Nev. 429.

New Jersey. — *Board of Health v. New York Horse Manure Co.*, 47 N. J. Eq. 1.

New York. — *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Bogert v. Burkhalter*, 2 Barb. (N. Y.) 525; *Hudson River R. Co. v. Loeb*, 7 Robt. (N. Y.) 418.

Ohio. — *Ett v. Snyder*, 6 Am. L. Rec. 415, 5 Ohio Dec. (Reprint) 523; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516.

Oregon. — *Roseburg v. Abraham*, 8 Oregon 509.

Pennsylvania. — *Hart v. Evans*, 8 Pa. St. 13; *Mechling v. Kittanning Bridge Co.*, 1 Grant's Cas. (Pa.) 416.

Rhode Island. — *Sullivan v. Waterman*, 20 R. I. (pt. ii.) 134.

South Carolina. — *Hellams v. Switzer*, 24 S. Car. 39.

Wisconsin. — *Greene v. Nunnemacher*, 36 Wis. 50; *Clark v. Chicago, etc., R. Co.*, 70 Wis. 593; *Carpenter v. Mann*, 17 Wis. 155.

England. — *Jeveson v. Moor*, 12 Mod. 262; *Pain v. Patrick*, 3 Mod. 289.

c. ALLEGATIONS AS TO TITLE OR CONTROL OF PROPERTY—

(1) *Plaintiff's Title*.—In the old common-law action by writ of nuisance, the plaintiff was required to allege in his declaration that he had a freehold estate in the premises affected by the nuisance, as the action was a real action.¹ But in an action in the nature of an action on the case merely for the damages sustained in consequence of the erection of the nuisance, the declaration need only show that the plaintiff was in possession of the premises affected.²

And see in general Am. and Eng. Encyc. of Law, tit. *Nuisances*.

For a complaint which was held not to allege sufficiently special damage to the plaintiff to warrant a private action for a public nuisance, see *Fogg v. Nevada-California-Oregon R. Co.*, 20 Nev. 429.

Sufficient Showing of Special Injury—*Injury to Business and Health*.—In an action for damages for a nuisance, the complaint alleged that, by reason of the unwholesome condition of the atmosphere around the plaintiff's premises, caused by the nuisance complained of, the plaintiff had been, and was, deprived of a great many customers and much patronage in his business as a tavern keeper; that his profits had thus been diminished at least five thousand dollars a year; and that he and his family had been greatly injured in health and subjected to frequent illness from the same cause. It was held on demurrer that these averments showed special and peculiar injury entitling the plaintiff to maintain a private action for a public nuisance. *Greene v. Nunnemacher*, 36 Wis. 50.

Where a complaint by a private party to abate a public nuisance alleges facts sufficient to show that the nuisance is a cause of special injury to the plaintiff by reason of the fact that customers are thereby restrained and influenced not to trade with the plaintiff, it is sufficient. *Pettis v. Johnson*, 56 Ind. 139.

Interruption of Use of River.—An averment that the plaintiffs are interrupted in the full and free use of the waters of the Hudson river in the slips between their piers or wharves, and thereby deprived of emolument which otherwise they would derive from their franchises of wharfage, sufficiently shows special damage to entitle them to maintain their private action for a public nuisance. *Hudson River R. Co. v. Loeb*, 7 Robt. (N. Y.) 418.

Injury to Crops.—In *Maynell v. Salt-*

marsh, 1 Keb. 847, an allegation that the plaintiff's corn was corrupted and spoiled in consequence of posts set in a highway which prevented his removing it was held a sufficient statement of special damage.

Judgment Not Given on Pleadings.—Although a complaint in an action at law to abate a public nuisance fails to allege that the plaintiff has sustained injury different from that sustained by the public, still if such injury appears by inference, a motion for judgment on the pleadings at the commencement of the trial is properly overruled. But such complaint is insufficient on special demurrer. *Hargro v. Hodgdon*, 89 Cal. 623.

Nuisance Not Alleged to Be Public.—In an action to abate an embankment which caused water to overflow the plaintiff's right of way, it is not necessary for the plaintiff to allege special damage, where there is no averment in the complaint that the right of way was a public highway or that the public had any easement therein. *Silva v. Spangler*, (Cal. 1896) 43 Pac. Rep. 617.

Distinct Injuries.—Where a complaint alleges that a nuisance has caused several distinct injuries to the plaintiff, the amount of damages caused by each injury should be averred, otherwise the complaint will be ambiguous and uncertain. *Grandona v. Lovdal*, 70 Cal. 161.

Omission Not Cured by Verdict.—The omission to state special injury is not cured by verdict. *Platte, etc., Ditch Co. v. Anderson*, 8 Colo. 131. But see *Hall v. Kitson*, 3 Pin. (Wis.) 296, 4 Chand. (Wis.) 20.

1. *Corn v. Harris*, 1 N. Y. 223; *Ellsworth v. Putnam*, 16 Barb. (N. Y.) 565. See also *Great Falls Co. v. Worster*, 15 N. H. 412.

2. 1 Chitty Pl. 330; 2 Saunders Pl. (3d Am. ed.) 687; *Quinn v. Winter*, 15 Daly (N. Y.) 383; *Ellsworth v. Put-*

(2) *Defendant's Title*. — Though the complaint need not set out the defendant's title to the property on which the nuisance exists, it should allege enough to show his liability for the existence of the nuisance.¹

f. ALLEGATIONS AS TO NEGLIGENCE. — As a general rule negligence is not an element in an action for a nuisance and need not be alleged.² But where the cause of action grows solely out of the negligence of the defendant, as for example a cause of action arising from an explosion,³ or the undermining of a building by excavating,⁴ or from the acts of those proceeding under legislative authority, unless the acts are in excess of their authority,⁵ negligence should be charged.⁶

nam, 16 Barb. (N. Y.) 565; *Cornes v. Harris*, 1 N. Y. 223.

Proving Title Alleged. — If title be stated in the declaration it must be proved as stated. 2 Saund. Pl. (3d Am. ed.) 687.

Sufficient Showing of Title. — An allegation in a complaint that the plaintiffs are the lessees in possession and are in the use of the piers and wharves in question, is a sufficient allegation as a pleading to show title. *Hudson River R. Co. v. Loeb*, 7 Robt. (N. Y.) 418.

Diversion of Watercourse. — In *Hart v. Evans*, 8 Pa. St. 13, it was held that in an action for diverting a watercourse from the lands of the plaintiff, his possession of the lands was sufficiently stated in the declaration by an allegation that he was "seized in their demesne as of fee."

Action to Abate. — In *Hutchins v. Smith*, 63 Barb. (N. Y.) 251, it was held that in an action to abate a nuisance the plaintiff must allege that he was the owner of the freehold affected by the nuisance at the time when the acts complained of were committed.

1. *Ft. Worth v. Crawford*, 74 Tex. 404. See also *Martinowsky v. Hannibal*, 35 Mo. App. 70.

Defendant in Possession of Premises. — In *Rider v. Smith*, 3 T. R. 766, an allegation that the defendants were in possession of the premises complained of was held sufficient.

Need Not Allege that Defendant Tenant of Freehold. — In *Horton v. Brownsey*, (Supreme Ct.) 10 N. Y. St. Rep. 800, it was held that an allegation that the defendant acted "with the consent, by license, lease, or otherwise," of the owner of the land, was sufficient to admit proof of the nature of the defendant's holding, in the absence of a motion to make it more definite, and

that an allegation that the defendant was a tenant of the freehold was not necessary.

Writ of Nuisance. — But in an action in the nature of the common-law writ of nuisance, the complaint must allege that the defendants were tenants of the freehold of the land whereon the nuisance was erected. *Ellsworth v. Putnam*, 16 Barb. (N. Y.) 565; *Hess v. Buffalo, etc.*, R. Co., 29 Barb. (N. Y.) 391. See also *Brown v. Woodworth*, 5 Barb. (N. Y.) 550.

2. *Laffin, etc., Powder Co. v. Tearney*, 131 Ill. 322; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Clifford v. Dam*, 81 N. Y. 52; *Campbell v. U. S. Foundry Co.*, 73 Hun (N. Y.) 576; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Heeg v. Licht*, 80 N. Y. 579; *Cogswell v. New York, etc.*, R. Co., 103 N. Y. 10; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18; *Fletcher v. Rylands, L. R.* 1 Exch. 265; *Wilson v. New Bedford*, 108 Mass. 261; *Cahill v. Eastman*, 18 Minn. 324; *Fletcher v. Smith, L. R.* 2 App. 781; *Baltimore, etc.*, R. Co. v. *Reaney*, 42 Md. 117.

3. *Losee v. Buchanan*, 51 N. Y. 476; *Wier's Appeal*, 74 Pa. St. 230. See also *People v. Sands*, 1 Johns. (N. Y.) 78.

4. *Moody v. McClelland*, 39 Ala. 45; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Thurston v. Hancock*, 12 Mass. 220; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169.

5. *Brewer v. Boston, etc.*, R. Co., 113 Mass. 52; *Johnson v. Atlantic, etc.*, R. Co., 35 N. H. 569; *Waterman v. Connecticut, etc.*, R. Co., 30 Vt. 610; *Lawrence v. Great Northern R. Co.*, 4 Eng. L. & Eq. 265. And see *Davis v. Sacramento*, 59 Cal. 596.

6. *Morris v. Barrisford*, 9 Misc. Rep. (N. Y. C. Pl.) 14; *Kuechenmeister v. Brown*, 13 Misc. Rep. (N. Y. C. Pl.)

g. ACTION AGAINST MUNICIPAL CORPORATION. — In an action against the officers of a municipal corporation for maintaining a nuisance, the complaint should allege the duty of the defendant in respect of the nuisance, and the failure to perform, or the negligent performance of, such duty.¹

h. NUISANCE IN HIGHWAY. — In an action to abate as a nuisance an obstruction of a highway, the petition should indicate the location of the alleged obstruction,² but need not allege its length and breadth.³

i. SUBSEQUENT ACTION FOR CONTINUANCE. — Where a judgment for damages for the maintenance of a nuisance up to the time of the judgment has been had, and another action is brought for damages accruing subsequent to such time, the complaint should set forth the former judgment and charge the continuance of the nuisance.⁴

j. JOINDER OF CAUSES OF ACTION — (1) *Erection and Continuance of Nuisance.* — A cause of action for the erection or creation of a nuisance may be joined with a cause of action for the continuance of the same nuisance.⁵

139; *Rockwood v. Wilson*, 11 Cush. (Mass.) 221; *Howland v. Vincent*, 10 Met. (Mass.) 371; *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352.

1. *Martinowsky v. Hannibal*, 35 Mo. App. 70; *Ft. Worth v. Crawford*, 74 Tex. 404.

See also *Threadgill v. Anson County*, 99 N. Car. 352, where it was held that the complaint in all actions against the officers of a municipal corporation for maintaining a nuisance should allege that the defendants had neglected to take the means at their disposal for the prevention of the nuisance.

2. *Sloan v. Rebman*, 66 Iowa 81, wherein it is said: "If all the averments in plaintiff's petition had been confessed, it would have been impossible for the court, from them alone, to so describe the alleged obstructions of the highway in an order, as that they could thereby be identified by the officer who might be charged with the duty of removing them."

But see *Mehrhof Bros. Brick Mfg. Co. v. Delaware, etc., R. Co.*, 51 N. J. L. 56, wherein the plaintiffs, who had a brickyard on a navigable stream, alleged in their declaration that the defendants by an unlawful obstruction therein shut them off from the natural market for their wares, but omitted to state the place where such obstruction was placed. It was held on general demurrer that, as a matter of substance, such description was unneces-

sary, and that, considered as a matter of venue in the body of the pleading, it was a matter of form only.

3. *Snow v. Adams*, 1 Cush. (Mass.) 443.

4. *Smith v. Elliott*, 9 Pa. St. 345; *Ellis v. Academy of Music*, 120 Pa. St. 608, wherein it was held that though the complaint should have alleged the former recovery, yet as the defect might have been cured by an amendment and as under his plea of not guilty the defendant could have set up the former recovery, and as the plaintiff was only allowed to recover for the continuance, the defendant was not prejudiced by the defect of the complaint. To the same effect see *Beckwith v. Griswold*, 29 Barb. (N. Y.) 291.

Former Recovery Not a Bar. — Every continuance of the nuisance is a new cause of action, and a declaration covering any one or all of such causes is sufficient, notwithstanding it alleges extraneous matter to which a former recovery may be interposed as in bar. *Fell v. Bennett*, 110 Pa. St. 181. See *infra*, III. 7. *Successive Actions.*

5. *Hodges v. Hodges*, 5 Met. (Mass.) 205; and see *Aldrich v. Wetmore*, 56 Minn. 20, wherein it was held that a cause of action for injuries resulting from noxious vapors from a cesspool or stagnant water suffered to remain on his premises by the owner in an excavation thereon made by him may be united with one for damages from de-

Amendment. — In an action for the erection of a nuisance, the declaration may be amended by the addition of a count for the continuance of the nuisance.¹

(2) **Abatement and Damages.** — And a complaint may demand both an abatement of the alleged nuisance and damages therefor, without being subject to the objection that distinct causes of action are improperly joined.²

4. Plea or Answer. — The ordinary plea in a common-law action in the nature of an action on the case for a nuisance is the plea of "not guilty."³ This plea puts in issue all material averments of the declaration,⁴ and under it the defendant may, as a general rule, show any matter that will preclude the plaintiff's recovery.⁵

positing dirt removed from such excavation in the street in front of the adjoining premises.

1. *Miller v. Frazier*, 3 Watts (Pa.) 456, wherein a count for the continuance of the nuisance was added after the testimony on each side had been given; *Foote v. Burlington Gaslight Co.*, 103 Iowa 576. And see *Beckwith v. Griswold*, 29 Barb. (N. Y.) 291.

2. *Grandona v. Lovdal*, 70 Cal. 161; *Drinkwater v. Sauble*, 46 Kan. 170; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251. And see *Harley v. Merrill Brick Co.*, 83 Iowa 73.

Wisconsin. — Under Taylor's Wis. Stat., c. 144, in a suit for damages on account of a nuisance, the court can grant relief both by damages and abatement of the nuisance, and a demurrer for misjoinder of causes will not lie to a complaint which asks for both forms of relief. *Lohmiller v. Indian Ford Water-Power Co.*, 51 Wis. 683.

Abatement and Damages Only Different Kinds of Relief. — "The nuisance is the cause of action; the abatement and damages therefor are merely the different kinds of relief to which the plaintiff may be entitled." *Sanderson, J.*, in *Yolo County v. Sacramento*, 36 Cal. 193.

Abatement and Action for Penalty. — Under Cal. Pol. Code, § 2734, providing that the road overseer may bring an action to abate an encroachment in a highway, "and if he recovers judgment he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after notice," a cause of action to abate a nuisance caused by the obstruction of a highway and a cause of action to recover the penalty for every day the nuisance remained may be united in

the same action. *Bailey v. Dale*, 71 Cal. 34.

Several Penalties. — In *Chapman v. Chapman*, 1 Root (Conn.) 52, it was held that in a prosecution upon the statute for the penalty of five shillings per week for overflowing the lands of another, the penalty for one week only can be sued for at a time.

3. 1 Chitty on Pl. 432; *Smiths v. McConathy*, 11 Mo. 517; *Jessup v. Loucks*, 55 Pa. St. 350.

Answer Showing Abatement Inequitable. — In an action for damages for a nuisance and for abatement of the nuisance, facts showing that the abatement would be inequitable may be set up in the answer. *Lohmiller v. Indian Ford Water-Power Co.*, 51 Wis. 683.

4. An Allegation by Way of Inducement in a declaration for maintaining a nuisance is not put in issue by the plea of "not guilty," and the plaintiff is not bound to prove it until an issue is made on it. *Jessup v. Loucks*, 55 Pa. St. 350.

5. 1 Chitty on Pleading 432.

Evidence of Custom. — In an action to abate as a nuisance a ditch by which water bearing detritus from the defendant's hydraulic mine was carried across the plaintiff's land it was held that evidence that a mining custom sanctioned such a ditch was admissible under the general issue. *Jacob v. Day*, 111 Cal. 571.

Former Recovery. — It has been held that under the plea of not guilty, the defendant may give in evidence a former recovery in an action on the case for a nuisance. *Smith v. Elliott*, 9 Pa. St. 345; *Ellis v. Academy of Music*, 120 Pa. St. 608; *Vooght v. Winch*, 2 B. & Ald. 662.

However, the decisions on this subject are not uniform. See the article FORMER ADJUDICATION, vol. 9, p. 611.

5. Judgment for Abatement. — Where, in an action at law for a nuisance, the plaintiff recovers damages, it is the usual practice to grant, in proper cases, a further judgment for the abatement of the nuisance.¹

Discretion of Court. — The judgment of abatement is not usually a matter of course, but rests to some extent in the discretion of the court;² but it cannot be considered purely discretionary, and

Necessity of Pleading License. — In *Clifford v. Dam*, 44 N. Y. Super. Ct. 391, affirmed 81 N. Y. 52, it was held that where an act is done under a license from public authority and the license is relied on as a defense it must be specially pleaded. To the same effect, see *Irvine v. Wood*, 51 N. Y. 224.

But see *Kuechenmeister v. Brown*, 13 Misc. Rep. (N. Y. C. Pl.) 139, where in it was held that in an action for personal injuries caused by maintaining a nuisance in a street the defendant may prove under a general denial that the city consented to the opening in the sidewalk alleged to constitute the nuisance.

Reply. — In an action for damages because the defendant had constructed a dam whereby the water was backed up and diminished the plaintiff's water power, the defendant pleaded a license and the expenditure of money on the faith thereof. It was held that the reply by the plaintiff that the license had been revoked before the expenditure was made was sufficient. *Williamson v. Yingling*, 80 Ind. 379.

1. *Codman v. Evans*, 7 Allen (Mass.) 431; *Bemis v. Clark*, 11 Pick. (Mass.) 452; *Williamson v. Yingling*, 93 Ind. 42; *Maxwell v. Boyne*, 36 Ind. 120; *Marsh v. Thrullinger*, 6 Oregon 356; *Kothenberthal v. Salem Co.*, 13 Oregon 604; *Cobb v. Smith*, 23 Wis. 261.

In *Williamson v. Yingling*, 93 Ind. 42, it was held that where, in an action for damages by back water, it appeared from the finding that such was a nuisance, a judgment ordering the nuisance to be abated was proper.

General Verdict Justifies Abatement. — In an action for the abatement of a nuisance, a general verdict in favor of the plaintiff is sufficient to justify a judgment for the abatement of such nuisance. *Blood v. Light*, 31 Cal. 115.

Failure of Record to Identify Nuisance. — Where, in an action at law for damages for a private nuisance, the plaintiff recovers a verdict on which judgment is entered, and the record fails to

show on its face the particular nuisance established by the verdict, the court may, in ordering a warrant to issue for its abatement, identify such nuisance by the evidence introduced on the trial. *Ankeny v. Fairview Milling Co.*, 10 Oregon 390.

Judgment in Alternative. — In an action to recover damages for a nuisance it was held that a judgment in the alternative that the defendants pay certain damages for a past injury with costs, and that the dam which constituted the nuisance be abated, or that on their paying a certain sum with interests and costs, they and their assigns have a perpetual right as against the plaintiffs, to maintain the dam in its present condition, and the plaintiffs be perpetually enjoined from enforcing the judgment for its removal, was proper. *Cobb v. Smith*, 38 Wis. 21.

Continuance of Nuisance Admitted. — Where, in an action for a nuisance, the court rendered judgment on the verdict for damages and ordered the nuisance abated, it was held that, although the verdict did not determine the continued existence of the nuisance, the order for its abatement was not erroneous since its continuance was conceded on the trial. *Platt v. Chicago, etc., R. Co.*, 74 Iowa 127.

2. *Kothenberthal v. Salem Co.*, 13 Oregon 604; *Cromwell v. Lowe*, 14 Ind. 234.

Massachusetts Statutes of 1828, c. 137, § 6, provides that where a judgment shall be rendered for the plaintiff in an action on the case for a nuisance, "the court may, on motion of the plaintiff, in addition to the common execution, issue a warrant to abate the nuisance." Under this statute it was held to be within the discretion of the court to grant or refuse such motion. *Bemis v. Clark*, 11 Pick. (Mass.) 452.

Turning Plaintiff Over to Equity. — Oregon Code, § 330, provides for an action at law in the case of a private nuisance, and declares that if the plaintiff prevails he may, on motion, have in ad-

whenever the interest and happiness of individuals or the community require such action, it is the imperative duty of the court to order the abatement of the nuisance.¹

6. Abatement No Bar to Recovery. — The abatement of a nuisance will neither bar nor abate an action to recover damages for injuries sustained prior to such abatement.²

7. Successive Actions. — As to the right to maintain successive actions for nuisances, and a recovery in one action as a bar to another where the nuisance continues, see Am. and Eng. Encyc. of Law, title *Nuisances*.

IV. SUITS IN EQUITY — 1. Jurisdiction — a. IN GENERAL. — The jurisdiction of equity courts to grant relief by injunction, in proper cases, against nuisances, either public or private, is undoubted and well settled;³ and wherever the circumstances of the case are

dition to the execution, a warrant to abate the nuisance, unless it appears that the nuisance has ceased, or that the remedy is inadequate. In such case, if it appears that the remedy in equity would be more effective, the court may refuse the warrant and turn the plaintiff over to his remedy in equity. *Kothenberthal v. Salem Co.*, 13 Oregon 604.

1. *Maxwell v. Boyne*, 36 Ind. 120 modifying *Cromwell v. Lowe*, 14 Ind. 234.

Oregon. — Under Oregon Code, § 330, allowing an action at law for a private nuisance, and providing for a warrant for the abatement of such nuisance unless it appears on the hearing of a motion for such a warrant that the nuisance has ceased or that the remedy by abatement would be inadequate, it becomes the imperative duty of the court to order the issuance of the warrant. *Ankeny v. Fairview Milling Co.*, 10 Oregon 390.

2. *Kendrick v. Bartland*, 2 Mod. 253; *Gleason v. Gary*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. (Mass.) 345; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Heather v. Hearn*, (Supreme Ct.) 5 N. Y. Supp. 85; *Tuebner v. California St. R. Co.*, 66 Cal. 171.

In *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 327, it was held that although an assize of nuisance was not maintainable after the abatement of the nuisance by the injured party, nevertheless an action of trespass on the case for damages might be brought.

3. **Alabama.** — *Ogletree v. McQuaggs*, 67 Ala. 580; *St. James Church v. Arrington*, 36 Ala. 546; *Kingsbury v. Flowers*, 65 Ala. 479; *Ray v. Lynes*, 10

Ala. 63; *Rosser v. Randolph*, 7 Port. (Ala.) 238; *State v. Mobile*, 5 Port. (Ala.) 279.

Arkansas. — *Harvey v. De Woody*, 18 Ark. 252; *Ex p. Martin*, 13 Ark. 198.

California. — *People v. Beaudry*, 91 Cal. 213; *People v. Gold Run Ditch, etc.*, Co., 66 Cal. 138.

Colorado. — *Denver v. Mullen*, 7 Colo. 345.

Florida. — *Thebaut v. Canova*, 11 Fla. 143.

Illinois. — *Boyes v. Van Wert*, 38 Ill. App. 426; *Laney v. Jasper*, 39 Ill. 46; *Smith v. McDowell*, 148 Ill. 51.

Indiana. — *Smith v. Fitzgerald*, 24 Ind. 316.

Kentucky. — *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 804.

Massachusetts. — *Carleton v. Rugg*, 149 Mass. 550; *Atty.-Gen. v. Tarr*, 148 Mass. 309.

New Hampshire. — *Burnham v. Kempton*, 44 N. H. 78; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249; *Webber v. Gage*, 39 N. H. 182.

New Jersey. — *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89; *Morris Canal, etc.*, Co. v. Fagan, 18 N. J. Eq. 215; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Atty.-Gen. v. New Jersey R., etc.*, Co., 3 N. J. Eq. 136; *Robeson v. Pittenger*, 2 N. J. Eq. 57; *Society, etc.*, v. *Morris Canal, etc.*, Co., 1 N. J. Eq. 157.

New York. — *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Rochester v. Curtiss*, *Clarke Ch. (N. Y.)* 336; *Syracuse Solar Salt Co. v. Rome, etc.*, R. Co., 11 N. Y. App. Div. 557; *Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133; *People v.*

such that adequate redress cannot be obtained elsewhere, equity will afford relief.¹

Metropolitan Telephone, etc., Co., 64 How. Pr. (N. Y. Supreme Ct.) 120.

Pennsylvania. — *Hieskell v. Gross*, 3 Brews. (Pa.) 430; *Rarick v. Smith*, 5 Pa. Dist. Rep. 530.

United States. — *Parker v. Winnipisogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *U. S. v. Debs*, 64 Fed. Rep. 724.

And see the cases cited throughout this and following sections.

In *State v. Mobile*, 5 Port. (Ala.) 279, it was held that chancery had a right to exercise its jurisdiction in the case of a nuisance in restraining the exercise or erection of, and in some instances to abate, that from which irreparable damage to individuals or great public injury would ensue.

In *Curtis v. Winslow*, 38 Vt. 690, it was held that a court of chancery had authority to grant injunctions to restrain parties from the use of their own land and buildings for trade and purposes in themselves lawful, but necessarily so obnoxious, unhealthy, dangerous, or unwholesome to the occupants of neighboring buildings as to destroy or seriously and substantially to impair their value for the purposes for which they were designed.

What Entitles Party to Relief. — A party asking to have a nuisance abated by injunction will be entitled to relief by that process whenever he can clearly demonstrate two facts: First, that the injury of which he complains is such in its nature and extent as to call for the interposition of a court of equity; and, second, that the right on which he grounds his title to relief is clear whether that fact has been made plain by the action of the appropriate tribunals for the adjudication of questions of legal right, or is so by the settled law of the state when applied to the facts of his particular case. *Stanford v. Lyon*, 37 N. J. Eq. 94.

Nuisances Threatened or Existing. — Courts of equity interfere to restrain and prevent public nuisances threatened or in progress as well as to abate those already existing. *Biddle v. Ash*, 2 Ashm. (Pa.) 211.

As to threatened nuisances, see *infra*, IV. 1. *f. Threatened Nuisances.*

Pending Trial at Law. — Equity will restrain a party from doing an act injurious to an individual or which may

be prejudicial as a public nuisance pending any judicial proceeding before those tribunals by which authority to do the act or its lawfulness is to be determined. *Williamson v. Carnan*, 1 Gill & J. (Md.) 184; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344. See also *Dunning v. Aurora*, 40 Ill. 481.

Injunction or Abatement by Decree. — Where a nuisance is continuing, or likely to produce irreparable injury, a court of equity will grant an injunction to restrain it or it may be abated by decree. *Ex p. Martin*, 13 Ark. 198.

In *Wisconsin* the jurisdiction to abate private nuisances which was taken away from equity by Wis. Rev. Stat. 1878, §§ 3180, 3181, was restored by Wis. Laws 1882, c. 190. *Stadler v. Grieben*, 61 Wis. 500; *Denner v. Chicago, etc., R. Co.*, 57 Wis. 218. And see *Wendlandt v. Cavanaugh*, 85 Wis. 256.

California — **District Courts.** — Actions to prevent or abate nuisances being cases in equity, the grant, in the California Constitution, of original jurisdiction in such actions to the county courts does not deprive the district courts of concurrent jurisdiction under their equity powers. *Courtwright v. Bear River, etc., Water, etc., Co.*, 30 Cal. 573; *Yolo County v. Sacramento*, 36 Cal. 193.

1. As to the particular cases in which equity will grant injunctions against nuisances, see Am. & Eng. Encyc. of Law (2d ed.), titles *Abatement of Nuisances*, vol. I, p. 63; *Nuisances*.

Polluting Water. — Equity has jurisdiction to enjoin a city from polluting the water of a stream, whereby such water will be rendered unwholesome, and a private nuisance will be created in the premises of a landowner over which the stream flows. *Dwight v. Hayes*, 150 Ill. 273.

Maintaining Milldam. — Chancery has power to issue a decree of perpetual injunction against the maintaining of a milldam which has been erected to such a height as to overflow the complainant's property. *Ramsay v. Chandler*, 3 Cal. 90.

Obstruction of Flow of Stream. — A court of equity may enjoin the obstruction of the flow of a stream whereby lands are inundated. *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263.

Jurisdiction Not Original.—But the equitable jurisdiction over nuisances is not an original one. It does not arise from the mere fact that a nuisance exists, but results from circumstances which call it into exercise upon other grounds, as, for example, to restrain irreparable injury, to suppress interminable litigations, or to prevent a multiplicity of suits.¹ A case of actual and pressing necessity must be shown before an injunction will be granted,² and where it does not appear that such a drastic remedy is

Obstruction of Public Highway.—While in general equity will not enjoin a trespass, yet if the trespass is an obstruction of a public highway it is a nuisance and will be prevented by injunction. *Morris Canal, etc., Co. v. Fagan*, 18 N. J. Eq. 215.

Obstructing Streets.—Courts of equity have jurisdiction to enjoin a public nuisance which consists in the placing of a permanent obstruction in the streets of an incorporated city without proper authority. *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601.

A Slaughter House in use in a populous part of a city is *prima facie* a nuisance; and its use as such may be enjoined at the suit of neighboring residents when it is shown by the evidence to be in fact an injury or annoyance. *Reichert v. Geers*, 98 Ind. 73.

Jurisdiction Not Defeated by Partial Abatement.—Where, as the facts were upon the filing of the bill, the complainant was entitled to relief in a court of equity, the defendant cannot defeat complete redress by a partial abatement of the nuisance, upon an insistence that the effects of such portion of the nuisance as still remain are not of sufficient consequence to entitle the complainant to ask that perfect relief which he was entitled to when he sought his remedy. *Carlisle v. Cooper*, 21 N. J. Eq. 576. Compare *King v. Morris, etc., R. Co.*, 18 N. J. Eq. 397.

1. *Oswald v. Wolf*, 129 Ill. 200; *Burnham v. Kempton*, 44 N. H. 78; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249; *Webber v. Gage*, 39 N. H. 182; *Carlisle v. Cooper*, 21 N. J. Eq. 576. And see *infra*, IV. 1. c. *Adequacy of Remedy at Law*.

Courts of equity have, in proper cases, concurrent jurisdiction with courts of law over private nuisances; but many cases will sustain an action at law which will not justify relief in equity. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395.

Jurisdiction in Aid of Courts of Law.—Jurisdiction of a court of equity in a case of nuisance is of a preventive character and comes in aid of the courts of law. It is founded on the necessity created by irreparable mischief and the inadequacy of pecuniary compensation. *Shields v. Arndt*, 4 N. J. Eq. 234; *Ogle-tree v. McQuaggs*, 67 Ala. 580.

Rests in Discretion of Court.—The power of an equity court to grant injunctions in cases of nuisances is unquestionable; but the exercise of the power must always rest in the sound discretion of the court to be governed by the nature of the case. *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157.

2. **It Must Be a Strong and Mischievous Case**, of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court. *Robeson v. Pittenger*, 2 N. J. Eq. 57; *Kingsbury v. Flowers*, 65 Ala. 479; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395.

As to when the right must first be established at law, see *infra*, IV. 1. g. *Necessity for Establishing Right at Law*.

In *Bowen v. Mauzy*, 117 Ind. 258, the court said: "It is well settled that courts of equity will not interfere to restrain a legitimate business except when the injury is material and the reasons for granting an injunction are strong and weighty."

The Remedy by Indictment Being So Efficacious, courts of equity entertain jurisdiction over public nuisance with great reluctance, whether their intervention is invoked at the instance of the attorney-general or of a private individual who suffers some injury therefrom distinct from that of the public. *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89; *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136; *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11.

Preliminary Injunction.—Before an

required by the circumstances of the case, it is the duty of a court of equity not to interfere.¹

Power Cautiously Exercised.—While, as has been stated above, the power of a court of chancery to interfere by injunction in cases of nuisance is clearly established, still it is one of the extraordinary powers of the court and should be cautiously and sparingly exercised;² and before an injunction is granted against a nuisance the complainant should be required to make out a clear case, showing that he is entitled to such relief.³

injunction will be granted *ex parte*, and before the hearing on the merits to restrain a nuisance, it must be shown to be a case of urgent necessity or one in which irreparable mischief will be produced if the aid of the court is denied. *Thebaut v. Canova*, 11 Fla. 143.

Not Ordered Abated Until Opposite Party Heard.—Equity has jurisdiction in the case of a private nuisance, but will not give an order to abate the nuisance until the opposite party has been heard. *Van Bergen v. Van Bergen*, 2 Johns. Ch. (N. Y.) 272.

1. **Where It Appears Doubtful** whether greater injury will not be done by granting than by withholding an injunction against a nuisance, it is the duty of the court to decline to interfere. *Demarest v. Hardham*, 34 N. J. Eq. 469.

Temporary and Occasional Occurrences of Nuisance are not grounds for the interference of the court of chancery by injunction except in extreme cases. *Swaine v. Great Northern R. Co.*, 4 De G. J. & S. 211.

In case of a nuisance which appears to be temporary merely, a court of equity will not grant a temporary injunction in order for the plaintiff to bring an action at law which may be nugatory. *Nelson v. Milligan*, 151 Ill. 462.

Abatement by Defendant.—When a defendant who has been doing what amounts to a nuisance disclaims the intention to continue it, and is proceeding with diligence to remove and abate it, the court will, if satisfied that the cause of complaint will be removed as speedily as practicable, refuse an injunction. *King v. Morris*, etc., R. Co., 18 N. J. Eq. 397. Compare *Carlisle v. Cooper*, 21 N. J. Eq. 576.

Threatened Nuisance.—A court of equity will not enjoin a threatened nuisance unless the danger is imminent and the injury not capable of adequate remedy in any other way. *Spooner v.*

McConnell, 1 McLean (U. S.) 337. See *infra*, IV. 1. *f. Threatened Nuisances.*

Where Damages Demanded in First Instance.—When the injury sought to be restrained has been completed before the filing of the bill, and the plaintiff has, in the first instance, demanded damages, the court will not grant a mandatory injunction even where the injury is substantial, but will direct an inquiry as to damages. *Gort v. Clark*, 16 W. R. 569, 18 L. T. N. S. 343.

2. *Rouse v. Martin*, 75 Ala. 510; *Ray v. Lynes*, 10 Ala. 63; *Rosser v. Randolph*, 7 Port. (Ala.) 238; *St. James' Church v. Arrington*, 36 Ala. 546; *Gray v. Baynard*, 5 Del. Ch. 499; *Green v. Lake*, 54 Miss. 540.

In *Thebaut v. Canova*, 11 Fla. 143, it was said that the jurisdiction of equity over nuisances by injunction, though now unquestioned, is nevertheless of recent growth, and courts of equity are slow to interfere in cases of doubtful right with the free use and enjoyment of property by its owner, as his interest, taste, or inclination may direct.

In *St. James' Church v. Arrington*, 36 Ala. 546, the court said: "The jurisdiction of courts of equity to interpose by injunction in cases of private nuisance is of comparatively recent growth; and though it is now well established, it must be admitted that the control thus assumed over an individual in the use or enjoyment of his property is one of the extraordinary powers of the court and should be cautiously and sparingly exercised."

3. *Lambeau v. Lewinski*, 47 Ill. App. 656; *Owen v. Phillips*, 73 Ind. 284; *Mirkil v. Morgan*, 134 Pa. St. 144; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Grey v. Ohio*, etc., R. Co., 1 Grant's Cas. (Pa.) 412; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Powell v. Bentley*, etc., Furniture Co., 34 W. Va. 804.

Long Existence of Nuisance. — Where an alleged nuisance has been allowed to remain without objection for a long period of time, equity will generally refuse to grant an injunction and will turn the plaintiff over to his remedy at law.¹

b. IN FEDERAL COURTS. — United States courts have jurisdiction of a suit in equity to abate a nuisance.² Such a suit is a local one and must be brought in the district wherein the nuisance is situated.³

c. ADEQUACY OF REMEDY AT LAW — (1) *Where Remedy Adequate.* — As has been remarked hitherto, the jurisdiction of equity

Anticipated Depreciation in Value. — Where the ground on which an injunction is sought against a nuisance is the anticipated depreciation of the value of neighboring property, a stronger case must be made out than where it is injury to the health of the neighborhood. *Phoenix v. Emigration Com'rs*, 1 Abb. Pr. (N. Y. Super. Ct.) 466.

Denial of Right in Answer. — Where a bill is filed in equity to enjoin a nuisance, the mere denial of the complainant's right by the defendant in his answer will not oust a court of equity of its jurisdiction to interfere by injunction. *Shields v. Arndt*, 4 N. J. Eq. 234. And see *Sinnickson v. Johnson*, 3 N. J. Eq. 374.

1. *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209; *Chicago, etc., R. Co. v. Gardner*, 66 Ill. App. 44.

In *Com. v. Croushore*, 145 Pa. St. 157, which was a suit to enjoin a public nuisance, it appeared that the alleged nuisance had been allowed to remain for nearly twenty years without objection, and that the trial of an indictment for maintaining such alleged nuisance had resulted in favor of the defendant. It was held that, under the circumstances, a court of equity would not grant an injunction.

Nuisance Erected Before Complainants Acquired Property. — Complainants filed a bill to enjoin as a nuisance to public health a dam which had existed forty years on property of the defendant, who also owned the land covered by the millpond. It did not appear how long the complainants had held the land claimed to be affected, except that they had held the same for several years prior to the filing of the bill. It was held that the complainants were not entitled to the same equitable consideration that would have prevailed if the defendant had created the nuisance after the complainants had acquired

and settled upon their respective premises; and that they should seek their remedy at law where the defendant could have a jury trial. *Ronayne v. Loranger*, 66 Mich. 373.

Where a Private Nuisance Had Continued for Five Years, it was held that an injunction would not be granted to restrain the same until the parties had tried their rights at law. *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19.

2. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

Suit by a State. — A United States Court, sitting in equity, has jurisdiction of a suit by a state to enjoin a public nuisance within its territory. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550.

Where No Adequate Remedy at Law. — The United States Circuit Court is not ousted of jurisdiction over a suit in equity to restrain a nuisance, where the plaintiff has not a plain, adequate, and complete remedy at law, by the United States Rev. Stat., § 723, which provides that suits in equity shall not be sustained in the United States Courts in cases where such a remedy may be had at law. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970.

3. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

Jurisdiction Co-extensive with State Court. — The United States Court can exercise no jurisdiction (locally) beyond what the state court can exercise. Thus, where the nuisance complained of was a bridge across the Mississippi, where the river divides the states of Illinois and Iowa, the state line being in the middle of the river, it was held that the United States District Court for Iowa had no power to abate the nuisance on the Illinois side. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

over nuisances is not an original one, but is called into play by special circumstances and comes in aid of the law courts. Therefore it follows that an injunction will not be granted against a nuisance, public or private, where adequate redress can be had in the ordinary tribunals, either by criminal prosecution or by civil action.¹ The extent of the injury, its character, the comparative

1. *Illinois*. — *Nelson v. Milligan*, 151 Ill. 462; *Lake View v. Letz*, 44 Ill. 81; *Dunning v. Aurora*, 40 Ill. 481; *Laney v. Jasper*, 39 Ill. 46.

Indiana. — *Laughlin v. Lamasco City*, 6 Ind. 223.

Iowa. — *Daniels v. Keokuk Water Works*, 61 Iowa 549.

Massachusetts. — *Ingraham v. Dunning*, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8.

Michigan. — *Ballentine v. Webb*, 84 Mich. 38.

New Jersey. — *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89; *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Jersey City Water Com'rs v. Hudson*, 13 N. J. Eq. 421; *Atty.-Gen. v. Paterson, etc., R. Co.*, 9 N. J. Eq. 526; *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11; *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136.

North Carolina. — *Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128.

Pennsylvania. — *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412.

Virginia. — *Wingfield v. Crenshaw*, 4 Hen. & M. (Va.) 474.

Wisconsin. — *Denner v. Chicago, etc., R. Co.*, 57 Wis. 218.

In *Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128, it was said that the private nuisance which equity will abate by injunction must be one occasioning a constantly recurring grievance from its nature insusceptible of adequate compensation in damages.

Principles Same as to Public and Private Nuisances. — The principles by which injuries are tested in their character as nuisances, for the prevention or suppression of which courts of equity administer injunctive relief, are substantially the same, whether such nuisances be private or public. In either case, the injury must be such as the courts of law cannot adequately redress. *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430.

Where Indictment Will Lie. — Except for special and urgent reason equity will not interfere to redress the grievance of a public nuisance where the object sought may be as well attained in the ordinary tribunals; and where the grievance is a misdemeanor, subject to indictment, equity will interfere with great reluctance, even though its intervention be sought by the attorney-general, and then only to prevent a very serious public injury. *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11; *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136; *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530.

Encroachment on Public Street. — The remedy at law by indictment is adequate to remove an encroachment on a public street by the erection of a building extending into the street. The courts of law are the proper tribunals to settle the fact of encroachment. For such cases a court of equity will not interfere by injunction unless under peculiar circumstances of pressing irreparable injury. *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410; *Lake View v. Letz*, 44 Ill. 81.

Injury from Smoke and Soot. — Where it was shown that smoke and soot from the stack of a water-works company disturbed the plaintiff in the comfortable enjoyment of his property, but that the health of himself and family was not affected thereby, or his property destroyed, it was held that he had an ample remedy at law, and that for the sake of the public good which required the maintenance of the water works, a court of equity would not grant an injunction against the maintenance of the same. *Daniels v. Keokuk Water Works*, 61 Iowa 549.

Where a bill was brought to enjoin a hotel keeper from permitting smoke, dust, and soot to be emitted from the chimneys of his hotel, and the proof showed that the defendant was temporarily compelled to use coal which produced a dense smoke, but that the injury was not a permanent one, and

values of the property affected, and other considerations which may present themselves under the varying circumstances, ought to be duly weighed, and relief afforded or withheld as equity and good conscience require.¹

(2) *Where Remedy Inadequate* — (a) *In General*. — Where from the circumstances of the case, it appears that the courts of law can afford no adequate redress for injuries arising from a nuisance, equity will interpose.² Thus where a nuisance is injurious to

could be compensated by an action at law, it was held that a court of equity had no jurisdiction to interfere. *Nelson v. Milligan*, 151 Ill. 462.

Throwing Surface Water on Land of Another. — Where a person by means of a ditch dug upon his own land throws surface water upon the land of another, at a place other than that where it would have been carried by the natural depression in the ground, there being no natural watercourse, it is an injury which may be amply compensated at law, and an injunction will not be granted in such a case. *Laney v. Jasper*, 39 Ill. 46.

If a Person Holding a Mere Naked Possession of land has an adequate remedy at law for an injury thereto arising from a nuisance, he cannot maintain an equitable action under the Wis. Laws of 1882, c. 190. *Denner v. Chicago, etc., R. Co.*, 57 Wis. 218.

1. *Turner v. Hart*, 71 Mich. 128.

In *Dunning v. Aurora*, 40 Ill. 481, it was held that, while a complete remedy could generally be had at law for an obstruction in a highway, if, under the peculiar circumstances of any case, the legal remedy were inadequate, equity might interpose.

To Relieve Public Travel from Inconvenience. — Where ample remedy by indictment exists a court of equity will not enjoin a public nuisance at the instance of the attorney-general, unless in case of a pressing necessity to relieve the public travel from immediate and serious inconvenience. *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530.

Where Remedy at Law Would Work Hardship. — Equity will not ordinarily interfere in cases of nuisance when the plaintiff has a complete remedy at law. But where an obstruction to public navigation is about to be erected, which, when erected, can only be removed at great expense and sacrifice, the court should exercise a preventive remedy of injunction. *Atty.-Gen. v. Paterson, etc., R. Co.*, 9 N. J. Eq. 526.

2. *Alabama*. — *Demopolis v. Webb*, 87 Ala. 659; *Nininger v. Norwood*, 72 Ala. 277; *St. James' Church v. Arrington*, 36 Ala. 546; *Ray v. Lynes*, 10 Ala. 63; *Rosser v. Randolph*, 7 Port. (Ala.) 238.

Illinois. — *Dunning v. Aurora*, 40 Ill. 481.

Kentucky. — *Hahn v. Thornberry*, 7 Bush (Ky.) 403.

Maine. — *Maine Wharf v. Custom House Wharf*, 85 Me. 175.

Maryland. — *Woodyear v. Schaefer*, 57 Md. 1; *Hamilton v. Whitridge*, 11 Md. 128.

Massachusetts. — *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376.

New Hampshire. — *Webber v. Gage*, 39 N. H. 186.

New Jersey. — *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

New York. — *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357.

Ohio. — *Crawford v. Rambo*, 44 Ohio St. 279.

Tennessee. — *Clack v. White*, 2 Swan (Tenn.) 540.

United States. — *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. Rep. 1000; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

In *Webber v. Gage*, 39 N. H. 186, *Fowler, J.*, said: "It is undoubtedly the correct rule, deducible from the authorities, that a court of equity will not interfere by injunction in the case of nuisances, trespasses, and the like injuries to property, when the parties can settle their rights fully and obtain complete redress in a court of law, unless it shall appear that irreparable mischief will be done by withholding the process, or the rights of the complainant have been established in a suit

health an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction.¹

(b) **To Prevent Irreparable Injury.** — Where the injury resulting from a nuisance is, or will be, of an irreparable nature, the law courts can usually afford no adequate redress, and equity will grant an injunction to restrain or prevent the nuisance.²

at law. But where the injury is irreparable, not susceptible of being adequately compensated by damages, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented; as where loss of health, loss of trade or business, destruction of the means of subsistence, or permanent ruin to property may or will ensue from the wrongful acts; in every such case a court of equity will interfere by injunction in furtherance of justice and the violated rights of the party."

In *State v. Mobile*, 5 Port. (Ala.) 279, the court said: "Informations in equity have been maintained in some cases where the object to be effected extended even to the abatement of a public nuisance. In such cases the jurisdiction of the courts is predicated upon the ground of the ability of equity to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation."

Permanent, Continuous, or Recurring Nuisance. — Where a nuisance is permanent, continuous, or constantly recurring, the legal remedy is obviously inadequate; and the interference of a court of equity is necessary to prevent irreparable injury and a multiplicity of suits. *Nininger v. Norwood*, 72 Ala. 277; *Clack v. White*, 2 Swan (Tenn.) 540; *Hamilton v. Whitridge*, 11 Md. 128.

An action to restrain a nuisance and to recover damages arising therefrom is an equitable action where it appears clearly that the nuisance is in its character permanent and continuing, it being a case where there is no adequate remedy at law. *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

Nuisance Diminishing Plaintiff's Profits. — Under the Mass. Stat. of 1827, c. 88, granting equitable relief in cases of nuisance, an equity court has jurisdiction over a private nuisance, such as the establishment without right of a bridge so near to one before rightfully

existing, as to diminish the profits accruing from tolls; there not being in such case a plain, adequate, and complete remedy at law. *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376.

Obstructing Wharf. — A court of equity will enjoin a riparian proprietor from maintaining a narrow strip of his wharf in deep water below low-water line in front of another proprietor's wharf, where such nuisance is permanent and the injuries caused by it, though small, are frequent and annoying and not easily measurable nor adequately compensated for by action at law. *Maine Wharf v. Custom House Wharf*, 85 Me. 175.

Pollution of Stream. — Where a riparian proprietor is injured by the continued pollution of a stream by the operation of a factory, and the extent of the injury is contingent and of doubtful pecuniary estimation, the only adequate remedy is by injunction. *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. Rep. 1000.

1. *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Beach v. Elmira*, 22 Hun (N. Y.) 158; *Louisville Coffin Co. v. Warren*, 78 Ky. 400. But see *Daughtry v. Warren*, 85 N. Car. 136; *Eason v. Perkins*, 2 Dev. Eq. (N. Car.) 38.

Emptying Sewage on Plaintiff's Lands. — Where a city emptied sewage on the plaintiff's lands, thereby rendering his buildings unfit for habitation, it was held that the plaintiff was not obliged to bring an action at law to abate the nuisance and for damages, but was entitled to an injunction. *Beach v. Elmira*, 22 Hun (N. Y.) 158.

Raising Height of Milldam. — A court of equity has jurisdiction to restrain a person from raising the height of his milldam if by so doing he would injure the health of the family of another person residing in the neighborhood. *Norwood v. Dickey*, 18 Ga. 528.

2. *Alabama.* — *Demopolis v. Webb*, 87 Ala. 659; *Rouse v. Martin*, 75 Ala. 510; *Nininger v. Norwood*, 72 Ala. 277; *State v. Mobile*, 5 Port. (Ala.) 279.

(c) **To Prevent Multiplicity of Suits.** — And so the jurisdiction of equity to enjoin a nuisance will be exercised whenever it is necessary to avoid vexatious litigation and a multiplicity of suits.¹

(3) **Statutes Providing Remedy at Law.** — Where there is a statute providing a complete and adequate remedy at law equity will not grant an injunction against a nuisance.² But the existence

Arkansas. — *Ex p. Martin*, 13 Ark. 198.

Florida. — *Thebaut v. Canova*, 11 Fla. 143.

Illinois. — *Oswald v. Wolf*, 129 Ill. 200.

Kentucky. — *Hahn v. Thornberry*, 7 Bush (Ky.) 403; *Seifried v. Hays*, 81 Ky. 377.

Massachusetts. — *Ingraham v. Dunnell*, 5 Met. (Mass.) 118.

Mississippi. — *Green v. Lake*, 54 Miss. 540.

New Hampshire. — *Burnham v. Kempton*, 44 N. H. 78; *Webber v. Gage*, 39 N. H. 182; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249.

New Jersey. — *Shields v. Arndt*, 4 N. J. Eq. 234.

New York. — *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Rochester v. Curtiss*, Clarke Ch. (N. Y.) 336.

Pennsylvania. — *Com. v. Rush*, 14 Pa. St. 186; *Biddle v. Ash*, 2 Ashm. (Pa.) 211.

United States. — *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Spooner v. McConnell*, 1 McLean (U. S.) 337.

In *Com. v. Rush*, 14 Pa. St. 186, it was held that where the damage from a public nuisance was of an irreparable nature, and the facts alleged in the bill were admitted, equity would grant an injunction to restrain and prevent the nuisance. *Com. v. Rush*, 14 Pa. St. 186.

Loss of Health, etc. — A court of equity will interfere in the case of a private nuisance where the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Hahn v. Thornberry*, 7 Bush (Ky.) 403; *Wall v. Cloud*, 3 Humph. (Tenn.) 181.

Depreciation of Value Not Ground for Interference. — Where a nuisance merely diminishes the value of adjacent property, without doing irreparable injury, it is not a ground for

equitable interference. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Ballentine v. Webb*, 84 Mich. 38; *Owen v. Phillips*, 73 Ind. 284.

1. *Demopolis v. Webb*, 87 Ala. 659; *Rouse v. Martin*, 75 Ala. 510; *Nininger v. Norwood*, 72 Ala. 277; *State v. Mobile*, 5 Port. (Ala.) 279; *Oswald v. Wolf*, 129 Ill. 200; *Woodyear v. Schaefer*, 57 Md. 1; *Turner v. Hart*, 71 Mich. 128; *Burnham v. Kempton*, 44 N. H. 78; *Webber v. Gage*, 39 N. H. 182; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

Recurring Injury. — In order to invoke the jurisdiction of equity to enjoin a nuisance it is enough if it appears to be such an injury as from its continuance or permanent mischief must occasion a constantly recurring grievance, which can only be prevented by injunction. *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

Where Injury Caused by Many. — The remedy in equity to prevent a nuisance is generally said to exist whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance. Especially is an injunction the only effectual remedy, when the injury is caused by so many that it would be difficult to apportion the damage, or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions, without any substantial benefit, might be the result. *Woodyear v. Schaefer*, 57 Md. 1.

2. *State v. Crawford*, 28 Kan. 726; *Rockland v. Rockland Water Co.*, 86 Me. 55. See also *Davis v. Davis*, 40 W. Va. 464.

Georgia. — The Georgia Code, §§ 4094-4098, provides a remedy for nui-

of such a statute does not take away from equity its jurisdiction over nuisances where there are grounds for equitable interference,¹ unless there is an express provision to that effect.²

d. PUBLIC BENEFIT OR CONVENIENCE. — In determining upon the propriety of injunctive relief against a nuisance at the suit of an individual, the court will usually be influenced against granting an injunction by the fact that the benefit accruing to the public from the alleged nuisance greatly outweighs the injury to the individual.³

sances, and parties who wish to abate a nuisance, either public or private, must resort to the remedy thus provided, unless special facts are alleged showing that that remedy is not sufficient, or is inadequate. The fact that courts of equity and law have been combined does not give the court power to enjoin a nuisance where the remedy provided by such statute is adequate. *Broomhead v. Grant*, 83 Ga. 451.

Tennessee. — Under the Tenn. Code, § 3403, authorizing courts of law to abate nuisances where the fact of nuisance is found in a civil action, a court of chancery will not interfere unless the existence of the nuisance is manifest, and the injury therefrom not susceptible of adequate compensation at law, or a recurring grievance requiring an injunction. *Lassater v. Garrett*, 4 Bixt. (Tenn.) 363.

1. Oregon. — Hill's Oregon Code, § 333, providing a remedy in cases of nuisance, is not exclusive and does not limit the remedy for nuisances to actions at law. Whenever a nuisance will cause an irreparable injury, or a multiplicity of actions at law will ensue, equity has "concurrent jurisdiction with courts of law" under § 380 of Hill's Oregon Code and will enjoin the continuance of the nuisance. *Fleischner v. Citizens' Invest. Co.*, 25 Oregon 119.

Iowa. — Iowa Code, § 3331, providing a remedy by action at law for the continuance of a nuisance, does not take away from the courts of equity their jurisdiction to restrain by injunction the continuance of the nuisance, since such courts had such jurisdiction prior to the adoption of the code of 1873. *Bushnell v. Robeson*, 62 Iowa 540.

Michigan. — How. Mich. Stat., c. 273, provides a remedy for the abatement of a private nuisance where the complaining party has recovered therefor

in an action on the case. Notwithstanding this statute a bill in equity will lie against the complainant's neighbor for building and maintaining a cornice that projects over plaintiff's boundary line to the permanent injury and depreciation of the property. *Wilmarth v. Woodcock*, 58 Mich. 482.

Massachusetts. — The remedy under Mass. Gen. Stat., c. 145, § 16, by an application for leave to file an information in the nature of a quo warranto to redress an injury to private rights or interests by the exercise by a private corporation of a franchise or privilege not conferred by law, does not deprive the Supreme Court of its jurisdiction in equity in case of a private nuisance. *Fall River Iron Works Co. v. Old Colony, etc., R. Co.*, 5 Allen (Mass.) 221.

Indiana. — In *Indianapolis Water Co. v. American Straw Board Co.*, 53 Fed. Rep. 970, it was held that the Ind. Rev. Stat., §§ 289-291, which provides that "a nuisance may be enjoined or abated, and damages recovered therefor by any person injured," was merely declaratory of the existing law, and did not affect the right to proceed in equity in proper cases.

2. Hoole v. Atty.-Gen., 22 Ala. 190, wherein it was held that the fact that the corporate authorities of a town within whose limits a nuisance was erected had been invested, by act of the legislature, with power to abate nuisances within the limits of the corporation, did not take away the jurisdiction of chancery, without an express provision to that effect.

3. Daniels v. Keokuk Water Works, 61 Iowa 549; *Thornton v. Roll*, 118 Ill. 350; *Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128; *Daughtry v. Warren*, 85 N. Car. 136; *Eason v. Perkins*, 2 Dev. Eq. (N. Car.) 38; *Atty.-Gen. v. Lea*, 3 Ired. Eq. (N. Car.) 301. But see *Dwight v. Hayes*, 150 Ill. 273.

In *Barnes v. Calhoun*, 2 Ired. Eq.

e. **NOMINAL DAMAGES.** — Equity will not ordinarily interfere where the damages resulting from a nuisance are of a trifling or merely nominal character.¹

f. **THREATENED NUISANCES** — (1) *When Equity Will Not Interfere.* — It is a general rule, that where the thing complained of is not a nuisance *per se*, but may or may not become so according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere.² The presumption is that

(N. Car.) 199, it was held that equity would exercise its power to enjoin a nuisance only in a case of necessity where the evil sought to be remedied was not merely probable, but undoubted; and that it would be particularly cautious in interfering where the apprehended mischief was to follow from such establishments and erections as had a tendency to promote public convenience.

Must Be a Very Strong Case. — Where the public interest requires the doing of a certain thing, a court of equity will not enjoin it upon the ground that it may prove a private nuisance, unless a very strong case is made by the bill and sustained by proofs. *Thorn-ton v. Roll*, 118 Ill. 350.

Private Advantage Must Yield to Public Benefit. — Where a jury find that the rebuilding of a proposed mill and dam would overflow and render useless the plaintiff's land and injure the health of his family, but that the mill would be a public convenience, pecuniary compensation is all that the plaintiff can claim, and an injunction against such erection will be refused upon the principle that private advantage must yield to public benefit. *Daughtry v. Warren*, 85 N. Car. 136; *Eason v. Perkins*, 2 Dev. Eq. (N. Car.) 38.

Where Adequate Compensation Can Be Had at Law. — Where the public benefit arising from the maintenance of an alleged nuisance greatly outweighs a private and individual inconvenience resulting therefrom, and the damages sustained by the private nuisance can be adequately compensated in an action at law, equity will not interfere by injunction to abate such nuisance. *Daniels v. Keokuk Water Works*, 61 Iowa 549.

Erection of Milldam. — In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that the dam will be a public nuisance, or, if a private nuisance only to an individual,

unless it manifestly appears that so great a difference will exist between the injury to the individual and the public convenience, as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief. *Atty.-Gen. v. Lea*, 3 Fred. Eq. (N. Car.) 301.

1. *McCord v. Iker*, 12 Ohio 387; *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 12 Misc. Rep. (N. Y. C. Pl.) 5; *Owen v. Phillips*, 73 Ind. 284, wherein it was held that in order to warrant interference by injunction with a lawful business on the ground that it constitutes a nuisance, the injury must be material and essential. Minor inconveniences in such a case must be remedied by action for damages and not by injunction.

But see *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63, wherein it was held that where the judge had found the existence of a nuisance that fact alone on a trial entitled the plaintiffs to an injunction, although no damage was shown. See also *Wellborn v. Davies*, 40 Ark. 83.

Injury to Neighboring Vegetation. — The court will not grant an injunction to restrain the working of collieries or manufactories on the ground that the fumes emitted from their chimneys are injurious to the neighboring vegetation, unless the plaintiff can prove that the damage thereby occasioned to his property is actual, substantial, and visible. By actual damage, the court means damage that is not contingent, prospective, or remote; and by visible damage, such as is capable of being perceived by an ordinary witness and not established solely by scientific evidence. *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705.

2. *Ramsay v. Riddle*, 1 Cranch (C. C.) 399; *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Laughlin v. Lamasco City*, 6 Ind. 223; *Hahn v. Thornberry*, 7 Bush (Ky.) 403; *Pfingst v. Senn*, 94 Ky. 556; *Green v. Lake*, 54 Miss. 540;

a person entering into a legitimate business will conduct it in a proper way, so that it will not constitute a nuisance;¹ and so, where a building in course of erection, or about to be erected, will not of itself constitute a nuisance, equity will not enjoin it on the ground that it may be used for a purpose which will make it a nuisance.² If the building is in fact used in such a manner as

Butler v. Rogers, 9 N. J. Eq. 487; *Ross v. Butler*, 19 N. J. Eq. 294; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Rochester v. Curtiss, Clarke Ch.* (N. Y.) 336; *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. Cas. (N. Y. Supreme Ct.) 472; *Ellison v. Washington*, 5 Jones Eq. (N. Car.) 57.

In *Ripon v. Hobart*, 3 Myl. & K. 177, Lord Chancellor Brougham said that "no instance can be produced of the interposition by injunction" in case of an eventual or contingent nuisance.

In *Hough v. Doylestown Borough*, 4 Brews. (Pa.) 333, it was held that in order for equity to enjoin a private nuisance the danger must be impending and imminent and the effect certain, not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury be doubtful, eventual, or contingent, or if the matter complained of is not *per se* a nuisance, an injunction will not be granted. In cases of prospective nuisance, a court of equity will not interfere unless the damages to be apprehended will be serious, nor when, upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction.

Nuisance Denied in Answer.—Where the thing complained of will not, *prima facie*, be a nuisance, and the answer denies that it will be such, the preliminary injunction will be dissolved, and if injury thereafter results from the alleged nuisance, ample relief can be afforded by the jury at the hearing. *Mygatt v. Goetchins*, 20 Ga. 350. See also *Flint v. Russell*, 5 Dill. (U. S.) 151.

1. *Bowen v. Mauzy*, 117 Ind. 258.

2. *Depierris v. Mattern*, (Supreme Ct.) 10 N. Y. Supp. 626; *Harrison v. Newton*, 1 Code Rep. N. S. (N. Y. C. Pl.) 207; *Dunning v. Aurora*, 40 Ill. 481; *Keiser v. Lovett*, 85 Ind. 240; *Shiras v. Olinger*, 50 Iowa 571; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 804; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415; *Cleveland v. Citizens' Gas Light*

Co., 20 N. J. Eq. 201; *Flint v. Russell*, 5 Dill. (U. S.) 151.

In *Bowen v. Mauzy*, 117 Ind. 258, it was held that in order to restrain a person from commencing the operation of a business in itself legitimate, it should be made to appear that the person about to enter into such business threatens and intends to conduct the business in a manner which will constitute a nuisance.

Erection Forbidden by City Ordinances.

—Where the erection of buildings not nuisances *per se* is forbidden by a city ordinance, equity will not interfere by injunction to enforce such ordinances. *Sheldon v. Weeks*, 51 Ill. App. 314.

Nuisance Denied by Answer.—Where the facts stated in a bill seeking an injunction against the erection of a building on the ground that it would constitute a nuisance to the adjoining property, were denied by the answer, it was held that equity would not grant a preliminary injunction to restrain the erection. *Flint v. Russell*, 5 Dill. (U. S.) 151. See also *Mygatt v. Goetchins*, 20 Ga. 350.

Establishment Promoting Public Convenience.

—A court of equity will only exercise the power to restrain nuisances in the course of erection in cases of necessity where the evil sought to be remedied is not only probable but certain; and it will be the less inclined to interfere where the establishment from which the injury is apprehended will have a tendency to promote the public convenience. *Harrison v. Brooks*, 20 Ga. 537.

Powder House.—A court of equity is not authorized to enjoin the erection of a powder house on the mere possibility that it may result in injury to those residing in the vicinity. *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 804; *Dunning v. Aurora*, 40 Ill. 481.

Slaughter House.—An injunction will not be granted to restrain the erection of a slaughter house and place for keeping hogs, where by the answer and affidavits it appears that the defendants intend to carry on the busi-

to create a nuisance, its use for such purpose will then be enjoined.¹

(2) *When Equity Will Interfere.* — However, an equity court may in proper cases grant preventive as well as remedial relief, and where a threatened act must, from its character, necessarily result in a nuisance, equity will interfere by injunction.²

ness so as not to be a nuisance. *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415.

Stable. — The court refused to enjoin a stable at the instance of an adjoining lot owner, where his residence and well were twenty-five or thirty feet distant from such structure, and it did not appear that such person, his family, or his property would ever be injured by the erection of the stable. *Keiser v. Lovett*, 85 Ind. 240.

Where a livery stable which was a source of annoyance had been burned down, the court refused to enjoin the rebuilding of the same, since it might be so modified as not to be a nuisance. *Shiras v. Olinger*, 50 Iowa 571.

1. *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201.

2. *Wahle v. Reinbach*, 76 Ill. 322; *Sheldon v. Weeks*, 51 Ill. App. 314; *People v. St. Louis*, 10 Ill. 351; *Bowen v. Mauzy*, 117 Ind. 258; *Gates v. Blincoe*, 2 Dana (Ky.) 159; *Miley v. A'Hearn*, (Ky. 1892) 18 S. W. Rep. 529; *Wolcott v. Melick*, 11 N. J. Eq. 204; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201. And see *Biddle v. Ash*, 2 Ashm. (Pa.) 211.

In *Bowen v. Mauzy*, 117 Ind. 258, the court said: "In a proper case an injunction will lie to prevent the use of property for operating a business which is a nuisance *per se*, and even to be used for a business not a nuisance *per se*, if threatened and intended to be conducted in an improper manner, so as to constitute a nuisance. An injunction will lie to prevent a nuisance threatened and in progress, as well as to abate one already in existence."

In *Miley v. A'Hearn*, (Ky. 1892) 18 S. W. Rep. 529, the court said: "A party is not required, however, to wait until the injury is inflicted. The object of the writ is preventive. Like the interdict of the civil law, it wards off the injury. It is true, it cannot be called into exercise unless the right of the party invoking it be certain, and a necessity exists for its aid. In other words, the case must be a clear one. But this does not mean that there

must be an absolute certainty of its need. If so it could rarely be invoked. It is true, the party cannot act upon a mere fear or apprehension, a mere possibility or theoretical injury; but, if the danger be probable and threatening, he may invoke its aid, and need not delay until the injury is actually inflicted. If this were required, the effectiveness of the writ would be destroyed. There must be good ground to apprehend injury of such a character that, if it be inflicted, adequate compensation will be impossible. The writ must be applied with care; but, if the danger be threatening, and likely to ensue, as it seems to us is the case here, it may properly be resorted to, and without it equity would in large measure be without the power to perform its office."

Pending Trial at Law. — The jurisdiction of courts of equity in affording preventive relief in cases of public nuisances is clearly defensible where the fact of nuisance is placed beyond a doubt. And even where the fact of nuisance is questionable, equity will sometimes afford relief by injunction until a trial at law can be had, where its denial would produce great public inconvenience. *State v. Mobile*, 5 Port. (Ala.) 279; *Williamson v. Carman*, 1 Gill & J. (Md.) 184. And see next section.

But in all such cases a strong *prima facie* case must be made. *Bliss v. Kennedy*, 43 Ill. 67.

Preliminary Injunction Made Perpetual. — On final hearing, upon bill and answer, a preliminary injunction will be made perpetual where it appears from the pleadings that the defendants intend to do some act charged in the bill, which would be a nuisance to the public or an injury to the complainants. *Atty.-Gen. v. Steward*, 21 N. J. Eq. 340.

Nuisance Not Actual Until After Replication. — Where the existence of an actual nuisance had been proved, it was held to be no objection to a bill to restrain an anticipated nuisance that the nuisance was prospective only

g. NECESSITY FOR ESTABLISHING RIGHT AT LAW — (1) *When Necessary* — (a) *In General*. — It may be laid down as a general, though rather elastic rule, subject to certain broad exceptions noted hereafter,¹ that equity will not ordinarily grant an injunction against a nuisance until the plaintiff's right has been established by a jury trial.² Thus, where the thing complained of

until after the date of replication being filed. *Umfreville v. Johnson*, L. R. 10 Ch. 580.

1. See *infra*, IV. 1. *g.* (2) *When Not Necessary*.

2. *Alabama*. — *Ogletree v. McQuaggs*, 67 Ala. 580; *Rouse v. Martin*, 75 Ala. 510.

Delaware. — *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435.

Florida. — *Shivery v. Streeper*, 24 Fla. 103; *Thebaut v. Canova*, 11 Fla. 143.

Georgia. — *Powell v. Macon, etc., R. Co.*, 92 Ga. 209.

Illinois. — *Dunning v. Aurora*, 40 Ill. 481; *Bliss v. Kennedy*, 43 Ill. 67; *Lake View v. Letz*, 44 Ill. 81; *Wahle v. Reinbach*, 76 Ill. 322; *Thornton v. Roll*, 118 Ill. 350; *Oswald v. Wolf*, 129 Ill. 200; *Dwight v. Hayes*, 150 Ill. 273; *Nelson v. Milligan*, 151 Ill. 462; *Robb v. La Grange*, 158 Ill. 21; *Iliff v. School Directors*, 45 Ill. App. 419; *Finegan v. Allen*, 46 Ill. App. 553; *Hayes v. Dwight*, 49 Ill. App. 530.

Maine. — *Porter v. Witham*, 17 Me. 294; *Jordan v. Woodward*, 38 Me. 423; *Varney v. Pope*, 60 Me. 192; *Rockland v. Rockland Water Co.*, 86 Me. 55.

Massachusetts. — *Ingraham v. Durnell*, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8.

Mississippi. — *Green v. Lake*, 54 Miss. 540.

New Hampshire. — *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

New Jersey. — *Shields v. Arndt*, 4 N. J. Eq. 234; *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410; *Carlisle v. Cooper*, 18 N. J. Eq. 241, 21 N. J. Eq. 576.

New York. — *Phoenix v. Emigration Com'rs*, 1 Abb. Pr. (N. Y. Super. Ct.) 466; *Benner v. Jordan*, 2 Edm. Sel. Cas. (N. Y.) 473; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282.

North Carolina. — *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (N. Car.) 12.

Ohio. — *McCord v. Iker*, 12 Ohio 387.

Pennsylvania. — *Hieskell v. Gross*, 3 Brews. (Pa.) 430; *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412; *Rhea v. Forsyth*, 37 Pa. St. 503; *New Castle*

v. Raney, 130 Pa. St. 546; *Com. v. Croushore*, 145 Pa. St. 157; *Wood v. McGrath*, 150 Pa. St. 451.

South Carolina. — *Kennerty v. Etivan Phosphate Co.*, 17 S. Car. 411.

Tennessee. — *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406.

United States. — *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

England. — *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 8 Jur. N. S. 583; *Elmhirst v. Spencer*, 2 Macn. & G. 45.

In *St. James' Church v. Arrington*, 36 Ala. 546, the court said: "Both in England and the United States the courts are exceedingly unwilling to interfere, until the nuisance has been established by a trial at law. Unless the nuisance has been previously established at law, it must be 'a strong and mischievous case of pressing necessity,' to entitle the party to an injunction."

In *Nelson v. Milligan*, 151 Ill. 462, it was held that the jurisdiction of equity to enjoin the erection or continuance of a nuisance at the suit of a private individual is always reluctantly exercised until the existence of the nuisance has been found by a jury; and is never exercised, unless both the nuisance and the resulting injury are shown clearly by the evidence.

In *Maine* the rule is stated to be that equity will not grant an injunction against a nuisance unless the complainant's rights have been settled in an action at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage. *Varney v. Pope*, 60 Me. 192; *Jordan v. Woodward*, 38 Me. 423; *Porter v. Witham*, 17 Me. 294; *Rockland v. Rockland Water Co.*, 86 Me. 55.

To Prevent Irreparable Injury. — In order for equity to enjoin a nuisance, where the plaintiff's right is doubtful and has not been established at law, a case of pressing and urgent necessity to prevent irreparable injury must be

does not *per se* constitute a nuisance, but may only prove so according to circumstances, a court of equity will generally not interfere until a previous trial at law has been had.¹ And so equity will decline to interpose where the complainant's title is doubtful,² or when the fact of nuisance is disputed or the evidence conflicting.³ In such cases, if there is no valid objection to the

made out. *Hieskell v. Gross*, 3 Brews. (Pa.) 430; *Wahle v. Reinbach*, 76 Ill. 322; *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410; *Van Bergen v. Van Bergen*, 2 Johns. Ch. (N. Y.) 272; *Kennerty v. Etiwan Phosphate Co.*, 17 S. Car. 411. See also *Dunning v. Aurora*, 40 Ill. 481.

Nuisance Long in Existence.—Where a nuisance has existed for a long time, equity will generally decline to grant an injunction until the right has been settled at law. *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209; *Ronayne v. Loran-ger*, 66 Mich. 373; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19.

Depends on Circumstances of Case.—Whether this court will interfere by injunction to prevent the nuisance, or leave the party to establish his right at law, must depend on the particular circumstances of each case. *Robeson v. Pittenger*, 2 N. J. Eq. 57.

Trial by Court—Waiver of Jury Trial.—Where the parties consent to a trial by the court on the merits, the objection that equity does not ordinarily intervene in cases of nuisance until the existence of the alleged nuisance is established at law is waived. *Ladd v. Granite State Brick Co.*, (N. H. 1895) 37 Atl. Rep. 1041.

When Rights Considered Established—Appeal Pending.—A plaintiff's rights at law will not be considered as established when he has obtained a judgment, but a writ of review is still pending. *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

1. *Ogletree v. McQuaggs*, 67 Ala. 580; *Rouse v. Martin*, 75 Ala. 510; *Shivery v. Streeper*, 24 Fla. 103; *Thebaud v. Canova*, 11 Fla. 143; *Thornton v. Roll*, 118 Ill. 350; *Lake View v. Letz*, 44 Ill. 81; *Iliff v. School Directors*, 45 Ill. App. 419; *Finegan v. Allen*, 46 Ill. App. 553; *Hayes v. Dwight*, 49 Ill. App. 530; *Phoenix v. Emigration Com'rs*, 1 Abb. Pr. (N. Y. Super. Ct.) 466; *Benner v. Jordan*, 2 Edm. Sel. Cas. (N. Y.) 473; *Grey v. Ohio*, etc., R. Co., 1 Grant's Cas. (Pa.) 412; *New Castle v. Raney*, 130 Pa. St. 546; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406.

2. *Oswald v. Wolf*, 129 Ill. 200; In-

graham v. Dunnell, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Shields v. Arndt*, 4 N. J. Eq. 234; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (N. Car.) 12; *Hieskell v. Gross*, 3 Brews. (Pa.) 430; *Rhea v. Forsyth*, 37 Pa. St. 503; *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209.

In *Porter v. Witham*, 17 Me. 294, where adjacent landowners about the same time proceeded to erect separate dams in a stream, and the lower dam rendered the upper one useless, it was held that equity would not enjoin the proprietor of the lower dam from completing it or interfere to abate it as a nuisance before the rights of the party were determined at law.

Person Claiming Adversely to Plaintiff.

—Equity will not enjoin the obstruction of a private right of way over the land of another by a person claiming adversely to the plaintiff, where the plaintiff has not, for a long time, been in the quiet and uninterrupted enjoyment of such right of way, or his right has not been established at law, or is not clear, but is disputed and doubtful. *Oswald v. Wolf*, 129 Ill. 200.

3. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Com. v. Croushore*, 145 Pa. St. 157; *Wood v. McGrath*, 150 Pa. St. 451; *New Castle v. Raney*, 130 Pa. St. 546.

The Question of the Existence of a Nuisance is one peculiarly appropriate for the jury, and ordinarily when the event of a suit in equity is dependent on a legal right, such right must be ascertained in an action at law before equity can grant relief. *Nelson v. Milligan*, 151 Ill. 462.

Bill Dismissed Without Prejudice.—

Where a bill to enjoin the construction of a sewer is brought too soon to determine fully whether such sewer will constitute a nuisance, and there is not sufficient evidence to show that a nuisance will be created, the bill should be dismissed without prejudice. *Robb v. La Grange*, 158 Ill. 21, *modifying* 57 Ill. App. 386. See also *New Castle v. Raney*, 130 Pa. St. 546.

bill and there is danger of irreparable injury, the court may order a temporary injunction to restrain the defendant until the right can be tried at law.¹

(b) **What Equivalent to Verdict.** — Where a master, commissioner, or arbitrator is appointed by a court of equity to inquire into the existence of an alleged nuisance, his report in regard thereto is deemed to be equivalent to the verdict of a jury.²

(c) **Effect of Judgment at Law.** — Where the existence of a nuisance has been established at law, a court of equity will generally grant an injunction to prevent further injury, if the nuisance is continuous or constantly recurring.³ But the court will not grant an injunction as a matter of course after a verdict at law. It will consider all the circumstances, the consequences of such action, and the real equity of the case.⁴ And so, while equity will gen-

1. *Ingraham v. Dunnell*, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Thebaut v. Canova*, 11 Fla. 143; *State v. Mobile*, 5 Port. (Ala.) 279; *Williamson v. Carnan*, 1 Gill & J. (Md.) 184; *Burnham v. Kempton*, 44 N. H. 78; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

2. **Master.** — Where the issues of fact involved in an equity suit for an injunction against a nuisance are referred to, and found by a master, his findings are equivalent to a trial by jury as to the extent of the nuisance. *Atlanta Mills v. Mason*, 120 Mass. 244.

Commissioner. — Where a commissioner was appointed by a court of equity to ascertain whether the structure complained of constituted a nuisance, his report was held to be equivalent to the verdict of a jury. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

Arbitrator. — In 1832 a market gardener became the occupier of land and premises adjoining the works of a gas company. In 1836 he took a lease, which would have expired in 1853, but in 1850 he obtained a renewal of this lease until 1874. At the time of the last renewal the company was enlarging its works and building a new retort-house, much larger and nearer the market-gardener's premises. He brought an action in 1854, against the company for damages for the nuisance which the works occasioned to him as a market-gardener. On the case coming on for trial, a reference was agreed upon, and the arbitrator, by his award, found that damage had accrued to a considerable extent. Notwithstanding

the award, the company added to its works, and built a third retort-house. On a bill filed for a perpetual injunction, it was held that the award of the arbitrator sufficiently established the right of the market-gardener, at law, to such injunction, without the verdict of a jury. *Imperial Gas-Light, etc., Co. v. Broadbent*, 5 Jur. N. S. 1319.

3. *Paddock v. Somes*, 102 Mo. 226; *St. James' Church v. Arrington*, 36 Ala. 546; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

In *Miller v. Trueheart*, 4 Leigh (Va.) 569, where a milldam caused stagnation of water, whereby the health of the neighbors was impaired, one of the neighbors brought an action at law for damages against the mill-owners and recovered. Afterwards the dam was carried away, and the owners were proceeding to erect a new one, whereupon the plaintiff in such judgment filed a bill for an injunction. It was held that the court of chancery ought to enjoin the erection of the dam unless it should be made to appear that such precautions had been taken as would avoid the nuisance in future, which fact ought to be ascertained by a jury.

Where Nominal Damages Recovered. — Courts of equity will more readily grant an injunction against a nuisance in a case where the damages recovered in an action at law are merely nominal and inadequate to prevent a repetition of the injury. *Paddock v. Somes*, 102 Mo. 226.

4. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

Application Addressed to Discretion of Court. — The application to a court of

erally refuse an injunction if the verdict at law is in favor of the defendant,¹ yet such is not necessarily the case.²

(2) *When Not Necessary*—(a) *In General*.—The rule requiring that the complainant's right be first established at law before equity will enjoin a nuisance, has been much relaxed in modern times; and it is now the generally accepted doctrine, that where the complainant's right is clear and undoubted, and the injury is such in its nature or extent as to call for the interposition of a court of equity, an injunction will be granted without requiring a previous resort to a court of law.³

(b) *Existence of Nuisance Manifest*.—Where the thing sought to be prohibited is a nuisance *per se*, or where its contemplated use will

equity to restrain a nuisance is addressed to the sound discretion of the chancellor, and the power being extraordinary in its character will be exerted only in cases of necessity to prevent mischiefs for which there is no adequate remedy at law notwithstanding the title of the plaintiff may have been already established at law. *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426.

1. *Durant v. Williamson*, 7 N. J. Eq. 547. See also *Davidson v. Isham*, 9 N. J. Eq. 186.

2. *Minke v. Hopeman*, 87 Ill. 450, wherein it was held that equity would not be deprived of its jurisdiction to abate a nuisance by the fact that the defendant had been already tried on an indictment for maintaining such nuisance and acquitted.

3. *Alabama*.—*Nininger v. Norwood*, 72 Ala. 277.

Illinois.—*Dwight v. Hayes*, 150 Ill. 273; *Oswald v. Wolf*, 129 Ill. 200; *Green v. Oakes*, 17 Ill. 249.

Michigan.—*White v. Forbes, Walk.* (Mich.) 112.

Mississippi.—*Learned v. Hunt*, 63 Miss. 373.

New Jersey.—*Stanford v. Lyon*, 37 N. J. Eq. 94; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Carlisle v. Cooper*, 18 N. J. Eq. 241, 21 N. J. Eq. 576; *Shields v. Arndt*, 4 N. J. Eq. 234; *Newark Plank Road, etc., Co. v. Elmer*, 9 N. J. Eq. 790.

New York.—*Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Olmsted v. Loomis*, 9 N. Y. 423.

North Carolina.—*Atty.-Gen. v. Hunter*, 1 Dev. Eq. (N. Car.) 12.

Pennsylvania.—*Hacke's Appeal*, 101 Pa. St. 245.

Tennessee.—*Vaughn v. Law*, 1 Humph. (Tenn.) 123; *Caldwell v.*

Knott, 10 Verg. (Tenn.) 209; *Brew v. Van Deman*, 6 Heisk. (Tenn.) 433.

United States.—*Parker v. Winnipiscogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

In *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (N. Car.) 12, wherein the bill charged that the defendant's milldam injured the health of the relators, an injunction was perpetuated, notwithstanding the defendant had been indicted for the same nuisance, on which there had been a mistrial, and although an indictment was still pending.

In *Parker v. Winnipiscogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545, it was stated that where an injunction against a nuisance is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a lawful discretion.

A Long Enjoyment of a Right will entitle the party to an injunction to restrain a private nuisance, even though the defendant may deny the right; and the court will exercise its discretion whether to order a trial at law or not, before granting an injunction, always inclining, if there be reasonable doubt, to put the case to a jury. *Shields v. Arndt*, 4 N. J. Eq. 234. See also *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Stanford v. Lyon*, 37 N. J. Eq. 94.

Nuisance in Watercourse.—Where a complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear. The mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to

necessarily make it a nuisance, equity will interfere to prevent irreparable injury without requiring a preliminary determination of the facts by a jury.¹ And in general chancery will enjoin a nuisance, without a previous trial at law, where the fact of its existence is undoubted.²

(c) **Remedy at Law Inadequate.** — Where, from the nature of the case, an action at law cannot afford adequate redress against a nuisance, equity will grant an injunction without first requiring that the plaintiff's right be established at law.³

an issue before the allowance of an injunction. *Carlisle v. Cooper*, 21 N. J. Eq. 576. See also *Olmsted v. Loomis*, 9 N. Y. 423; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162.

Defendant Denying Plaintiff's Right. — In a suit to enjoin a nuisance if the complainant's right is clear, the mere fact that the defendant denies the right by his answer or sets up title in himself by adverse user, will not entitle him to an issue to a jury before the allowance of the injunction. *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

1. *Rouse v. Martin*, 75 Ala. 510; *Oxletree v. McQuaggs*, 67 Ala. 580; *Shivery v. Streeper*, 24 Fla. 103; *Thebaut v. Canova*, 11 Fla. 143; *Dwight v. Hayes*, 150 Ill. 273; *Smith v. McDowell*, 148 Ill. 51; *Hayes v. Dwight*, 49 Ill. App. 530; *Iliff v. School Directors*, 45 Ill. App. 419; *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412; *Atty.-Gen. v. Lombard, etc., St. Pass. R. Co.*, 10 Phila. (Pa.) 352, 32 Leg. Int. (Pa.) 238; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406.

In *Rouse v. Martin*, 75 Ala. 510, *Somerville, J.*, said: "The rule has long been recognized as quite different where the thing sought to be prohibited is *per se* a nuisance, and where it is not unavoidably noxious in itself, but may prove so according to circumstances, or otherwise. In the first class of cases an injunction will ordinarily be granted without waiting for the result of a trial at law. In the second class the court will generally refuse to interfere until the matter has been tried at law."

The Public Is Entitled to the Speediest and Most Effectual Way to prevent the threatened invasion of its rights, and if there has been a clear invasion of the common right, the unauthorized taking for private use of that which belongs to the public, an injunction will be granted at the suit of the proper officer on behalf of the public to pre-

vent the creation and maintenance of the nuisance. *Smith v. McDowell*, 148 Ill. 51.

2. *Demopolis v. Webb*, 87 Ala. 659; *Robb v. La Grange*, 158 Ill. 21; *Schlue-ter v. Billigheimer*, 14 Cinc. Wkly. L. Bul. 224; *McClung v. North Bend Coal, etc., Co.*, (C. Pl.) 31 Ohio L. J. 9; *Beardmore v. Treadwell*, 7 L. T. N. S. 207; *Inchbald v. Robinson*, L. R. 4 Ch. 388; *Roskell v. Whitworth*, 19 W. R. 804.

Whether Nuisance Has Been Abated or Not. — Where the only question of fact in issue, in a suit for an injunction, is whether the nuisance is continued or has been abated, a court of equity is an appropriate tribunal to decide that question; there is nothing in the subject-matter of such investigation that would entitle the defendant to a jury trial as of course. *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Imperial Gas Light, etc., Co. v. Broadbent*, 5 Jur. N. S. 1319.

Controlling Question Proper Location of Boundary Line. — The fact that the controlling question in an equity suit for the abatement of a private nuisance is the proper location of a boundary line, and that, as such location is a question of fact rather than of law, the defendant would be entitled in ejectment to three trials before as many juries, will not oust a court of equity of its jurisdiction, where the bill makes out a clear case for its intervention. *Wilmarth v. Woodcock*, 66 Mich. 331.

3. *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Robinson v. Baugh*, 31 Mich. 290, *Canton Cotton Warehouse Co. v. Potts*, 69 Miss. 31; *Learnard v. Hunt*, 63 Miss. 373; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Atty.-Gen. v. Blount*, 4 Hawks (N. Car.) 384; *Caldwell v. Knott*, 10 Verg. (Tenn.) 209; *Brew v. Van Deman*, 6 Heisk. (Tenn.) 433; *Vaughn v. Law*, 1 Humph. (Tenn.) 123.

To Prevent Irreparable Injury. — Equity will exercise its jurisdiction to enjoin

2. Parties — a. PLAINTIFF — (1) In General. — The general rules of equity pleading regarding the proper parties plaintiff to a bill apply in general to suits for equitable relief against nuisances.¹

(2) *In Suits to Restrain Public Nuisances* — (a) **Where Injury Common to All.** — A suit to enjoin a public nuisance which affects all the public alike must usually be instituted by bill or information filed by the attorney-general, or other proper state officer, in behalf of the estate.² Thus, in the absence of a statute allowing it, a local board of health cannot bring such a suit in its own name, but must take proceedings through the attorney-general, or other proper officer.³

a nuisance without first requiring that the existence of such nuisance be found in a law court where the injury resulting therefrom is in its nature irreparable, as when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection. *Dierks v. Highway Com'rs*, 142 Ill. 197; *Minke v. Hopeman*, 87 Ill. 450. See also *Dunning v. Aurora*, 40 Ill. 481.

A Nuisance Which Operates to Destroy Health or seriously to diminish the comfortable enjoyment of a dwelling house is productive of irreparable injury for which no adequate remedy can be given at law, and in such cases a court of equity will restrain such nuisance without awaiting the result of an action or the trial of an issue. *Ogletree v. McQuaggs*, 67 Ala. 580; *Barkau v. Knecht*, 10 Cinc. Wkly. L. Bul. 342. Compare *Daughtry v. Warren*, 85 N. Car. 136; *Eason v. Perkins*, 2 Dev. Eq. (N. Car.) 38.

1. See the articles *INJUNCTIONS*, vol. 10, p. 892 *et seq.*; *PARTIES*.

2. *State v. Mobile*, 5 Port. (Ala.) 279; *Yolo County v. Sacramento*, 36 Cal. 193; *People v. Gold Run Ditch, etc.*, Co., 66 Cal. 138; *People v. Beaudry*, 91 Cal. 213; *Denver v. Mullen*, 7 Colo. 345; *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435; *Atty.-Gen. v. Tarr*, 148 Mass. 309; *Higbee v. Camden, etc.*, R. Co., 19 N. J. Eq. 276; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393; *Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133; *People v. Metropolitan Telephone, etc.*, Co., 64 How. Pr. (N. Y. Supreme Ct.) 120; *People v. Vanderbilt*, 28 N. Y. 396; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364; *U. S. v. Debs*, 64 Fed. Rep. 724; *Atty.-Gen. v. Rich-*

mond, L. R. 2 Eq. 306; *Bermondsey v. Brown*, 14 W. R. 213, 13 L. T. N. S. 574.

An Individual Cannot Institute Such a Suit where the nuisance injures him only in rights enjoyed by him as one of the public. *Hartshorn v. South Reading*, 3 Allen (Mass.) 501; *Higbee v. Camden, etc.*, R. Co., 19 N. J. Eq. 276; *Kuehn v. Milwaukee*, 83 Wis. 583; *Van Wagenen v. Cooney*, 45 N. J. Eq. 24. See next section.

Corporation Not Empowered to Sue as Public Agent. — Where a corporate body is given power by statute to maintain a suit in equity for a nuisance to water courses connected with its works, it is not thereby constituted a public agent to sue to restrain a public nuisance, but is merely clothed with power to sue as an individual for the protection of private property. *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393.

Bill of Revivor to Enforce Decree. — Where a decree has been rendered against the corporate authorities of a city for the abatement of a public nuisance on an information in the name of the state at the relation of certain citizens, any citizen may interfere as relator by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution. *State v. Mobile*, 24 Ala. 701.

3. *Atty.-Gen. v. Richmond*, L. R. 2 Eq. 306. And see *Bermondsey v. Brown*, 14 W. R. 213, 13 L. T. N. S. 574.

New Jersey — Board of Health as Relators. — A board of health organized under the "Act concerning the protection of the public health, and the record of vital facts and statistics relating thereto," approved March 11, 1880 (P. L. of 1880, p. 206), may file a bill in the court of chancery as relators, in

Municipal Corporations, however, have in some cases been held to be proper parties plaintiff in such suits.¹

(b) **Special Injuries to Private Persons.** — Where, by reason of a public nuisance, a private person suffers or is threatened with substantial special damage, different in kind from that sustained by the general public, such person may maintain a bill for an injunction in his own name,² and several persons who are thus specially dam-

the name of the state, for an injunction to restrain the continuance of any nuisance hazardous to the public health of the locality. In this respect the remedy to restrain such a nuisance, which formerly was required to be in the name and at the instance of the attorney-general, has been extended so that a proceeding in equity for an injunction may be taken by such a board. *Hutchinson v. State*, 39 N. J. Eq. 569.

1. *Huron v. Volga Bank*, 8 S. Dak. 449; *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *San Francisco v. Buckman*, 111 Cal. 25. And see *Demopolis v. Webb*, 87 Ala. 659.

In *Pine City v. Munch*, 42 Minn. 343, it was held that where a municipal corporation is by its charter authorized, by ordinance or by-laws, "to remove and abate any nuisance injurious to the public health," it may, at its election, in cases falling within some recognized head of equity jurisdiction, resort to a court of equity to aid it in enforcing its public duties to preserve the public health of its inhabitants, and may maintain in its own name a suit to abate a public nuisance within its corporate limits affecting the public health.

City as Representative of State. — Where the street of a city is obstructed in such a manner as to constitute a nuisance, the city, as the representative of the state, may pursue all of the ordinary civil remedies for enjoining or abating such public nuisance. *San Francisco v. Buckman*, 111 Cal. 25.

Selectmen. — Where a building is used for a noxious trade in violation of the Mass. Stat. of 1871, c. 167, § 1, the selectmen may sue in behalf of the inhabitants of the town for an injunction to prevent its use in that manner. *Watertown v. Mayo*, 109 Mass. 315.

Need Not Show Interest in Injured Premises. — For a public nuisance caused by the pollution of a natural stream running through a city, the city may maintain an action for the abatement thereof without showing an in-

terest in the land or watercourse in question. *Belton v. Baylor Female College*, (Tex. Civ. App. 1896) 33 S. W. Rep. 680; *Belton v. Central Hotel Co.*, (Tex. Civ. App. 1895) 33 S. W. Rep. 297.

2. *Alabama.* — *Rosser v. Randolph*, 7 Port. (Ala.) 238.

Arkansas. — *Wellborn v. Davies*, 40 Ark. 83.

Colorado. — *Denver v. Mullen*, 7 Colo. 345.

Delaware. — *Harlan, etc., Co. v. Paschall*, 5 Del. Ch. 435.

Illinois. — *Nelson v. Milligan*, 151 Ill. 462.

Iowa. — *Ewell v. Greenwood*, 26 Iowa 377.

Missouri. — *Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508.

New Jersey. — *Higbee v. Camden, etc., R. Co.*, 19 N. J. Eq. 276; *King v. Morris, etc., R. Co.*, 18 N. J. Eq. 397; *Allen v. Chosen Freeholders*, 13 N. J. Eq. 68; *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314.

New York. — *Knox v. New York*, 55 Barb. (N. Y.) 404. See also *Eldert v. Long Island Electric R. Co.*, 28 N. Y. App. Div. 451.

North Carolina. — *Barnes v. Calhoun*, 2 Ired. Eq. (N. Car.) 199.

Ohio. — *Brown v. Manning*, 6 Ohio 298.

Pennsylvania. — *Faust v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Biddle v. Ash*, 2 Ashm. (Pa.) 211.

Wisconsin. — *Barnes v. Racine*, 4 Wis. 454.

United States. — *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

England. — *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Soltan v. De Held*, 2 Sim. N. S. 133.

In *Nelson v. Milligan*, 151 Ill. 462, the court said: "All the authorities agree that the restraining power of courts of equity, by injunction, may

aged may join as plaintiffs in such a suit,¹ though not required to do so.²

(3) *Joinder* — (a) *In General*. — Where two or more persons having separate and distinct tenements are injured by a nuisance which is common to all and affects each in the same way, they may properly join as plaintiffs in a bill filed solely for injunctive relief.³

be invoked by a private individual, to prevent a special injury by the erection or continuance of a nuisance. But it is equally well settled that the jurisdiction is always reluctantly exercised until the nuisance has been found to exist by a jury, and never unless both the nuisance and the resulting injury are clearly shown by the evidence."

Iowa. — Under the Iowa Revision, § 3715, any person whose property is injuriously affected or whose personal enjoyment is lessened by the erection of a nuisance, may sue in equity for the abatement of the nuisance and the recovery of special damages. *Ewell v. Greenwood*, 26 Iowa 377.

Injury Must Be Different from That to General Public. — In case of a public nuisance equity will interfere, at the instance of a private individual, only when the complainant suffers some private, direct, and material damage beyond that which is suffered by the public at large, and which, without such interference, will be an irreparable injury to him. *Van Wagenen v. Cooney*, 45 N. J. Eq. 24; *Higbee v. Camden*, etc., R. Co., 19 N. J. Eq. 276; *Zabriskie v. Jersey City*, etc., R. Co., 13 N. J. Eq. 314; *Kuehn v. Milwaukee*, 83 Wis. 583; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501; *Denver v. Mullen*, 7 Colo. 345; *Beveridge v. Lacey*, 3 Rand. (Va.) 63; *Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508; *Taylor v. Portsmouth*, etc., St. R. Co., 91 Me. 193.

Diminishing Plaintiff's Trade. — Where it appeared that the complainant was a retail merchant doing business near the place of the nuisance, and that the said nuisance would divert travel from its accustomed route, and thereby decrease the value of complainant's property and diminish his trade, it was held that he was entitled to an injunction against such public nuisance. *Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508.

1. *Barnes v. Racine*, 4 Wis. 454.

2. **Need Not Join Partners in Business.**

— Where a private person sues in equity to abate a public nuisance, he

need not join as plaintiffs his partners in the particular business affected by the nuisance, any more than he need join other persons who have suffered similar injuries. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485. See also *King v. Morris*, etc., R. Co., 18 N. J. Eq. 397.

3. **Indiana.** — *Sullivan v. Phillips*, 110 Ind. 320.

Kansas. — *Palmer v. Waddell*, 22 Kan. 352; *Atchinson St. R. Co. v. Nave*, 38 Kan. 744.

Michigan. — *Turner v. Hart*, 71 Mich. 128; *Robinson v. Baugh*, 31 Mich. 290.

New Jersey. — *Demarest v. Hardham*, 34 N. J. Eq. 469; *Davidson v. Isham*, 9 N. J. Eq. 186; *Rowbotham v. Jones*, 47 N. J. Eq. 337.

New York. — *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59; *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

Ohio. — *Schlueter v. Billigheimer*, 14 Cinc. Wkly. L. Bul. 224.

Texas. — *Jung v. Neraz*, 71 Tex. 396.

West Virginia. — *Snyder v. Cabell*, 29 W. Va. 48.

Wisconsin. — *Barnes v. Racine*, 4 Wis. 454.

A Nuisance Is Common to Several Complainants when it affects all of them, not precisely at the same instant and in the same degree, but at the same period of time and in a similar way, so that the same relief may be had in the suit, whether there be one, two, or a dozen plaintiffs. *Rowbotham v. Jones*, 47 N. J. Eq. 337.

To Enjoin Laying Out of Cemetery. — Where an injunction is sought against the laying out and using of a cemetery which it is alleged will constitute a nuisance, all persons having a common interest in restraining the establishment of such cemetery may properly join as plaintiffs. *Jung v. Neraz*, 71 Tex. 396.

Overflowing Lands. — Where two or more persons have separate and distinct tracts of land injured or rendered less valuable by the overflow, at certain seasons, from a natural watercourse,

But they cannot recover damages in such suit.¹ And where there is no community of interest, but the object of the suit is to restrain something which works a distinct and special injury to the property of each, they cannot join.²

Objections for Misjoinder must ordinarily be taken before the hearing.³

obstructed by bridges and dams, if such overflow is a common injury to the lands of all, they may join as plaintiffs in a suit to enjoin such nuisance, since they have a common interest in the subject-matter thereof. *Palmer v. Waddell*, 22 Kan. 352. See also *Sullivan v. Phillips*, 110 Ind. 320.

Supplemental Bill. — In a suit in equity commenced by two persons who own distinct tenements in severalty to enjoin a nuisance common to both, if a supplemental bill becomes necessary in respect of the case of one of the parties, it is proper to exhibit the same in the name of both parties; and an injunction may be granted on such supplemental bill on the application of the party presenting the new matter, although it in no respect adds to or sustains the case of the other party complaining. *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362.

Failure of One Plaintiff's Case. — Two owners of distinct properties having joined as plaintiffs in a suit to enjoin a nuisance, the court found that a sufficient case of nuisance had not, in the case of the first plaintiff, been made out, but in the case of the second plaintiff had been made out. A decree was made for an injunction so far as regarded the second plaintiff, and for the defendant to pay him his costs; the bill as regarded the first plaintiff was dismissed, and the costs occasioned by joining him deducted from the costs to be paid by the defendant. *Umfreville v. Johnson*, L. R. 10 Ch. 580.

Striking Out Plaintiffs. — Where several plaintiffs join in the bill for an injunction against a nuisance, and only part of them show title to relief, the court is authorized by Mass. Rev. Stat., c. 100, § 122, to allow an amendment by striking out part of the plaintiffs, even after issue joined and evidence published. *Dana v. Valentine*, 5 Met. (Mass.) 8.

Individual Joining with Municipal Corporation. — A grantee of a lot adjoining a public square, who has a special covenant from the original owner of the square that it shall be kept open for the benefit of his lot, may join with the

municipal corporation in a suit to restrain the erection of a nuisance in such square. *Watertown v. Cowen*, 4 Paige (N. Y.) 510.

Life Tenants and Remaindermen. — In a suit in equity to restrain a nuisance the life tenants may be joined with the remaindermen as parties plaintiff. *Rainey v. Herbert*, 55 Fed. Rep. 443.

1. *Peck v. Elder*, 3 Sandf. (N. Y.) 126.

Multifariousness — Striking Out Prayer for Damages. — Where several persons sustaining a common injury from a nuisance file a bill to restrain the nuisance, and, in addition to the prayer for an injunction, the bill contains a prayer that the defendants may be decreed to pay the plaintiffs respectively the damages which they have sustained, it will be multifarious. But the objection on account of multifariousness may be obviated by striking out of the bill that part of the prayer which asks for damages. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

2. *Demarest v. Hardham*, 34 N. J. Eq. 469; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Rowbotham v. Jones*, 47 N. J. Eq. 337; *Fogg v. Nevada-California-Oregon R. Co.*, 20 Nev. 429.

No Joint Suit for Particular Injuries. — There is no objection to several complainants uniting in a bill if the nuisance is common to all, but they have no right to make a joint complaint for particular injuries confined to one or two of the complainants, as shaking, etc., the houses owned by one of the complainants. They cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance which separately would not establish the complaint. *Davidson v. Isham*, 9 N. J. Eq. 186.

3. See article PARTIES.

Objection Should Be Raised in Answer. — Where, in a suit by several parties to prevent the erection of a public nuisance, the answer takes no defense upon the ground of multifariousness, and under such a point the real point in controversy can be determined as well as if there were as many suits as

(b) **Landlord and Tenant.** — The owner of houses occupied by tenants can maintain a suit in equity in his own name to restrain the continuance of a nuisance, if the injury is of such a nature as to be practically continuous and permanent.¹ But where the nuisance is of a temporary character, it seems that the tenant should be joined.²

b. **DEFENDANT.** — In general, the owner of the premises whereon a nuisance is maintained is the proper party defendant in a suit to enjoin such nuisance.³ And it seems that all persons

there are plaintiffs, an objection of multifariousness taken at the hearing cannot be sustained. *Hamilton v. Whitridge*, 11 Md. 128.

Failure to Move for More Specific Statement. — A petition in equity filed by several property owners to abate a nuisance affecting their property, but which fails to state whether the plaintiffs jointly or severally own the property affected, may be vulnerable to a motion for a more specific statement; but the defendants, failing to make such motion, cannot on the trial object to evidence tending to show the character and extent of the plaintiffs' interest in the property. *Bushnell v. Robeson*, 62 Iowa 540.

Demurrer. — Where several parties are improperly joined as plaintiffs in a suit to restrain a nuisance, a demurrer will lie to the bill. *Fogg v. Nevada-California-Oregon R. Co.*, 20 Nev. 429.

1. *Park v. White*, 23 Ont. Rep. 611.

Lessee's Interest Not Affected. — Where a bill in equity alleged that the plaintiff was the owner of a water power, and that he had leased a part of it, and that the defendant had by a nuisance diminished the water power, it was held that as it did not appear on the face of the bill that the interest of the lessee would be affected by the diminution of the water power, it was not necessary to make him a party plaintiff. *Boston Water Power Co. v. Boston, etc., R. Corp.*, 16 Pick. (Mass.) 512.

The Interest of a Tenant from Month to Month in the premises is not sufficient to enable him to sue in equity for an injunction against a nuisance injurious to his possession. *Clarke v. Thatcher*, 9 Ma. App. 436.

2. *Broder v. Saillard*, 2 Ch. Div. 692.

Joining Tenant by Amendment. — A landlord cannot maintain a bill in equity to suppress a nuisance caused to his property before he demised it and continued afterwards without joining his tenant as a co-plaintiff; and it

seems that after hearing upon the merits of such bill and after the expiration of the tenant's term, the landlord cannot be permitted to amend the bill by joining the tenant. *Ingraham v. Dunnell*, 5 Met. (Mass.) 118.

3. For a general discussion of parties defendant to bills for injunctions, see the article *INJUNCTIONS*, vol. 10, p. 909 *et seq.*

Owner of Fee. — In *Hutchins v. Smith*, 63 Barb. (N. Y.) 251, it was held that, in a suit to abate a nuisance, the owner of the fee should be made a party defendant. But see *Olmsted v. Rich*, (Supreme Ct.) 6 N. Y. Supp. 826, where a suit was brought against a lessee to enjoin a nuisance, and no objection was made by demurrer or answer on the ground of the nonjoinder of the owner of the fee, and it was held that as the action was in equity the rules of equity and not the provisions of the New York Code of Civ. Proc., § 1660, were applicable, and therefore the nonjoinder of the owner was not a defense.

Legal Title Remaining in Vendor. — Where the legal title to lands which have been sold to one who intends erecting a dam upon them remains in the vendor, who has an immediate right of entry thereon, having made an executory contract to sell with full knowledge of the purposes to which the vendee intends to devote the property, the vendor is a proper if not a necessary party to a bill for an injunction to restrain the erection of the dam. *Ogletree v. McQuaggs*, 67 Ala. 580.

Where It Is Sought to Enjoin the Laying Out of a Cemetery, on the ground that it will constitute a nuisance, the bishop of the church who possesses and controls the property of the church which is being so laid out for use as a cemetery is the proper defendant. *Jung v. Neraz*, 71 Tex. 396.

Suit to Abate Dam. — In an equitable action to abate a dam the one who

interested in maintaining the nuisance against which relief is sought should be joined.¹

Where the Acts of Several Persons, acting independently, combine to produce a nuisance, such persons may be joined as defendants in a suit for injunctive relief;² but not where damages are claimed.³

3. The Bill or Complaint — a. IN GENERAL. — The general principles of equity pleading governing bills for injunction apply in the main to suits to restrain nuisances.⁴ In general, the bill should allege facts sufficient to show clearly the existence of the nuisance,⁵ and that the case is one in which the intervention of an

claims an interest in the shore where the dam abuts is the proper party defendant. *Eastman v. St. Anthony Falls Water-Power Co.*, 12 Minn. 137.

1. Landlord and Tenant. — Where a nuisance is erected and carried on by a tenant both landlord and tenant are proper parties defendant in a suit for an injunction. *Robinson v. Smith*, (Supreme Ct.) 7 N. Y. Supp. 38; *O'Sullivan v. New York El. R. Co.*, (Supreme Ct.) 7 N. Y. Supp. 51; *Martin v. Blattner*, 68 Iowa 286.

Where A erected a nuisance and leased the premises to B, who sublet to C, and C sublet to D, it was held that A, B, C, and D should be made parties defendant to a bill to restrain the nuisance. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

Nuisance Committed under Grant of License. — Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance. *White v. Jameson*, L. R. 18 Eq. 303, 22 W. R. 761.

Persons Outside Jurisdiction of Court. — Where a nuisance has been erected and is maintained by several persons or corporations, those who are not within the jurisdiction of the court need not be joined as defendants in the bill. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

2. Thorpe v. Brumfitt, L. R. 8 Ch. 650; *Woodyear v. Schaefer*, 57 Md. 1; *People v. Gold Run Ditch, etc., Co.*, 66 Cal. 133; *Kingsbury v. Flowers*, 65 Ala. 479.

Death of One Party. — On a bill to restrain further interments in a private burying-ground, such ground being devoted to that purpose by two persons who own separate portions in severalty,

both might properly be joined as defendants; and where one of such parties had died before the bill was filed, it was held that his widow, having a right of sepulture therein, and her second husband were properly made defendants with the survivor; and the heirs of the deceased should also be made defendants to the bill, though his personal representative was not a proper party. *Kingsbury v. Flowers*, 65 Ala. 479.

3. Sadler v. Great Western R. Co., (1895) 2 Q. B. 688.

4. See article INJUNCTIONS, vol. 10, p. 918 *et seq.*

5. Failure to State Sufficient Facts. — A petition in equity to compel the defendants to lower their dam, which fails to allege the height of the dam at any time, or how much it has been raised by the defendants, is defective. *Tye v. Catching*, 78 Ky. 463.

Must Charge that Acts Constitute a Nuisance. — The statute providing for the issuance of an injunction in cases of nuisance, and authorizing the court to make such orders and decrees for enforcing or dissolving it as justice may require, does not give the court jurisdiction to grant the injunction where the bill does not charge that the acts complained of constitute a nuisance. *Androscoffin, etc., R. Co. v. Androscoffin R. Co.*, 49 Me. 392.

Insufficient Description. — A complaint by a railroad company praying for an injunction alleged that there were a number of saloons and gambling houses along the line of its road, and that the said houses were public and private nuisances, but failed to state any particular house or to designate wherein it was disorderly or a nuisance. On demurrer the complaint was held to be fatally defective in that it contained no allegation that would locate any particular house or describe

equity court is justifiable.¹ And the manner in which the complainant is injured by such nuisance should be clearly alleged;² though it has been held to be unnecessary to allege that the injury is irreparable.³

it as disorderly. *Northern Pac. R. Co. v. Whalen*, 3 Wash. Ter. 452.

Sufficient Allegation. — In a suit for an injunction to perpetually restrain injury to complainant's property caused by the manufacturing of vitriol and sulphuric acid upon the defendants' premises, the bill, after alleging the injury to the complainant's property, prayed "that they may, upon their several and respective corporal oaths, answer the premises, and that they may set forth and discover whether they or one of them (and if one, which one) do not conduct, control, and operate a factory at the place hereinbefore mentioned, wherein vitriol and sulphuric or sulphurous acid or some of these products are made; and that they may be perpetually enjoined, restrained, and prohibited from keeping up and maintaining the aforesaid factory and from making vitriol, sulphuric and sulphurous acids and other noxious and unwholesome products in the place where the said factory is situated." It was held that the premises of the bill in regard to the nuisance and injury to the complainant were sufficient to warrant the relief by injunction. *Chappell v. Funk*, 57 Md. 465.

In a suit in equity to abate a nuisance the complaint alleged that the defendant had constructed a breakwater in a stream, which stream formed the common boundary between the parties, so that in time of freshet, which occurred frequently, it threw the water with great force against the plaintiff's land, and thus greatly damaged it. It was held that this complaint stated facts sufficient to show that danger was probable and imminent, and was sufficient as against a general demurrer to justify a decree abating the breakwater as a nuisance. *Nicholson v. Getchell*, 96 Cal. 394.

1. No Adequate Remedy at Law. — Where a bill seeking an injunction against a private nuisance fails to show that the plaintiff is without a legal remedy, it will be dismissed. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545. But see *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 483; *Aldrich v. Howard*, 7 R. I. 87.

Pressing Necessity. — An allegation that the laying of a second track of a railroad in the street of a town will have a tendency to depreciate the value of the property of the relators and cause them great and irreparable injury by reason of the narrowing of the street, and also by reason of the increased annoyance that will be caused by the running of the trains and the danger to their buildings from proximity to such track, in the absence of any allegation of pressing necessity to relieve public travel from immediate and serious inconvenience, will not warrant the granting of an injunction on an information filed by the attorney-general as a representative of the public. *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530.

2. Where a bill seeking an injunction against a nuisance failed to show how the complainant would be injured by the act complained of, it was held to be insufficient. *Spooner v. McConnell*, 1 McLean (U. S.) 337.

To Enable Court to Judge Whether Injury of Nature Stated. — Where an injunction is sought against a nuisance it is not enough to allege that the injury will be irreparable to the complainant, but facts must be shown to enable the court to judge whether the injury will be of the character stated, and such as will clearly authorize an injunction. *Shivery v. Streep*, 24 Fla. 103.

3. *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 483. But see *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

May Prove Any Amount of Injury. — Where a bill states that the dam complained of backs the water upon the land of the plaintiff, it is not demurrable because it does not state a case of irreparable or destructive mischief. Under the allegation that the water is backed upon the plaintiff's land, he would be at liberty to prove any amount of injury, and no inferences can be drawn against him upon demurrer. *Sprague v. Rhodes*, 4 R. I. 301.

Allegation of Amount of Damage. — A bill in equity to abate a nuisance which alleges that the injury therefrom

Proof. — The proof must, of course, respond to the allegations.¹

b. ALLEGATION OF TITLE. — It is a general rule of equity pleading that in a suit for an injunction the plaintiff's bill must allege that he has some interest or title which it is the duty of the court to protect.² And so it has been held that, in a suit to restrain a nuisance, the plaintiff must aver that he was the owner of the premises affected by the nuisance at the time when the acts complained of were committed.³ But it seems that the bill need not negative title in the defendant.⁴

amounts to five hundred dollars is not bad for setting up a standard of damages that might be recovered at law. The "irreparable injury" alleged as a ground of equitable jurisdiction is not necessarily such injury as cannot be measured by a pecuniary standard. *Wilmarth v. Woodcock*, 58 Mich. 482.

1. Allegation of Public Way — Proof of Private Way. — Where a bill in equity seeking relief for an obstruction of a way to the plaintiff's mill alleges it to be a public way, it is not sustained by proof of the existence of a private way. *Gurney v. Ford*, 2 Allen (Mass.) 576.

Easement Less than That Alleged to Exist. — A demurrer to a bill in equity for the abatement of a nuisance to a right of way will be sustained if it appears on the face of the bill, and by reference to an annexed plan, that an easement which actually exists is of less extent than that which is averred to exist, and that the existing easement is not injured. *Hartshorn v. South Reading*, 3 Allen (Mass.) 501.

Negligence. — In an action to restrain a nuisance and for damages for injuries arising therefrom, allegations in the complaint that the nuisance complained of was due to the negligent operation of a steam hammer on the defendant's premises do not necessarily render the action one for negligence; therefore, proof that the injury to the plaintiff arose from such negligent use does not involve a substitution of a different cause of action. *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 374.

2. See article INJUNCTIONS, vol. 10, p. 944.

3. *Hutchins v. Smith*, 63 Barb. (N. Y.) 251.

In *Denner v. Chicago, etc., R. Co.*, 57 Wis. 218, it was held that under Wis. Laws of 1882, c. 190, restoring the jurisdiction in equity to abate private nuisances, in order to bring the action

within such jurisdiction the essential facts should be affirmatively alleged in the complaint. Thus a complaint which fails to allege that the plaintiff has any title or vested interest in the land is insufficient.

Failure to Show Right. — In an action to abate a nuisance consisting in the erection of a dam in a cañon, the complaint failed to allege that the plaintiff possessed the right to use the cañon the obstruction of which constituted the nuisance. It was held that this rendered the complaint radically defective. *Stone v. Bumpus*, 40 Cal. 428.

Sufficient Allegation of Title. — In cases of nuisances the title and estate of the complainant are set out with sufficient certainty in a bill for an injunction, if the complainant alleges himself to be the owner of the premises in fee simple by purchase, and to be in possession. A greater degree of precision is not required, especially where it is not alleged in the bill that the defendants make any pretense of right in themselves. *Vanwinkle v. Curtis*, 3 N. J. Eq. 422.

Evidence of Title. — In an action to abate and enjoin a nuisance and to recover damages, where the defendant alleges that he owns the ground in dispute, or denies that the plaintiff is the owner without alleging title in himself, it is competent for him to overcome the plaintiff's evidence of title by showing title in himself. *Stone v. Bumpus*, 40 Cal. 428.

4. *Sprague v. Rhodes*, 4 R. I. 301, wherein it was held that, where a bill seeking equitable relief from a nuisance does not disclose any rights of the defendants, existing at the time of the bill filed, to flow the lands of the complainant, but complains of such flow as a nuisance, it is not demurrable because it does not allege that the flowage complained of is *not* under claim of right.

c. **THREATENED NUISANCES.**—As has been remarked hitherto, equity is usually reluctant to grant an injunction against a nuisance not yet in existence, but only threatened, and will require that a clear case be made out before it will grant relief.¹ Hence, where an injunction is sought in such case the bill must allege sufficient facts for the court to see clearly that the thing complained of will constitute a nuisance.² It is not enough to allege

1. See *supra*, IV. 1. f. *Threatened Nuisances*.

2. *Kingsbury v. Flowers*, 65 Ala. 479; *Thebaut v. Canova*, 11 Fla. 143; *Bowen v. Mauzy*, 117 Ind. 258; *Dalton v. Cleveland, etc.*, R. Co., 144 Ind. 121; *Davis v. Atkins*, (Ky. 1896) 35 S. W. Rep. 271; *Edlen v. Barber*, 8 Ky. L. Rep. 268; *Adams v. Michael*, 38 Md. 123; *Dunn v. Austin*, 77 Tex. 139.

Insufficient Bill.—In a suit for an injunction against the erection of a factory for the manufacture of felt roofing in the immediate vicinity of certain valuable dwelling houses, the property of the complainants, the bill alleged that, if the factory were allowed to be erected, it would become a nuisance specially injurious to the complainants; that, owing to the dirt, odor, smoke, and appurtenances of the factory, together with the inflammable nature of the material used, the property of the complainants would be utterly destroyed as dwellings, and one of the complainants would be deprived of the comforts of his home, and the health of his family would be impaired by the nuisance. The bill further alleged that irreparable and continuing injury to complainants' property and the value thereof, and to their just enjoyment of the same, would result from the erection and carrying on of the said business. It was held that the allegations in the bill were not sufficiently specific and definite as to the facts and circumstances from which alone the court could determine whether the nuisance would be of the character and nature supposed; that the simple allegation that particular consequences would follow the erection of the factory was not sufficient; facts should have been stated so that the court could see and determine whether the factory, when erected, would or would not constitute a nuisance such as would sensibly and materially diminish the value of complainants' property and the ordinary comforts and enjoyment thereof. *Adams v. Michael*, 38 Md. 123.

Injury Not Inevitable.—Equity will not enjoin the erection of a nuisance, on the ground that a spring 150 feet distant will be polluted thereby, where the allegation of the bill does not make it clear that such pollution will inevitably result. *Davis v. Atkins*, (Ky. 1896) 35 S. W. Rep. 271.

Failure to Aver Intention to Commit Nuisance.—A complaint for an injunction which alleges that the defendant is constructing a building on his lot adjacent to the plaintiff's residence, for the purpose of carrying on the business of blacksmithing and horseshoeing, is bad if it fails to aver as a fact that the defendant threatens or intends to conduct the same improperly, or that it cannot be conducted at such place without material injury to the plaintiff. *Bowen v. Mauzy*, 117 Ind. 258.

Equity Will Not Enjoin the Erection of a Building which is not a nuisance *per se*.—On the ground that certain uses to which it is alleged the building will be put will constitute it a nuisance, where there is neither allegation nor proof that the building could not be used for other purposes which would not constitute it a nuisance. *Dalton v. Cleveland, etc.*, R. Co., 144 Ind. 121.

Sufficient Complaint.—In an action to enjoin the erection of a stable upon an alley by an abutting property owner, the complaint alleged the obstruction of the alley by such building, and that it was in such proximity to the plaintiff's residence that if used for such purposes it would endanger the health of himself and family, and render his property useless as a residence. It was held on demurrer that the complaint was sufficient. *Keiser v. Lovett*, 85 Ind. 240.

Bill to Prevent Erection of Stable—Sufficiency.—A bill in equity to enjoin the defendant from erecting a large livery stable in close proximity to the complainant's dwelling house, hotel, and stores, with a prayer for general relief, and containing allegations that the use of the stable as proposed by

in general terms that probable injury will result; the bill must state facts and not opinions.¹

d. SUIT BY PRIVATE PERSON FOR PUBLIC NUISANCE.—Where a private person sues in equity for an injunction against a public nuisance, his bill must allege a special and peculiar injury to himself, different in kind from that sustained by the general public.²

the defendant will cause irreparable damage to the complainant by rendering, from its disagreeable and unwholesome effluvia, its noise, flies, and other nuisances, his dwelling house untenable, and breaking up the custom and diminishing the rents of his hotel and stores, is not demurrable for want of equity; nor as stating a case in which the sole remedy of the complainant is at law; nor because it does not state that the rights of the parties have been settled in favor of the complainant, before the filing of the bill, in an action at law, or does not give some equitable reason why such action has not been first brought. *Aldrich v. Howard*, 7 R. f. 87.

1. *Thebaut v. Canova*, 11 Fla. 143; *Dunn v. Austin*, 77 Tex. 439; *Kingsbury v. Flowers*, 65 Ala. 479.

Expression of Opinion.—Where a bill for an injunction alleged that a steam mill, if put into operation, would unavoidably and in itself become a nuisance, this allegation was held to be nothing but an expression of opinion by the plaintiff, upon which the court should not retain the injunction, but should leave the parties to their remedy at law. *Thebaut v. Canova*, 11 Fla. 143.

Conclusions—Truth Not Admitted by Demurrer.—A complaint for an injunction to restrain the erection of a blacksmith shop stated that "the erection and maintaining of a blacksmith shop at such place will destroy the free use of the plaintiff's property," but did not allege that such business could not be conducted so as not to injure the plaintiff, nor that the defendants were intending to conduct it improperly, nor that they could not, or would not, so construct the building as to prevent all injury. It was held that the truth of these allegations of injury were not admitted by a demurrer, they being mere conclusions. *Bowen v. Mauzy*, 117 Ind. 258.

2. *Packet Co. v. Sorrels*, 50 Ark. 466; *Payne v. McKinley*, 54 Cal. 532; *Bigelow v. Hartford Bridge Co.*, 14

Conn. 565; *O'Brien v. Norwich, etc.*, R. Co., 17 Conn. 372; *Smith v. McDowell*, 148 Ill. 51; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364; *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485. See also *Schall v. Nusbaum*, 56 Md. 512.

A General Allegation that Damages Have Resulted or will result is not sufficient. *Packet Co. v. Sorrels*, 50 Ark. 466.

Depreciating Value of Property.—Equity has jurisdiction to enjoin the creation or erection of a public nuisance upon a bill filed by private individuals alleging that the close proximity of such nuisance will deprive the complainants of the comfortable enjoyment of their property and greatly depreciate and lessen its value. *Hamilton v. Whitridge*, 11 Md. 128.

Alleging Injury Common to All.—Where a bill stated that the plaintiff resided near the head of a certain cove; that the right to navigate the cove was a common right, the enjoyment of which was valuable to him in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he was in danger of being deprived of his lawful right to navigate the cove by an obstruction to be erected by the defendant; it was held that the injury alleged in the bill was not one peculiar to the plaintiff, but common to him and all others having occasion to use the cove for such purposes. *O'Brien v. Norwich, etc., R. Co.*, 17 Conn. 372.

Failure to Object.—In a suit for obstructing a street, the plaintiffs alleged that their store was near defendant's on the same side of the street, and that they were prevented from passing along that side of the street, as were also their employees and patrons, to the great damage of their business. It was held that, as the defendant took issue and went to trial on this complaint, it must be held sufficient to warrant proof of special damage. *Callanan v. Gilman*, 107 N. Y. 360.

2. **SUIT FOR INJUNCTION AND DAMAGES.** — It is a general principle of equity jurisdiction to aim at complete and final relief, in respect to all matters between the same parties growing out of the same general transaction;¹ and so in a suit to restrain a nuisance the plaintiff may properly unite with his prayer for an injunction a prayer for damages caused by the nuisance.²

4. **The Decree** — *a.* **IN GENERAL.** — The relief granted by an equity court should conform in general to the prayers of the bill,³

1. See article JURISDICTION, vol. 12, p. 162.

2. *Yolo County v. Sacramento*, 36 Cal. 193; *Will v. Sinkwitz*, 41 Cal. 588; *Smith v. Fitzgerald*, 24 Ind. 316; *Paddock v. Somes*, 102 Mo. 226; *Whipple v. McIntyre*, 69 Mo. App. 397; *Robinson v. Smith*, (Supreme Ct.) 7 N. Y. Supp. 38; *O'Sullivan v. New York El. R. Co.* (Super Ct.) 7 N. Y. Supp. 51; *Syracuse Solar Salt Co. v. Rome*, etc., R. Co., 11 N. Y. App. Div. 557; *Lefrois v. Monroe County*, 24 N. Y. App. Div. 421; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *People v. Metropolitan Telephone, etc., Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 120; *New York Cent., etc., R. Co. v. Rochester*, 127 N. Y. 591; *Fleischner v. Citizens' Invest. Co.*, 25 Oregon 119; *Wendlandt v. Cavanaugh*, 85 Wis. 256. And see *Whipple v. McIntyre*, 69 Mo. App. 397; *Beir v. Cooke*, 37 Hun (N. Y.) 38. See also the article INJUNCTIONS, vol. 10, p. 972.

In *Williams v. New York Cent. R. Co.*, 16 N. Y. 111, the court said: "Although he had a remedy at law for the trespass, yet as the trespass was of a continuous nature he had a right to come into a court of equity and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief."

Oregon.—Notwithstanding the Oregon Constitution, article 1, § 17, which provides that "in all civil cases the right of trial by jury shall remain inviolate," a court of equity has obtained jurisdiction of an action to restrain a private nuisance, and may render judgment for damages as an incident to a suit for injunction. That section of the constitution continues to all suitors the right of trial by jury in all cases where it was secured to them by the laws or practices of the courts at the time of the adoption of the constitution, but was not intended to abridge the equitable jurisdiction then existing. Since

the jurisdiction to restrain nuisances belongs to courts of equity prior to the adoption of the constitution, such jurisdiction still continues, and the matter of damages is only incidental thereto. *Fleischner v. Citizens' Invest. Co.*, 25 Oregon 119.

Injunction Should Be Demanded. — As a general rule, equitable relief restraining a nuisance will only be granted when made the subject of a special prayer. *Cobb v. Smith*, 23 Wis. 261; *Delaware, etc., Canal v. Camden*, etc., R. Co., 16 N. J. Eq. 321; *Earl v. De Hart*, 12 N. J. Eq. 280; *Wolcott v. Melick*, 11 N. J. Eq. 204. But see *Sullivan v. Royer*, 72 Cal. 248.

3. See, in general, article DECREES, vol. 5, p. 956 *et seq.*

Where a Bill Only Prayed for an Injunction to restrain the defendants from flowing back the waters of a stream upon the complainant's property, it was held that the injunction was the only relief which the court could grant, and that a further order requiring defendants to remove their dam, and that in case the same was not removed within thirty days the sheriff should proceed to remove the same, was unauthorized, there being no prayer in the bill for such relief. *Lummery v. Brady*, 8 Iowa 33.

Nuisance from Operating Steam Hammer. — A bill prayed that a defendant might be restrained from working a steam hammer in such a way as to cause a nuisance or injury to the plaintiff and his premises. The master of the rolls considered that a nuisance was caused by machinery other than the steam hammer, and granted an injunction to restrain the defendant from so conducting his works as to cause injury, damage, or annoyance to the owner or occupier of the premises. It was held, on appeal, that the injunction should be granted in the terms of the prayer in the bill, and the decree was varied accordingly. *Goose v. Bedford*, 21 W. R. 449.

and should not be disproportionate to the injury.¹ The injunction should be specific in its description of the particular things and acts in respect to which the defendant is enjoined.²

Abatement. — Where the nuisance complained of consists in an obstruction of a public highway, the decree may require the removal of the obstruction.³ And so where the injuries are caused by the maintenance of a dam, it is proper to direct the lowering of the dam to such an extent as will abate the nuisance.⁴ The

Location of Nuisance. — On a bill for an injunction to restrain the erection of a nuisance, which prays that the defendant be restrained from erecting said nuisance on F. street, "in front of or near the said premises belonging to your orators as aforesaid," a decree restraining such erection elsewhere on the defendant's premises than on F. street, "so near the premises of the said complainants as to injure the same," is unauthorized. *Rainey v. Herbert*, 55 Fed. Rep. 443.

A factory situated at U. was complained of by one who lived at S., a mile and a half from U., and an injunction was thereupon allowed, restraining defendants from causing a nuisance at U. by their factory. It was held that as no one at U. had complained, the injunction must be modified so as to restrain defendants from causing a nuisance at S. only. *Williams v. Osborne*, 40 N. J. Eq. 235.

1. *Big Rapids v. Comstock*, 65 Mich. 78, wherein it was held that equity would not require the walls of a building to be torn down because of an encroachment of four and one-half inches on the street.

Noise from Roller Coaster. — Where it was not clear that the noise from a roller coaster created a nuisance at other times, an injunction against the operation of the same was limited to Sundays and night hours, and when there was an extreme sickness in a complainant's family, certified to by two reputable physicians. *Schlueter v. Billigheimer*, 14 Cinc. Wkly. L. Bul. 224.

2. **Injunction Against "Dense Smoke."** — An injunction which prohibits the defendant from allowing "dense smoke" to issue from the chimneys of his business establishment was held to be too broad, as the question what was "dense smoke" would be a matter of endless controversy. *Milligan v. Nelson*, 51 Ill. App. 441.

Decree Not Objectionable Because Too

Specific. — A decree which refers to the cap piece of the dam as fixing the extreme height to which the water may be raised by the use of the gates when shut, though more specific in its direction than is usual, is not objectionable for that reason. *Carlisle v. Cooper*, 21 N. J. Eq. 576.

3. *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396.

Where Portion of Nuisance Outside Jurisdiction. — A bill in equity was filed in the United States District Court for the district of Iowa to abate as a nuisance a bridge across the Mississippi where that river divides the states of Illinois and Iowa, the state line being in the middle of the river. It was held that inasmuch as the court had no jurisdiction over such portion of the bridge as was in Illinois, and as the removal of that part which was in Iowa would not materially remedy the nuisance, the court would not grant a decree requiring the removal of the portion of the bridge in Iowa. *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

Location of Obstruction Uncertain. — In a suit by a town to abate an obstruction in a highway, the complaint and verdict were so uncertain as to the location of the obstruction that no definite order of abatement could be based thereon; it was held that the decree should be modified so as to eliminate the order of abatement. *American Furniture Co. v. Batesville*, 139 Ind. 77.

May Be Abated by Mandatory Injunction. — In a suit for an injunction to restrain the maintaining of an obstruction upon a public highway, and for damages brought by a private person specially injured thereby, although such obstruction exists at the commencement of the suit, it may be abated by a mandatory injunction as well as by a judgment that the obstruction be removed and the nuisance abated. *Gardner v. Stroeve*, 89 Cal. 26.

4. *Rothery v. New York Rubber Co.*, 90 N. Y. 30; *Ramsay v. Chandler*, 3

court may order the abatement by its own officers or require the party to do it.¹

b. WHERE NUISANCE CAN BE REMEDIED BY USE OF PROPER METHODS. — A court of equity is always reluctant to grant a perpetual injunction against the carrying on of a legitimate business. Where the court finds that such an establishment, as conducted, is a nuisance it should allow the defendants to show, if they can, that by the use of proper methods and appliances it is possible to continue the business in the same place without its being a nuisance.² Where this can be done a decree absolutely enjoining the defendants from further conducting such business is too broad;³ the injunction should be limited to such uses as

Cal. 90; *Hammond v. Fuller*, 1 Paige (N. Y.) 197.

Matter of Equitable Discretion. — The removal of a milldam so far as it exceeds a proper height, by the decree of the equity court, is not a matter of right, but of equitable discretion, and must depend on the circumstances of the case. *Miller v. Cornwell*, 71 Mich. 270.

Amount of Lowering Should Be Specially Found. — Where suit is brought for the abatement of a dam which on account of its height causes damages by overflow, and for an injunction against the same, the jury should find specially as to how much of the dam should be abated, and if not so found it must be ascertained by the court. *Finch v. Green*, 16 Minn. 355.

Need Not Specify Height at Time of Trial. — Where an upper proprietor sues to abate a dam built by a lower proprietor, which is so high as to set the water back on the lands of the former, the judgment may direct that the dam be cut down a specified amount from its height at the time of the trial, without specifying what that height is. *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

1. *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396.

Sheriff. — Under Minn. Gen. Stat. 1878, c. 75, § 44, providing that "by the judgment the nuisance may be enjoined or abated as well as damages recovered," in an action by a riparian owner to abate a dam by which the water is sent back on his land, the court in ordering the dam to be cut down may direct the sheriff to do it. *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

Commissioners' Court. — To a suit to abate a public nuisance maintained

by a county, the district court may in its decree of abatement require the commissioners' court to remove such nuisance. *Llano County v. Llano*, (Tex. Civ. App. 1895) 28 S. W. Rep. 926.

2. *Bushnell v. Robeson*, 62 Iowa 540.

Examination of Proposed Remedies by Commissioner. — The defendants having shown by the evidence of scientific and practical experts that the matters complained of as a nuisance could be remedied, and that they had adopted certain measures, and proposed to adopt others, to remedy the evils, a commissioner was appointed to examine the premises and the proposed remedial measures, with power to examine witnesses, and report; neither party to offer any testimony; either party to have the right to move for action on the report on four days' notice, and upon like notice to move for any specified modification of the injunction. *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. 296.

3. *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Chamberlain v. Douglas*, 24 N. Y. App. Div. 582; *Bushnell v. Robeson*, 62 Iowa 540; *Richards v. Holt*, 61 Iowa 529; *Seifried v. Hays*, 61 Ky. 377; *McMenomy v. Banl*, 87 Cal. 134; *Fresno v. Fresno Canal, etc.*, Co., 98 Cal. 179; *Green v. Lake*, 54 Miss. 540.

In *Fresno v. Fresno Canal, etc.*, Co., 98 Cal. 179, it was held that a decree ordering a canal to be filled up, where such canal could have been covered over, and thereby rendered unobjectionable, was erroneous.

Objectionable Use of Buildings. — Equity will not restrain the erection or maintenance of buildings not nuisances *per se*; it will only restrain an improper use of the same constituting the nuisance. *Czarniecki's Appeal*,

create the nuisance, leaving the right to carry on the business in a proper manner.¹ If, however, it appears that the grievance complained of cannot be rectified by any method adopted, a decree absolutely enjoining the further operation of the establishment is proper.²

(Pa. 1887) 11 Atl. Rep. 660; *Trulock v. Merte*, 72 Iowa 510.

In *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201, it appearing from the evidence, upon an application for an injunction to restrain the erection of gas works, that if the process of purifying by lime should be used in the works it would cause an injury to the complainants, who were owners of dwelling and residents in the immediate neighborhood, by the generation of annoying and offensive vapors and odors, but that the defendants proposed to use other processes which might not so result, the court granted an injunction restraining the defendants from using the lime process, and from manufacturing gas in any way that would produce any annoyance to persons dwelling in the houses of the complainants, by any smoke, gases, or other effluvia or odors from the works, but permitted them to erect their buildings and manufacture gas subject to a perpetual injunction if discomfort should be occasioned thereby; costs to abide the event of the suit.

1. *Richards v. Holt*, 61 Iowa 529; *Seifried v. Hays*, 81 Ky. 377; *Minke v. Hopeman*, 87 Ill. 450; *Green v. Lake*, 54 Miss. 540.

Nuisance Rectified After Suit Brought. — Where, after the bringing of a suit to enjoin a nuisance, the defendants so kept the building complained of that it was no longer a nuisance, except in one particular, and there was nothing in the evidence to indicate that they would again keep it as when the action was commenced, it was held that the injunction should have been limited to the offense existing at the time of the hearing. *Trulock v. Merte*, 72 Iowa 510.

Modifying Injunction. — Where the operation of a business has been enjoined on the ground that it is a nuisance, if the defendant afterwards shows that it can be so carried on as not to constitute a nuisance, the injunction should be modified so as to permit such business to be operated in an unobjectionable manner. *Chamberlain v. Douglas*, 24 N. Y. App. Div. 582; *McMenomy v. Baud*, 87 Cal. 134.

In *Callanan v. Gilmer*, 107 N. Y. 360, which was a suit to enjoin the obstructing of a sidewalk by using a bridge in unloading trucks in the street in front of the store of the defendant, it was held that a decree perpetually enjoining the defendant from using such bridge should be modified so as to enjoin him from "unnecessarily or unreasonably" using such bridge or hindering or obstructing the free use of the sidewalk.

Must Specify What Defendant Required to Do. — In a suit in equity to enjoin the using of certain premises for slaughter-house purposes, a decree which fails to specify what the defendant is required to do in order to comply with its requirements is defective. To adjudge merely that he is so to conduct his business as not to be offensive, is to give him no rule of conduct which the law had not before prescribed. The decree should specifically point out the things he is required to do in order to abate the nuisance which the court finds to exist. *Ballentine v. Webb*, 84 Mich. 38. But see *Dickson v. Burnham*, 17 Grant's Ch. (U. C.) 261; *Learned v. Hunt*, 63 Miss. 373.

2. *Bushnell v. Robeson*, 62 Iowa 540; *Baker v. Bohannon*, 69 Iowa 62.

In *Treat v. Bates*, 27 Mich. 390, which was a suit to restrain a defendant from restoring or maintaining a certain dam, it appeared that a partial abatement of the dam would prevent the overflow of the plaintiff's land, but that its entire abatement was necessary to abate a public nuisance affecting his homestead. It was held that a decree for a complete abatement was proper.

Allowing Time for Removal of Business.

— Where a defendant is conducting a business which is a nuisance to the plaintiff, but an injunction requiring the defendant to abate the nuisance immediately would be a greater injury to the defendant than a benefit to the plaintiff, and compensation in damages can be made, the decree should allow the defendant a fixed time to remove his business before the judgment takes effect. *Braender v. Harlem Lighting Co.*, (Supreme Ct.) 2 N. Y. Supp. 245.

NUL DISSEIZIN.

See article *ENTRY, WRIT OF*, vol. 7, p. 727.

NULLA BONA.

See articles *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 303; *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 5, p. 584; *CREDITORS' BILLS*, vol. 5, p. 388.

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NUL WASTE.

See articles *PLEAS AT LAW*; *WASTE*.

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OBJECTIONS.

See article *EXCEPTIONS AND OBJECTIONS*, vol. 8, p. 153.

OBSCENE LANGUAGE AND PUBLICATIONS.

BY HARRY UPSON SIMS.

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Matters of Substantive Law and Evidence, see the title *OBSCENE LANGUAGE AND PUBLICATIONS*, AM. AND ENG. ENCYC. OF LAW.

I. INTRODUCTORY — 1. The Common-law Offense. — To use indecent or obscene language in the public hearing, or to publish or distribute obscene writings or pictures, has long been held to be a misdemeanor under the common law.¹ It is a crime because it is fraught with great danger to the public morals over which the common law always stands guard.²

1. *Rex v. Curl*, 2 Stra. 788; *Rex v. Wilkes*, 4 Burr. 2527; *Dugdale v. Reg.*, 1 El. & Bl. 435, 72 E. C. L. 435; *Steele v. Brannan*, L. R. 7 C. P. 261; *Reg. v. Hicklin*, L. R. 3 Q. B. 360; *Reg. v. Saunders*, 1 Q. B. Div. 15; *Knowles v. State*, 3 Day (Conn.) 103; *McJunkins v. State*, 10 Ind. 140; *State v. Appling*, 25 Mo. 315; *Ware v. Loveridge*, 75 Mich. 488; *Com. v. Holmes*, 17 Mass. 336; *Com. v. Sharpless*, 2 S. & R. (Pa.) 91; *Barker v. Com.*, 19 Pa. St. 412; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Bell v. State*, 1 Swan (Tenn.) 42; *Young v. State*, 10 Lea (Tenn.) 165.

Formerly Cognizable in Ecclesiastical Courts. — In an early case, the doctrine, since departed from, was announced that the publication of an obscene book was not indictable, as the offense was cognizable only in the ecclesiastical courts. *Reg. v. Read*, 11 Mod. 142.

2. *Dugdale v. Reg.*, 1 El. & Bl. 435, 72 E. C. L. 435; *McJunkins v. State*, 10 Ind. 140; *Com. v. Holmes*, 17 Mass.

336; *State v. Appling*, 25 Mo. 315; *Bell v. State*, 1 Swan (Tenn.) 42. So generally, the basis has been the same where the common law has been declared by statute. *Reyes v. State*, 34 Fla. 181; *Montross v. State*, 72 Ga. 261; *Com. v. Tarbox*, 1 Cush. (Mass.) 66; *Com. v. Dejardin*, 126 Mass. 46; *People v. Kaufman*, 14 N. Y. App. Div. 305; *People v. Muller*, 32 Hun (N. Y.) 209, 96 N. Y. 408; *Com. v. Dowling*, 14 Pa. Co. Ct. Rep. 607; *State v. Smith*, 17 R. I. 371.

Indictment Insufficient under Statute Sustained under Common Law. — An indictment which is bad under a statute may be good as a common-law indictment. *Knowles v. State*, 3 Day (Conn.) 103; *State v. Appling*, 25 Mo. 315.

Breach of the Peace. — In one case it was held by a majority of the court that the principle upon which the common law forbade the offense was that it tended to a breach of the peace. *Ware v. Loveridge*, 75 Mich. 488. In

2. Obscene Matters in the Mails. — In the *United States* various statutes have been enacted making it an offense to send obscene matters in the mails.¹

II. JURISDICTION — **1. In General.** — In England jurisdiction over the crime belongs to the general or quarter sessions of the peace, and so was cognizable, it would seem, either by the assize courts of oyer and terminer, or by a justice of the peace, the latter having jurisdiction over misdemeanors.²

In the *United States*, however, the common-law offense is, it seems, regarded as only cognizable by those courts which are the outcome of the criminal courts of England which proceeded after the presentment of an indictment or information.³

Municipal Courts. — In some states, municipal courts and corporation courts have been given jurisdiction over these offenses, and in these jurisdictions the offense is usually denounced by a municipal ordinance.⁴

Presumption of Regularity. — The regularity of the proceedings and

some states statutes have been framed with this end in view. *Benson v. State*, 68 Ala. 544; *Shields v. State*, 89 Ga. 549; *Stevenson v. State*, 90 Ga. 456; *State v. Clarke*, 31 Minn. 207; *State v. Bach*, 25 Mo. App. 554.

Nuisance. — It has been held that the public use of obscene or profane language amounts to a nuisance, even though but one oath be used. *Young v. State*, 10 Lea (Tenn.) 165. See also *Gaines v. State*, 7 Lea (Tenn.) 410.

Presence of Women. — The basis of the *Georgia* statute was said by the court, in *Dillard v. State*, 41 Ga. 278, to be the protection of females from insult, it being necessary to show that the language was used in the presence of a woman. See also *Brady v. State*, 48 Ga. 311.

1. Rev. Stat. U. S., § 3893, as amended by Acts Cong. July 12, 1876, June 18, 1888, September 26, 1888.

In England similar statutes have also been enacted. 33 and 34 Vict., c. 79, § 20.

Ingredients of the Offense. — The offense "consists in using the *United States* mails for its circulation. It is not designed or intended to prohibit the publication of obscene matter, but only to prohibit and prevent its circulation through the mails." *U. S. v. Bebout*, 28 Fed. Rep. 522.

2. 4 Black. Com. 270, 272.

3. *Massachusetts.* — In *Com. v. Holmes*, 17 Mass. 336, it was held that the circuit court of common pleas, which is an outcome of the court of

quarter sessions in England, has jurisdiction of all common-law offenses which would have been cognizable by the court of quarter sessions if they had not been allotted by statute to a different court.

Michigan. — In *Ware v. Loveridge*, 75 Mich. 488, it was declared that the offense, if a common-law misdemeanor, is beyond the jurisdiction of a justice of the peace.

Tennessee. — In *Grisham v. State*, 2 Yerg. (Tenn.) 589, it was declared that the county courts of pleas and quarter sessions have jurisdiction over all offenses against public morals, even those cognizable by the old spiritual courts in England.

Justices of the Peace — Alabama. — Justices of the peace have jurisdiction where an information is filed within sixty days after the commission of the offense. *Carter v. State*, 107 Ala. 146.

Missouri. — Justices of the peace have jurisdiction over an information for the publication of obscene literature. *State v. Hayward*, 83 Mo. 299. See also *State v. Fare*, 39 Mo. App. 110.

Transfer of Cause — Georgia. — An indictment for obscene language may be transferred from the superior court to a county court. *Cannon v. State*, 74 Ga. 381.

4. *Ex p. Slattery*, 3 Ark. 484, holding that a city charter and ordinance conferring such jurisdiction do not violate any constitutional provision; *Barton v. La Grande*, 17 Oregon 577.

the proper exercise of jurisdiction are presumed in prosecutions before courts of general jurisdiction,¹ but no such presumptions are indulged as to the regularity of proceedings before justices of the peace and in municipal courts and recorders' courts.²

2. Obscene Matters in the Mails. — As the offense of sending obscene matters through the mails is created by acts of Congress, it is cognizable in the United States courts, and the prosecution must be had within the district or circuit where the crime was committed.³

3. Venue. — As in prosecutions for other offenses, the crime must have been committed within the territorial jurisdiction of the particular court in which the prosecution is instituted.⁴

III. INDICTMENT OR INFORMATION — **1. Appropriateness of Indictment or Information** — *a. IN GENERAL.* — Ordinarily, as in other prosecutions for misdemeanors, the defendant is charged by an information or indictment, but where the prosecution is instituted in a corporation or justice's court this is not the rule.⁵

b. OBSCENE MATTERS IN THE MAILS. — As the offense of sending obscene matters in the mails is an infamous crime, the defendant can be tried only upon the presentment of a grand jury.⁶

2. Joinder of Offenses and Offenders — **Indictment Charging Two Offenses.** — It has been held that it is not proper to join in the same indictment or information two offenses consisting of violations of

1. *Ex p. Kearny*, 55 Cal. 212.

2. *Ex p. Kearny*, 55 Cal. 212.

Violation of Ordinances. — Where the defendant is charged with violating a town ordinance against obscene and abusive language on the streets, it is only permissible to inspect the records to see if the offense is properly stated and the jurisdiction is properly exercised. *Barton v. La Grande*, 17 Oregon 577.

Remedy by Habeas Corpus. — When the record shows an attempt to imprison the defendant for an offense of which the court has no power to take cognizance, a writ of habeas corpus will be allowed. *Ex p. Kearny*, 55 Cal. 212.

3. *Ex p. Doran*, 32 Fed. Rep. 76; *In re Wahll*, 42 Fed. Rep. 822.

Transfer From Circuit to District Court. — In *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338, it was held that where the indictment is found in a circuit court for mailing obscene literature, a transfer of the cause on motion of the defendant to the district court will not be allowed.

4. It would seem that the diffusion of an obscene publication is punishable in the jurisdiction where it was uttered by request in another jurisdiction.

Com. v. Blanding, 3 Pick. (Mass.) 304.

District in Which Obscene Matter Was Mailed. — Where a letter is mailed in one district and goes through other districts, the prosecution cannot be had in such other districts, but must be had in the district in which the letter was mailed because the crime is not a continuing one. *U. S. v. Comerford*, 25 Fed. Rep. 902.

5. In *Arkansas*, by statute, an indictment or presentment is not necessary where the prosecution is instituted in a corporation court. *Ex p. Slattery*, 3 Ark. 484.

In *Missouri*, a prosecution for diffusing obscene literature may be brought before a justice of the peace by an information. *State v. Hayward*, 83 Mo. 299; to which case reference is made as laying down the rule as to who is a proper party to present an information. See also *State v. Armstrong*, 106 Mo. 395, in which case the information charged the publication of a libel.

6. *U. S. v. Harmon*, 34 Fed. Rep. 872; *Ex p. Bain*, 121 U. S. 1. But see *U. S. v. Adams*, 59 Fed. Rep. 674, in which case the trial was had on an agreed statement.

different clauses in the same statute.¹

Joinder of Offenders. — The offense of uttering obscene *publications* being one in which several parties can join, there can, of course, be no objection to joining two or more defendants in the same indictment.² But the uttering of obscene *language* is said to be a separate act of each offender, and consequently the better opinion seems to be that each defendant must be prosecuted separately, although the cases are not in harmony.³

1. *State v. Lancaster*, 36 Ark. 55. But see a dictum in *State v. Roulstone*, 3 Sneed (Tenn.) 107.

After Verdict. — It is too late after verdict to make the objection that the indictment or information is duplicitous by a motion in arrest of judgment, where the offense is a misdemeanor. *State v. Armstrong*, 106 Mo. 395.

Obscenity Addressed to Several. — Where an offensive denunciation is addressed to a company of men, intended to apply to all of them, it may be charged as having been made to all, or any one or some of them. *Hearn v. State*, 34 Ark. 550.

Obscene Matters in the Mails. — In *U. S. v. Harman*, 38 Fed. Rep. 827, it being objected to an indictment charging the sending of obscene matter through the mails, that a multitude of counts for the same offense were joined, while the court doubted whether "the publisher of an obscene paper can be convicted of a separate offense for every person to whom he shall mail that particular issue of his paper," it was said that "the most defendant can claim on that ground is that the government be required to elect on which counts it will prosecute."

Use of Copulative in Describing Matter. — It is not duplicity to allege in an indictment for sending obscene matter through the mail, that the article was of an "obscene, lewd, and lascivious character." *Swearingen v. U. S.*, 161 U. S. 446.

Depositing and Causing to Be Deposited. — A charge that the defendant deposited in the mail and caused to be deposited in the mail, obscene matter, is not duplicitous. *U. S. v. Janes*, 74 Fed. Rep. 545.

2. *Baker v. State*, 97 Ga. 452, in which case, however, the defendants were indicted for uttering a libel.

Sending Obscene Matters Through the Mails. — As one or more persons can be jointly concerned in sending obscene matter through the mails, it is

permissible to join more than one person in the same indictment, and under such indictment one or both may be convicted or acquitted. *U. S. v. Rebout*, 28 Fed. Rep. 522.

3. **No Joint Guilt.** — In *Rex v. Benfield*, 2 Burr. 980, Lord Mansfield held that two persons might be indicted together for singing libelous songs, regarding the singing of the songs as one joint act. But in *Cox v. State*, 76 Ala. 66, an indictment against two persons for using obscene language was considered bad, the court saying: "It would seem that, *ex vi terminorum*, this offense can scarcely be committed by two or more persons conjointly. It is made up of speech — perverted speech — which is necessarily a personal, individual act; and if two should employ the same abusive or obscene language, it would seem this could not amount to a joint act. Each might be guilty, but we cannot perceive how the guilt could be joint. Possibly, one might procure another to use language interdicted by the statute; and possibly such offense, so procured to be committed, would present a case of joint criminality. * * * There are some authorities which hold that, when two or more persons commit separate offenses of the same grade, and subject to the same punishment, they may be separately charged in one and the same indictment; and that in such case, the judge presiding, having regard to the matter of convenience, will exercise a sound discretion in quashing the indictment or permitting the prosecution to proceed. We need not express our opinion of such practice further than to say it is hazardous, and should not be encouraged." See also *State v. Lancaster*, 36 Ark. 55.

The Offense Likened to Perjury. — In *State v. Roulstone*, 3 Sneed (Tenn.) 107, the court said: "In perjury as well as the offense of obscenity, the crime is committed by words spoken, and the same words uttered by one

3. Averments in Language of Statute — a. UTTERING OBSCENE LANGUAGE AND WRITINGS. — The better opinion is, it would seem, that it is not sufficient to charge the offense in the language of the statute, but it is necessary to "state the circumstances which constitute the definition of the offense;" but this rule has in some cases been departed from.¹

cannot possibly be applied to those which proceeded from another."

Missouri. — In *State v. Marlier*, 46 Mo. App. 233, an indictment for slander joined three persons, one for singing and the other two for abetting, and it was held good.

Tennessee. — In *State v. Roulstone*, 3 Sneed (Tenn.) 107, it was declared that several offenders may be charged in one indictment in different counts.

Indiana. — In *McJunkins v. State*, 10 Ind. 140, six persons were joined in one indictment for obscene language, and no motion having been made to quash, the court, after the jury had been sworn and a portion of the evidence had been heard, held that it was too late to move for separate trials.

1. *Reyes v. State*, 34 Fla. 181; *State v. Peirce*, 43 N. H. 273. See also *Smith v. State*, 63 Ala. 55, in which case it was stated to be sufficient "to describe the offense in other words of equivalent import." See further the following cases: *Yancy v. State*, 63 Ala. 141; *Weaver v. State*, 79 Ala. 279; *State v. Hutson*, 40 Ark. 361; *Moore v. State*, 50 Ark. 25; *Ex p. Foley*, 62 Cal. 508; *State v. Williams*, 2 Strobb. L. (S. Car.) 474; *Parsons v. State*, 33 Tex. Crim. Rep. 540; *State v. Brown*, 27 Vt. 619.

In *Illinois*, although it has been provided by statute that "an indictment * * * shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury," it has been held that "the offense charged * * * should so describe the offense that the judgment on the trial could be pleaded in bar in another prosecution. * * * The practice has generally required more than the mere charge, in the language of the statute, that the accused has committed a crime. Whilst mere technicalities should not be indulged to the obstruction of justice, still the courts can never relax until the accused may be

unjustly and oppressively convicted." *McNair v. People*, 89 Ill. 441.

In *Pennsylvania* all that is required is to state the offense plainly. *Com. v. Keenan*, 67 Pa. St. 203. If the indictment is not sufficiently clear, the defendant must resort to a bill of particulars. *Com. v. Havens*, 6 Pa. Co. Ct. Rep. 545.

The Reason for the Rule. — In *State v. Hayward*, 83 Mo. 299, the court held that it is not enough to merely set forth the crime in the words of the statute saying: "This rule [that it is enough] only applies where all the facts which constitute the offense are set forth in the statute." See also *State v. Bach*, 25 Mo. App. 554. But see *contra*, *State v. Fogerson*, 29 Mo. 416. See further *State v. Fare*, 39 Mo. App. 110, in which case the court distinguished the above cases, saying: "The court was led into the error in the *Bach* case by assuming that the offense created by the statute and charged in the information was the use of indecent and offensive language, etc., whereas the gravamen of the offense was the disturbance of the peace of 'a family, person or neighborhood,' and not the mere fact that the accused had been guilty of quarreling." *State v. Parker*, 39 Mo. App. 116; *State v. Brumley*, 33 Mo. App. 126.

Every Material Ingredient of the offense must be set forth in the indictment when it is not framed on any form given in the code. *Smith v. State*, 63 Ala. 55.

Names of Auditors. — Where the statute denounces the use of obscene language in the presence of another, it is necessary to state the name of the person in whose presence and in reference to whom the language was used. *State v. Clarke*, 31 Minn. 207.

Without Lawful Purpose. — Where the crime is sending indecent letters without lawful purpose, lack of such purpose must be averred expressly, and the use of the word "unlawfully" is not sufficient. *State v. Smith*, 46 N. J. L. 491.

b. OBSCENE MATTERS IN THE MAILS. — An indictment charging the transmission of obscene matters through the mail, which charges the offense in the language of the statute, is not ordinarily sufficient.¹

4. Laying the Venue. — The indictment or information must allege the venue of the offense, and proof of it must appear upon the record.²

5. Description of Place as a Material Ingredient. — Minor locality need not generally be alleged, unless it constitutes part of the offense, and then it must be charged and proved as laid.³

6. Time. — As in prosecutions for other offenses, it is necessary to allege and prove the time when the offense was committed.⁴

7. Description of the Obscene Matter — *a. ORAL UTTERANCES.* — It is necessary to set out the defendant's utterances with substantial accuracy, but it is often permissible to omit to set forth *in hac verba* the obscene matter, when it is alleged as an excuse that it is too obscene to be placed upon the record; but when the latter course is pursued, the language must be described particularly.⁵

Insufficient to Charge Single Instance. — In *North Carolina*, the use of profane and vulgar language does not *per se* constitute an offense but only when long indulged in or repeated, and so the indictment must allege facts and circumstances showing that there was such continuation of the offense as to constitute a nuisance. *State v. Brewington*, 84 N. Car. 783.

Concerning Whom the Words Were Used. — Where the gist of the offense is the abusiveness of the language and its tendency to produce a breach of peace, an allegation that the defendant used the language to a named person and in his presence and hearing, is not bad because it does not expressly allege that the language was used "concerning" such named person. *Menasco v. State*, 32 Tex. Crim. Rep. 582.

The Defendant's Age. — Where by statute more severe punishment is imposed when the defendant is over twenty-one years of age, nevertheless the defendant's age need not be alleged. *People v. Justices*, 10 Hun (N. Y.) 224.

1. *U. S. v. Clark*, 37 Fed. Rep. 106; *U. S. v. Brazeau*, 78 Fed. Rep. 464. See also *U. S. v. Slenker*, 32 Fed. Rep. 691.

2. *McNair v. People*, 89 Ill. 441.

3. In *Young v. State*, 10 Lea (Tenn.) 165, an indictment charging that the defendant did publicly use profane and blasphemous and obscene language in

the hearing of divers citizens, was held to aver place sufficiently.

In or Near Dwelling House. — But in *Quin v. State*, 65 Miss. 479, under a statute making abusive and vulgar language a crime when used by one who "enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises," the indictment charged that the words were used in a yard, and the evidence failed to sustain the averment as to place. The court held the indictment insufficient to meet this proof, but said: "If the indictment had charged the abusive language used by the appellant to have been uttered near the premises, the conviction might be sustained."

4. *Stichtd v. State*, 25 Tex. App. 420, which, however, was a prosecution for slander. And see, generally, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 511.

5. *State v. Burrell*, 86 Ind. 313; *State v. Appling*, 25 Mo. 315; *People v. Hallenbeck*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 66; *Barker v. Com.*, 19 Pa. St. 412, to which case reference is made as illustrating when the prosecution may omit to set out the words; *State v. Steele*, 3 Heisk. (Tenn.) 135, in which last mentioned case the court held that it was sufficient to set out so much of the conversation as clearly described the language used.

b. WRITINGS AND SIGNS. — In England the courts have rigidly held that writings and the like must be inserted verbatim in the indictment, and that it is not sufficient to state their tenor and to give as an excuse for so doing that the matter would pollute the records of the court.¹

In the United States, according to the weight of authority, it is unnecessary to set out in the indictment such matter as would, because of its extreme obscenity, pollute the records of the court.²

Necessity to Allege Excuse. — Failure to set forth obscene matter will not be permitted unless it is expressly alleged that the omitted matter is too obscene to justify its insertion in the indictment.³

Words Need Not Be Laid Exactly as Spoken. — In *Bell v. State*, 1 Swan (Tenn.) 42, McKinney, J., said: "The gist of this offense is the gross violation of good morals and public decency. * * * If the criminality of the defendant's conduct depends alone for the flagrant outrage to public decency by the utterance of shamelessly obscene language in reference to certain acts, can it, in reason, be of any consequence whether such language imported that he had done or would do the specified acts? In either case the offense, so far as public decency is concerned, is identically the same. To hold that the words must be laid exactly as spoken, or that they must be proved as laid, would, perhaps, in most cases insure impunity to the offender; because almost every one not abandoned to all sense of decency would instinctively turn away his ear from hearing such revolting indecency."

To Enable Court to Determine Obscenity. — In *Steuer v. State*, 59 Wis. 472, it was held that the words must be set out to enable the court to judge whether their utterance constitutes a crime; but in that case no excuse was given for not setting them out.

1. In *Bradlaugh v. Reg.*, 3 Q. B. Div. 607, Bramwell, L. J., said: "It is manifest that where words constitute the offense they must be stated in the indictment; and the authorities distinctly show that where a defamatory libel is complained of * * * it must be stated in the indictment. It seems to me that whatever reason there is for setting out the words of a defamatory libel is equally applicable to other writings that are called libels; though possibly * * * they are called libels in a different sense from that in which defamatory writing is called libel. * * * I do not know that there is any case in which judg-

ment has been arrested on an indictment or information for a seditious, a blasphemous or an obscene libel, for want of setting out the words. But no precedent can be found in which they have not been set out, except in certain American cases."

2. In *Com. v. Holmes*, 17 Mass. 336, which is a leading case, the indictment charged the printing of "a certain lewd, wicked, scandalous, infamous, and obscene printed book entitled 'Memoirs of a Woman of Pleasure,' which said printed book is so lewd, wicked and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore the jurors aforesaid do not set forth the same in this indictment." The court said: "It can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it." See also *Reyes v. State*, 34 Fla. 181; *Stevenson v. State*, 90 Ga. 456; *Strohm v. People*, 60 Ill. App. 128, 160 Ill. 582; *Thomas v. State*, 103 Ind. 419; *Com. v. Tarbox*, 1 Cush. (Mass.) 66; *Com. v. Dejardin*, 126 Mass. 46; *Com. v. McCance*, 164 Mass. 162; *People v. Girardin*, 1 Mich. 90; *People v. Kaufman*, 14 N. Y. App. Div. 305; *Com. v. Sharpless*, 2 S. & R. (Pa.) 91; *State v. Smith*, 17 R. I. 371; *State v. Brown*, 27 Vt. 619; *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338. But see *State v. Hayward*, 83 Mo. 209, and *State v. Hanson*, 23 Tex. 232, in which cases the indictment was considered insufficient, but it should be observed that no excuse was given for not setting out the obscene matter in full.

3. *Com. v. Holmes*, 17 Mass. 336; *Com. v. Tarbox*, 1 Cush. (Mass.) 66;

Voluinous Matters. — Where the writing declared to be obscene is of great length, *e. g.*, a newspaper or book, it need not be set forth in its entirety, as to do so would be of no practical advantage and would encumber the record.¹

Want of Access to Obscene Matter. — It would seem to be a good excuse for not setting forth the obscene matter in full, that it is out of reach of the grand jury or prosecuting attorney, or has been destroyed.²

Pictures and Prints. — Where the offense consists in the publication of an obscene picture, print or photograph, all that is necessary is to describe the same with sufficient certainty to identify it. And this rule is placed upon the ground that the record should not be encumbered with matters of extraordinary size, and upon the further ground that the records should not be polluted with obscene matters.³

People v. Girardin, 1 Mich. 90; *Com. v. Sharpless*, 2 S. & R. (Pa.) 91; *State v. Brown*, 27 Vt. 619. But see *People v. Danihy*, 63 Hun (N. Y.) 579.

In *State v. Hanson*, 23 Tex. 232, the court said: "The composition or print should have been set out, or such description given of it, as that the court could judge of its character in reference to the alleged indecency and obscenity," with a view to enabling the defendant to plead the prosecution in bar of another prosecution.

Tenor of Matter Must Be Stated. — Where the matter is not set out at large, it is necessary to state its tenor, or describe it so fully as to completely identify it and give the defendant notice of the charge which he is to meet. *McNair v. People*, 89 Ill. 441; *Strohm v. People*, 60 Ill. App. 128, 160 Ill. 582; *People v. Danihy*, 63 Hun (N. Y.) 579; *Com. v. McCance*, 164 Mass. 162; *State v. Smith*, 17 R. I. 371.

Whether Language Is Oral or Written. — In *Stevenson v. State*, 90 Ga. 456, it was held that the *prima facie* meaning of an indictment for "obscene language" is that the language was used orally; and that if it is intended to prove the promulgation of written language, it should be charged that the language was in writing, and it should be described fully.

Public Indecency. — In *Jennings v. State*, 16 Ind. 335, and *State v. Huey*, 16 Ind. 338, informations which charged the defendants with "public indecency" merely, in the language of the statute, were quashed because they did not sufficiently describe the offense.

Reference in One Count to Another. —

Where there is more than one count in the indictment, and in one count the matter has been set forth or described, another may charge the defendant with having "the same printed" matter in his possession, etc., referring to the other count, without repeating the matter. *People v. Graves*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 134; *People v. Danihy*, 63 Hun (N. Y.) 579.

1. *Strohm v. People*, 60 Ill. App. 128, 160 Ill. 582; *State v. Van Wye*, 136 Mo. 227, in which case the matter consisted of a newspaper.

Boccaccio's Decameron. — In *Com. v. McCance*, 164 Mass. 162, the indictment charged the defendant with selling the *Decameron*, and alleged that the said book contained certain obscene, indecent, and impure language, without setting forth the book in full. The court held that while it was not necessary to set out the obscene matter in full, it was incumbent upon the prosecution to so identify the vicious parts thereof as to put the defendant upon notice.

2. *Strohm v. People*, 60 Ill. App. 128, 160 Ill. 582. The rule stated in the text is the familiar rule which is applied in general where it is necessary to describe writings, and in the following cases the rule was applied where the offense charged was *forgery*: *State v. Parker*, 1 D. Chip (Vt.) 298; *Armitage v. State*, 13 Ind. 441; *Munson v. State*, 79 Ind. 541; *Hess v. State*, 73 Ind. 537. See also the article *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 511.

3. In *State v. Pennington*, 5 Lea (Tenn.) 506, an indictment bottomed on

c. **OBSCENE MATTERS IN THE MAILS.** — It is well established that an indictment charging the sending of obscene matter through the mail need not set out the obscene matter, where it is alleged that it is so extremely obscene that to set it out would pollute the records.⁴

8. **Inducement or Colloquium — Matter Not Obscene on Its Face.** — The publication or language set forth must be obscene on its face; or if not, any peculiar meaning sought to be applied to the words must be averred in the indictment by means of some inducement or colloquium.⁵

a statute denouncing the introduction of obscene pictures into schools, was considered sufficient, which charged in substance that the defendant "on the tenth day of July, 1879, in said county of Scott, at New Salem, a place of education, unlawfully, wilfully, obscenely and publicly introduced an obscene picture into a public school at said New Salem, manifestly tending to corrupt the morals of said school." See also *Reyes v. State*, 34 Fla. 181; *McNair v. People*, 89 Ill. 441; *Com. v. Sharpless*, 2 S. & R. (Pa.) 91.

1. *U. S. v. Gaylord*, 17 Fed. Rep. 438, in which case it was held sufficient to describe an obscene writing by giving time, place and address, and saying that it purported to be a letter and was too obscene to be set forth; *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338, in which case the court held sufficient an indictment which gave the name of a book, alleged its obscenity, and gave its obscenity as an excuse for not setting it forth. See also *U. S. v. Chase*, 27 Fed. Rep. 807; *U. S. v. Grimm*, 45 Fed. Rep. 558; *Grimm v. U. S.*, 156 U. S. 604; *In re Wahll*, 42 Fed. Rep. 822.

Method of Stating Tenor. — Where the obscene matter is not set forth in full, it must be described with sufficient certainty to identify it. "The date of the paper, the title of the article, or its general tenor and purport, couched in decent language, would serve to make the charge definite and certain." *U. S. v. Harmon*, 34 Fed. Rep. 872. See also, for the same effect, *U. S. v. Fuller*, 72 Fed. Rep. 771; *U. S. v. Reid*, 73 Fed. Rep. 289; *Rosen v. U. S.*, 161 U. S. 29.

Excuse Must Be Given. — Unless an excuse is given for not setting out the obscene matter in its entirety, the express words must be given. *U. S. v. Kaltmeyer*, 16 Fed. Rep. 760.

Voluminous or Destroyed Matter. — In

an indictment for sending obscene matter through the mail, the length of the obscene matter, or the fact that it has been destroyed, may probably be given as an excuse for not setting it out in full. *U. S. v. Kaltmeyer*, 16 Fed. Rep. 760.

Bill of Particulars. — If in a prosecution for sending obscene matter through the mail, the defendant desires more than a description sufficient to identify the same, he must ask for a bill of particulars. *Rosen v. U. S.*, 161 U. S. 29. See also *U. S. v. Foote*, 13 Blatchf. (U. S.) 418, and a dictum in *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338.

Method of Charging Failure to Set Out Matter in Full. — An indictment charging that a book "is so obscene, lewd, and lascivious" that it would be offensive to set it forth, cannot be attacked as failing to charge the fact that the book is obscene and as expressing merely the pleader's conclusions. *Price v. U. S.*, 165 U. S. 311.

Demurrer Where Matter Has Been Omitted. — Where the obscene publication is left off the record on account of its extreme obscenity, a demurrer to the indictment will not bring the obscene matter before the court, as the demurrer brings only the record. *U. S. v. Clarke*, 38 Fed. Rep. 500.

Information as to Procurement of Obscene Matter. — Where an indictment charges the defendant with mailing a letter giving information as to the prices of obscene photographs, it is not necessary to set out in the indictment a description of the photographs, as the gist of the offense is the mailing of the information, and the obscenity of the photograph may be left to the evidence. *Grimm v. U. S.*, 156 U. S. 604. See also *U. S. v. Kaltmeyer*, 16 Fed. Rep. 760.

2. In *State v. Coffing*, 3 Ind. App. 304, an indictment for using obscene

9. Publication — a. NECESSITY TO ALLEGE. — As the use of obscene language is a crime, at least at common law, because of its effect upon the public, it is necessary to allege the public use of the language; and where the basis of the offense is a writing or composition, it is necessary to charge that the same was published.¹

b. PARTICULARS AS TO PUBLICATION. — The cases are not in accord whether the precise method in which the obscene matter was published should be alleged; the rule being, it would seem, that it is sufficient to allege merely that the matter was read by or communicated to others than the defendant.²

language in the presence of a female was quashed, because the language set out was not such as to convey a meaning in its nature obscene, and there was no colloquium showing that the words had a provincial meaning; the court saying: "Penal statutes cannot be enlarged by construction so as to make that criminal which is not made so by the express terms thereof." See also *Shields v. State*, 89 Ga. 549.

Indecency Must Be Apparent. — It must distinctly appear from the indictment or information that the words or publications are of an indecent character. *Abendroth v. State*, 34 Tex. Crim. Rep. 325.

Indictment for Libel. — The rule that obtains in prosecutions for libel is applicable; viz., where the matter is not libelous on its face, it must be alleged not only that the words were used in a peculiar sense, but that they were understood by the hearers in that sense. *People v. Collins*, 102 Cal. 345. See also the article LIBEL AND SLANDER, vol. 13, p. 26.

In Cases of Doubtful Interpretation, effect must be given to the general words of the indictment or information which charge that the act was done or the words were spoken in a criminal sense. So, even though the indictment fails to state that the woman referred to was unmarried, the use of the word "Miss," and the allegations of criminal intent, are enough to show what was meant. *State v. Buck*, 43 Mo. App. 443, which case, however, was an indictment for slander.

Innuendoes. — It would seem that innuendoes may be used to explain the meaning or reference in a particular word or phrase in like manner as in an indictment for libel. But it appears that the innuendo does not dispense with the necessity of an inducement

or colloquium which states extrinsic facts. *State v. Mott*, 45 N. J. L. 494; *Com. v. Keenan*, 67 Pa. St. 203; *State v. Atkins*, 42 Vt. 252.

Enlargement of Meaning of Words. — It is not permissible to enlarge the meaning of the words by innuendoes, and in a proper case the innuendoes may be rejected as surplusage. *Com. v. Snelling*, 15 Pick. (Mass.) 321. See also *Adams v. Lawson*, 17 Gratt. (Va.) 250.

1. *Reg. v. Carlile*, 1 Cox C. C. 229; *State v. Kountz*, 12 Mo. App. 511; *Com. v. Sharpless*, 2 S. & R. (Pa.) 91; *State v. Syphrett*, 27 S. Car. 29; *Smith v. State*, 32 Tex. 594.

Extent of Publicity. — It is not necessary ordinarily to allege that the matter was communicated or shown to more than one person. *State v. Barnes*, 32 Me. 530, which case, however, is not precisely in point, as in that case the defendant was prosecuted for libel.

Averment that Matter Was Read. — It is not sufficient to allege that obscene or libelous matter was posted on a tree, but it must be alleged that it was read. *Giles v. State*, 6 Ga. 276. For a more extended citation of authorities on this point, see the article LIBEL AND SLANDER, vol. 13, p. 26.

Utterances in Foreign Languages. — As to the necessity to charge that words uttered in a foreign language were understood by the hearers, consult the article LIBEL AND SLANDER, vol. 13, p. 26.

2. *Smith v. State*, 24 Tex. App. 1, in which case the obscene matter was engraved on the back of a church bench, and it was held unnecessary to allege the manner of publication or the circumstances. But see *State v. Smith*, 17 R. I. 371. See, further, the following cases in which the defendants were indicted for libel: *People v. Stark*, 136

10. **Intent and Scienter — Corrupt Intent.** — It is proper, and it seems necessary, to allege that the acts were done with corrupt intent.¹

Scienter. — The defendant's knowledge of the character of the obscene matter must ordinarily be alleged.²

11. **Averments Peculiar to Indictments for Mailing Obscene Matter — a. THAT MATTER WAS MAILED.** — In an indictment for sending obscene matters through the mail, it is necessary to allege that the defendant deposited or procured to be deposited the matter in the mail.³

b. PAYMENT OF POSTAGE. — It is not necessary to allege that the postage was prepaid.⁴

c. KNOWLEDGE THAT MATTER WAS OBSCENE. — It is necessary, in an indictment for sending obscene matter through the mail, to allege that the defendant knew that the matter was obscene, as well as to allege that he knowingly deposited it. But this requirement is insisted upon more strenuously before than after verdict.⁵

d. ADDRESS OF MATTER MAILED. — It has generally been held in prosecutions for sending obscene matter through the mail, that

N. Y. 538; *Tracy v. Com.*, 87 Ky. 578; *State v. Barnes*, 32 Me. 530.

Distribution of Matter. — In *State v. Smith*, 17 R. I. 371, an indictment charging that the defendant did distribute a certain printed paper entitled "For Sale" was insufficient because it did not allege the manner of distribution.

1. *Barker v. Com.*, 19 Pa. St. 412. See also *Smith v. State*, 24 Tex. App. 1; *Abendroth v. State*, 34 Tex. Crim. Rep. 325. But see *State v. Smith*, 17 R. I. 371; *Thomas v. State*, 92 Ala. 85.

2. In *State v. Holedger*, 15 Wash. 443, it was held that the information charging that the defendant did "knowingly, unlawfully, maliciously," etc., compose, etc., sufficiently charged that the defendant knew the matter was obscene.

Conclusion as in Indictment for Nuisance. — It is not necessary ordinarily to allege that the offense was committed "to the common nuisance." *Com. v. Sharpless*, 2 S. & R. (Pa.) 91; *Baker v. Com.*, 19 Pa. St. 412. But see *State v. Barham*, 79 N. Car. 646, and *State v. Brewington*, 84 N. Car. 783.

3. *U. S. v. Bott*, 11 Blatchf. (U. S.) 346; *U. S. v. Bebout*, 28 Fed. Rep. 522; *U. S. v. Grimm*, 45 Fed. Rep. 558.

4. *U. S. v. Janes*, 74 Fed. Rep. 545.

5. *U. S. v. Bebout*, 28 Fed. Rep. 522;

U. S. v. Slenker, 32 Fed. Rep. 691, in which case the court declared that the defendant's scienter is a matter of substance and must be alleged, notwithstanding the provision of Rev. Stat. U. S. 1025, that no matter of form which has not prejudiced the defendant shall vitiate the indictment; and in the latter case an indictment which did not allege the defendant's knowledge of the obscenity was considered bad on a motion in arrest. See also *U. S. v. Grimm*, 45 Fed. Rep. 558; *U. S. v. Clark*, 37 Fed. Rep. 106; *U. S. v. Nathan*, 61 Fed. Rep. 936.

On a Motion in Arrest of Judgment it is sufficient to allege that the defendant knowingly deposited the obscene matter, without alleging in terms that he knew that the matter was obscene. *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338; *Rosen v. U. S.*, 161 U. S. 29; *Price v. U. S.*, 165 U. S. 311.

The Distinction in the Rulings Before and After Verdict lies in the familiar rule that an indictment will be scrutinized more closely before the trial than it will afterwards. *U. S. v. Reid*, 73 Fed. Rep. 289.

Intention Presumed. — If the obscene matter is knowingly deposited in the mail, it will be conclusively presumed that the sender intended to divulge its contents. *U. S. v. Grimm*, 45 Fed. Rep. 558.

the address of the matter should be alleged, ordinarily, for identification, and that the address constitutes a material part of the crime, since without it the matter can hardly be said to have been deposited for transmission.¹

IV. PLEADING AND PROOF — VARIANCE — 1. Uttering Obscene Language and Writings. — In prosecutions for the diffusion of obscene matter, the familiar rule is applied, that the proof must conform to the allegations of the indictment or information; but it should be noted that this rule is applied with greater strictness where the obscene matter is written or printed than it is when it is spoken.²

Where the Matter Is Spoken it will be assumed that the hearers turned away their ears and paid no particular heed to it, and consequently the court will not require the words to be laid exactly as spoken.³

1. *U. S. v. Grimm*, 45 Fed. Rep. 558.

An Essential Averment. — In *U. S. v. Brazeau*, 78 Fed. Rep. 464, the court said that it is necessary to set forth the address for the purpose of identifying the letter, and that such averment will not be supplied by the general allegation that the matter was deposited for mailing and delivering.

Direction to Actual Person. — It is apparently necessary to set out that the article mailed was addressed to an actual person. *U. S. v. Chesman*, 19 Fed. Rep. 497. See also *U. S. v. Kaltmeyer*, 16 Fed. Rep. 760.

Receipt of Matter Sent Through Mail. — It is not necessary in an indictment for sending obscene matter through the mail to allege that such obscene matter was actually conveyed to the person to whom it was addressed. *U. S. v. Grimm*, 45 Fed. Rep. 558.

Letters Addressed to Persons Having Assumed Names. — An indictment for sending obscene matter through the mail is not bad for alleging that letters were addressed to named persons intended to convey information to another named person, which other named person had assumed the names to which the matter was addressed. *U. S. v. Grimm*, 50 Fed. Rep. 538.

Privileged Communications — Matter Sent Through Mails. — "If it be a fact that the defendant in any case was justified in sending what would ordinarily be deemed an indecent publication through the mail, by reason of the calling, profession, or peculiar need of the person to whom it was sent, that is a matter of defense to be brought forward by the defendant, and he may do so on a plea of 'not guilty.' Such a de-

fense need not be anticipated by any negative averments in the indictment." *U. S. v. Clarke*, 38 Fed. Rep. 500.

2. *Com. v. Griffin*, 21 Pick. (Mass.) 523.

Pictures of Naked Persons. — Where the indictment charges that the defendant published pictures of naked persons, this description is material, and the defendant cannot be convicted upon proof that the pictures were of persons naked down to the waist. *Com. v. Dejardin*, 126 Mass. 46.

Sufficient to Prove Publication. — Where it is charged that the defendant composed, wrote, printed, and published the matter, proof that he published it is sufficient. *Com. v. Morgan*, 107 Mass. 199. See also *State v. Jay*, 34 N. J. L. 368.

Printed Picture. — A charge that the matter consisted of a printed picture is not sustained by proof that the picture was cut into a plank. *State v. Powers*, 12 Ired. L. (N. Car.) 5.

A Charge that the Defendant Procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation, is not proved by showing that she sat for a negative. *People v. Ketchum*, 103 Mich. 443.

In *Benson v. State*, 68 Ala. 544, in which case the matter consisted of oral words, the court said: "If the words are substantially proved as laid, this is all that the law exacts, provided there is no variance in the sense."

3. *Bell v. State*, 1 Swan (Tenn.) 42, in which case an indictment charging that the defendant had said that he had done certain acts was supported by proof that he had said that he would have done the acts if opportunity had been afforded.

2. Obscene Matter in the Mail. — It is not a variance to prove, under a charge that the defendant deposited obscene matter in the mail, that the same was deposited by the defendant's agent;¹ nor is it a variance to prove that the person intended to receive the letter actually had another name than that by which he was addressed.²

V. INSTRUCTIONS — The Law of the Case. — As in other prosecutions it is incumbent upon the court to construe the statute with the violation of which the defendant is charged, and it seems to be the better opinion that any reasonable doubts as to the construction of the statute should be resolved in favor of the defendant.³

Province of Court in Construing Obscene Matter. — It is within the province of the court to construe the objectionable document or language so far as necessary to decide whether a verdict establishing its obscenity would be set aside as against the weight of evidence.⁴

VI. FORFEITURE AND DESTRUCTION OF OBSCENE MATTER. — When the defendant is found guilty of having uttered obscene matter, and the same has come under the control of the court, it is proper to order the destruction of such matter as constituting a nuisance.⁵ But where the destruction of obscene matter is authorized by statute the court has no power to order its forfeiture and destruc-

1. *Bates v. U. S.*, 10 Fed. Rep. 92; *U. S. v. Bebout*, 28 Fed. Rep. 522.

2. **Decoy Letters.** — It is not a variance to prove that the matter was addressed to a real person under an assumed name, in answer to a decoy letter. *Grimm v. U. S.*, 156 U. S. 604; *Andrews v. U. S.*, 162 U. S. 420.

Letter Addressed to Wholly Fictitious Person. — In *U. S. v. Whittier*, 5 Dill. (U. S.) 35, it was held that if the letter is addressed to a wholly fictitious person, thereby not giving information to any one, the act is not within the statute, and that the information must have been sought for immoral purposes.

Pamphlet Equivalent to Book. — It is not a variance under an indictment charging the mailing of an obscene book to prove the mailing of an obscene pamphlet. *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338, in which case the question arose after verdict.

3. *Ex p. Doran*, 32 Fed. Rep. 76; *U. S. v. Wilson*, 58 Fed. Rep. 768.

Reasonable Doubt. — In *U. S. v. Huggett*, 40 Fed. Rep. 636, it was intimated that the ruling of reasonable doubt, as applied to the evidence,

should not be applied to the construction of statutes.

4. *U. S. v. Smith*, 45 Fed. Rep. 476.

Defendant's Opinion as to Obscenity. — The defendant is not entitled to an instruction that he is entitled to an acquittal, if he used the language or published the words thinking that they were not obscene, as the actual obscenity of the matter is to be inquired into, and whether or not it was obscene is a question for the jury. *Rosen v. U. S.*, 161 U. S. 29.

5. *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Com. v. Certain Lottery Tickets*, 5 Cush. (Mass.) 369.

In England under a statute, 20 and 21 Vict., c. 83, if the magistrate is satisfied that the belief of a complainant is well founded that certain articles published are obscene, and that the publication of them will be a misdemeanor, he may order the seizure of the works. They must be kept for an unlawful purpose, and it must be so stated on the warrant. And the justices in petty sessions being satisfied of it, the books may be destroyed. *Reg. v. Hicklin*, L. R. 3 Q. B. 360.

tion unless the indictment or information charges that it is obscene; moreover, the obscenity of the matter must be in issue, and the fact that it was obscene must have been judicially ascertained.¹

1. In *U. S. v. One Case Stereoscopic Slides, 1 Sprague* (U. S.) 467, on an information against "one case of stereoscopic slides," charging that the same were obscene, the verdict was that only fifty-nine were obscene, and the court said: "If it were true * * * that the verdict contains enough to warrant a judgment of forfeiture, still such judgment could not be pronounced upon this information and the plea of general issue."

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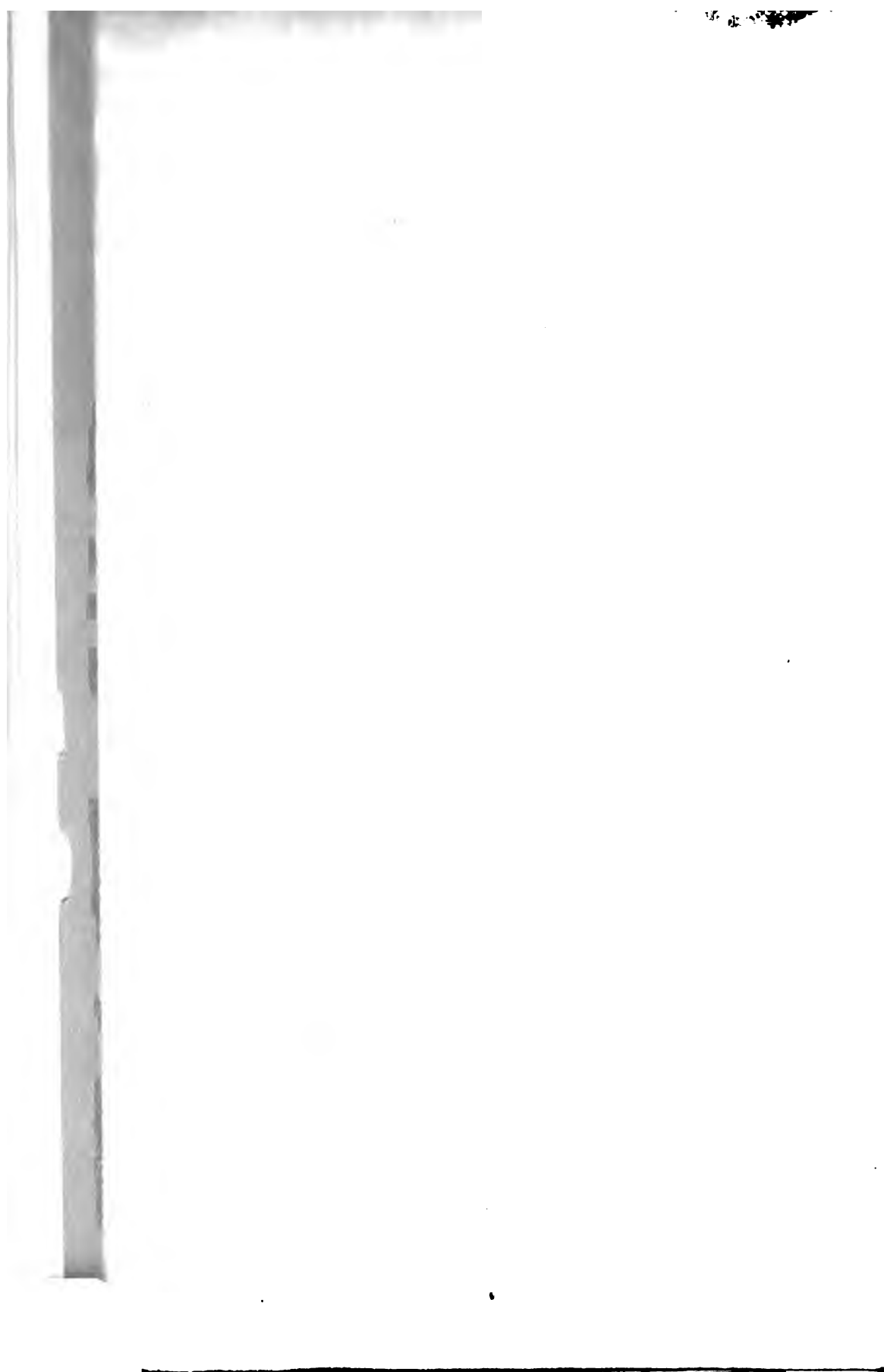
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